

RACIAL CRITIQUES OF MASS INCARCERATION:

BEYOND THE NEW JIM CROW

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Abstract. In the last decade, a number of criminal justice scholars have called the American criminal justice system a new form of Jim Crow. This New Jim Crow School effectively draws attention to the injustices created by a facially race-neutral system that severely ostracizes offenders and stigmatizes young, poor black men as criminals. This Article argues that despite these important contributions, the Jim Crow analogy leads to a distorted view of mass incarceration. The analogy presents an incomplete account of mass incarceration's historical origins, fails to adequately explain black attitudes toward crime and punishment, ignores violent crimes while focusing almost exclusively on drug crimes, obscures class distinctions within the African-American community, and overlooks the effects of mass incarceration on other racial groups. Finally, the Jim Crow analogy diminishes our collective memory of the old Jim Crow's particular harms.

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INTRODUCTION

In the five decades since black Americans won their civil rights, hundreds of thousands have lost their liberty. Blacks now make up a larger portion of the prison population than they did at the time of *Brown v. Board of Education*,¹ and their lifetime risk of incarceration has doubled.² As the United States has become the world’s largest jailer³ and its prison population

¹ 397 U.S. 483 (1954) (holding that state laws establishing segregation in public schools are unconstitutional). Blacks constituted 30% of America’s prisoners at the time of *Brown v. Board of Education* in 1954, MARC MAUER, RACE TO INCARCERATE 121 (1999), while blacks constituted 38% of all inmates in state or federal prisons in 2008, WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

² See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 25–26 (2006) (noting that the odds that a black man born in the late 1960s will land in prison are twice as great as they were for a black man born in the 1940s).

³ See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, KING’S COLL. LONDON WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf (discussing how U.S. prisoners constitute 2.29 million of the 9.8 million people held in penal institutions throughout the world, making the United States the country with both the largest number of prisoners and the highest per capita prison population).

has exploded,⁴ black men have been particularly affected. Today, black men are imprisoned at 6.5 times the rate of white men.⁵

While scholars have long analyzed the connection between race and America's criminal justice system, in the last decade, an emerging group of scholars and advocates has made a distinctive contribution to the debate. These scholars claim that our growing penal system, with its black tinge, constitutes nothing less than a new form of Jim Crow. This Article examines the New Jim Crow analogy. Part I tracks the analogy's history, documenting its increasing prominence in the scholarly literature on race and crime. Part II explores the analogy's usefulness, pointing out that it is extraordinarily compelling in some respects. The Jim Crow analogy effectively draws attention to the plight of black men whose life chances have been permanently diminished by the stigma and loss of citizenship rights they suffer as convicted offenders. It highlights how ostensibly race-neutral criminal justice policies unfairly target black communities. In these ways, the analogy shines a light on injustices that are too often hidden from view.

But, as I argue in Parts III through VIII, the Jim Crow analogy also obscures much that matters. Part III shows how the Jim Crow analogy oversimplifies the origins of mass

⁴ Since 1970, the number of Americans behind bars has increased 600%. In 1970, there were 326,000 Americans behind bars: 196,000 in state and federal prisons and another 130,000 in local jails. MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 35 tbl.3-7, 76 tbl.4-1 (1986), available at <http://www.ncjrs.gov/pdffiles1/pr/102529.pdf>. As of 2009, there were 2.3 million Americans in jails and prisons. *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last revised Oct. 2, 2011).

⁵ See SABOL ET AL., *supra* note 1, at 2 tbl.2 (showing that 3161 non-Hispanic black men per 100,000 were imprisoned in 2008, versus 487 non-Hispanic white men per 100,000).

incarceration⁶ by highlighting the role of politicians seeking to exploit racial fears while minimizing other social factors. Part IV demonstrates that the analogy has too little to say about black attitudes towards crime and punishment, masking the nature and extent of black support for punitive crime policy. Part V explains how the analogy’s myopic focus on the War on Drugs diverts us from discussing violent crime—a troubling oversight given the toll that violence takes on low-income black communities and the fact that violent offenders make up a plurality of the prison population. Part VI argues that the Jim Crow analogy obscures the fact that mass incarceration’s impact has been almost exclusively concentrated among the most disadvantaged African-Americans. Part VII argues that the analogy draws our attention away from the harms that mass incarceration inflicts on other racial groups, including whites and Hispanics. Part VIII argues that the analogy diminishes our understanding of the particular harms associated with the old Jim Crow.

Before I turn to the argument itself, I would like to offer a frame through which I hope readers will receive my argument. I have long criticized our nation’s overly punitive criminal justice system. I was a public defender for six years and co-founded a school that educates young people who have been involved with the juvenile justice system.⁷ As an academic, I have written extensively about the toll that mass incarceration has taken on both

⁶ The terms “mass incarceration” and “mass imprisonment” are used synonymously in the criminal justice literature. David Garland is credited with coining “mass imprisonment”; according to Garland, mass imprisonment’s two defining features are: 1) “sheer numbers” and 2) “the systematic imprisonment of whole groups of the population.” David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1–2 (David Garland ed., 2001).

⁷ See David Domenici & James Forman, Jr., *What It Takes To Transform a School Inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, in *JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM* 283 (Nancy E. Dowd ed., 2011) (discussing an effort to improve a school within a juvenile justice facility).

young people and the African-American community.⁸ This history prompted one friend familiar with this project to ask the following questions: 1) “Don’t you agree with much of what the New Jim Crow writers have to say?” and 2) “Why are you critiquing a point of view that is so closely aligned with your own?” I hope to clarify this Article’s broader goals by providing brief answers to those questions here.

Don’t you agree with much of what the New Jim Crow writers have to say? In a word: yes. The New Jim Crow writers seek to draw attention to a profound social crisis, and I applaud them for that. Low-income and undereducated African-Americans are currently incarcerated at unprecedented levels. The damage is felt not just by those who are locked up, but by their children, families, neighbors, and the nation as a whole. In Part II, I stress some of the signal contributions of the New Jim Crow writers. I especially commend their description of how our criminal justice system makes permanent outcasts of convicted criminals and stigmatizes other low-income blacks as threats to public safety. I also

⁸ See generally, James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that aggressive criminal justice policies, including racial profiling, have affected communities of color disproportionately); James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004) (arguing that community policing efforts are undercut because the efforts leave youth out of the model); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009) (arguing that the expansiveness and harshness of mass incarceration have contributed to even more drastic war on terror policies); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1006–09 (2010) (reviewing PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009)) (discussing the adverse effects of prison conditions on both inmates and the community at-large).

repeatedly single out Michelle Alexander's contribution to the literature because her elaboration of the argument is the most comprehensive and persuasive.

Why are you critiquing a point of view that is so closely aligned with your own?

Although the New Jim Crow writers and I agree about more than we disagree, the disagreements matter—for two reasons. First, they matter in the traditional academic quest to seek the truth. As an academic, I endeavor to accurately understand the causes and consequences of mass incarceration. I believe the Jim Crow analogy leads us away from some important truths, and in this Article, I seek to explain why and how the analogy misleads. My differences with the New Jim Crow writers matter for a second reason—one that should appeal to policymakers, activists, and all those whose goal is to make our criminal justice system less harsh. Reformers cannot effectively counter mass incarceration if we misunderstand, or only partially understand, the phenomenon. This is a theme that runs throughout the Article, but for now I offer one example. I argue in Part V that the Jim Crow analogy encourages us to view mass incarceration as exclusively (or mostly) a result of the War on Drugs. But drug offenders constitute only a quarter of our nation's prisoners, while violent offenders make up a much larger share: one-half.⁹ Accordingly, an effective response to mass incarceration will require directly confronting the issue of violent crime and developing policy responses that can compete with the punitive approach that currently dominates American criminal policy. This idea—that the Jim Crow analogy leads to a distorted view of mass incarceration and therefore hampers our ability to effectively challenge it—is the central theme to which I return throughout the Article.

⁹ SABOL ET. AL, *infra* note 103, at 37 app. tbl.15.

I. A BRIEF HISTORY OF THE “NEW JIM CROW”

Though I have not determined who first drew the analogy between today’s criminal justice system and Jim Crow, a number of writers began using the term to describe contemporary practices in the late 1990s. In 1999, for example, William Buckman and John Lamberth declared that:

Jim Crow is alive on America’s highways, trains and in its airports. Minorities are suspect when they appear in public, especially when they exercise the most basic and fundamental freedom of travel. In an uncanny likeness to the supposedly dead Jim Crow of old, law enforcement finds cause for suspicion in the mere fact of certain minorities in transit.¹⁰

Buckman and Lamberth argued that racial profiling was a byproduct of the nation’s strategy to combat drugs,¹¹ and criticisms of the War on Drugs have remained central to the Jim Crow analogy. That same year, in a widely-quoted speech to the American Civil Liberties Union (ACLU), Executive Director Ira Glasser argued that “drug prohibition has become a replacement system for segregation. It has become a system of separating out, subjugating, imprisoning, and destroying substantial portions of a population based on skin color.”¹² Graham Boyd, who led the ACLU’s Drug Policy Litigation Unit, made a similar claim in 2002. According to Boyd,

The war on drugs subjects America to much of the same harm, with much of the same economic and ideological underpinnings, as slavery itself. Just as Jim Crow responded to emancipation by rolling back many of the newly gained rights of African-Americans, the drug war is again replicating the institutions and repressions of the plantation¹³

¹⁰ William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, THE CHAMPION, Sept./Oct. 1999, at 14.

¹¹ *See id.* (“Around the nation Jim Crow exists as a by-product of a ‘War on Drugs’ spun out of control.”).

¹² Ira Glasser, *American Drug Laws: The New Jim Crow*, *The 1999 Edward C. Sobota Lecture*, 63 ALB. L. REV. 703, 723 (2000).

¹³ Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 845 (2002).

At the same time that ACLU lawyers were promoting the Jim Crow analogy in the policy and advocacy world, the idea began to gain adherents in the scholarly community. In 2001, Temple Law School hosted a symposium titled *U.S. Drug Laws: The New Jim Crow?*, which featured a series of lectures and articles supporting the analogy.¹⁴ During this same period, Berkeley sociologist Loïc Wacquant developed a theoretical framework for the idea. Wacquant's version of the argument has an especially high profile in the academic literature, figuring prominently in two of the most influential works devoted to mass incarceration.¹⁵

Whereas Glasser, Boyd, and the Temple symposium analogized Jim Crow to the War on Drugs in particular, Wacquant compares Jim Crow to the broader phenomenon of mass incarceration. In Wacquant's view, four parallel institutions have controlled and segregated America's disfavored and feared black population. First there was slavery, then Jim Crow, the urban ghetto, and—finally—mass incarceration. As one form of racial subjugation is dismantled, says Wacquant, another takes its place. Each of these institutions subordinates and confines blacks “in physical, social, and symbolic space.”¹⁶ Thus, Wacquant argues that mass incarceration is just another version of an institution that constructs race and racial divisions in

¹⁴ See generally Symposium, *U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 303 (2001) (consisting of several lectures which, among other things, characterize the War on Drugs as a racialized criminal justice policy similar to Jim Crow).

¹⁵ Wacquant first outlined this argument in *Mass Imprisonment*, the edited collection in which David Garland coined that term. See generally Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT, *supra* note 6, at 82 (highlighting racial effects of the prison system in America); see also Garland, *supra* note 6, at 1–2 (coining the term “mass imprisonment”). Wacquant has further developed the argument. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74, 78 (describing unique and problematic features of what he labels “hyperincarceration”).

¹⁶ Wacquant, *Deadly Symbiosis*, *supra* note 15, at 83.

such a way as to reproduce inequalities in group power and perpetuate the stigmatizing image of blacks as criminals.¹⁷

Wacquant argues that as the prison system has shifted its focus away from rehabilitation over the past thirty years, it has become more like the ghetto, which functions as a means of “social and cultural purging” through containment of a stigmatized population.¹⁸ From this, Wacquant concludes that mass incarceration reflects America’s intent to punish and confine poor blacks.¹⁹ In this way, mass incarceration operates in a fashion similar to slavery, Jim Crow, and the ghetto. Wacquant is careful to note that mass incarceration is not entirely parallel to the previous forms of subordination. Most importantly, mass incarceration does not extract labor from blacks in the way that its predecessors did.²⁰

Since Glasser, Boyd, and Wacquant first made the analogy, many others have followed suit²¹—most prominently, Michelle Alexander in her recent book *The New Jim*

¹⁷ *See id.* at 103–04 (arguing that the ghetto and prison revive and solidify stigmatizing racial beliefs).

¹⁸ *Id.* at 98; *see also id.* at 95 (drawing parallels between effects of mass incarceration and the creation of the ghetto).

¹⁹ *See id.* at 107 (highlighting continued distinctions between “praiseworthy ‘working families’” and “the despicable ‘underclass’ of criminals, loafers, and leeches” that are “increasingly being drawn . . . by the prison”).

²⁰ *See* Loïc Wacquant, *The New “Peculiar Institution”: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 385 (2000) (stating that “unlike slavery, Jim Crow and the ghetto of the mid-century, [mass incarceration] does not carry out a positive economic mission of recruitment and disciplining of the work force”).

²¹ *E.g.*, Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 57–58, 87 (2007) (situating the current legal regime which grossly limits access to relief for prisoners who are victims of sexual abuse in prisons as “part of a historical and contemporary pattern of legal enforcement” of racial hierarchy which includes slavery and Jim Crow); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious*

Crow: Mass Incarceration in the Age of Colorblindness. Alexander reports that she initially resisted the analogy when she encountered it as a young ACLU lawyer in the Bay Area.

Upon noticing a sign on a telephone pole proclaiming that “THE DRUG WAR IS THE NEW JIM CROW,” she remembers thinking: “Yeah, the criminal justice system is racist in many ways, but it really doesn’t help to make such an absurd comparison. People will just think you’re crazy.”²² Over the years, however, she has come to believe that the flyer was right.

Lawyering, 98 GEO. L.J. 1005, 1076 (2010) (“Unfortunately, we currently see a criminal justice system that, in operation today, has disparate impacts on minority communities, much as in the days of Jim Crow, with that system in effect sanctioned by the U.S. Supreme Court.”); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 505–06 (2009) (“Mass incarceration profoundly harms the most vulnerable part of the African American population by disintegrating legions of African American men from family and economic life. . . . This is an intense form of social exclusion that rivals Jim Crow and other, earlier forms of racial subordination long since recognized as unjust and unwise.”); Alex Lichtenstein, *The Private and the Public in Penal History: A Commentary on Zimring and Tonry*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 171, 173–74, 176 (arguing that the current regime of mass incarceration is “intimately bound up with larger patterns of historic and contemporary racial inequality, discrimination, and repression,” including Jim Crow); Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 191 (2009) (“The oppression of slavery and Jim Crow is not gone; instead, it has been disaggregated and reassembled into more efficient components of oppression.”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (arguing for an “abolish[ment] [of the] criminal justice institutions with direct lineage to slavery and Jim Crow that are key components of the present regime of racial repression”); Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L.J. 345, 348–49 (2007) (“[R]acialized mass imprisonment . . . in the post-segregation era, has replaced Jim Crow as the literal and symbolic tool of Black subjugation.”); Andrew D. Black, Note, *“The War on People”: Reframing “The War on Drugs” by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration*, 46 U. LOUISVILLE L. REV. 177, 178 (2007) (“[T]he true insidiousness of the ‘War on Drugs’ is its role as an effective weapon destroying the infrastructure of African-American communities through the steady reimplementations of Jim Crow.”); Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 612 (2004) (“The incarceration boom of the past three decades, combined with the corresponding collateral consequences stemming from criminal convictions, has ingrained into modern society a minority underclass resembling that of the stratified societal structure present during the Jim Crow era.”)

²² MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 3 (2010) (internal quotation marks omitted).

“Quite belatedly,” she says, “I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”²³

II. THE VALUE OF THE JIM CROW ANALOGY

The Jim Crow analogy has much to recommend it, especially as applied to the predicament of convicted offenders. Building on the work of legal scholars who have examined the collateral consequences of criminal convictions,²⁴ the New Jim Crow writers document how casually, almost carelessly, our society ostracizes offenders. Our mantra is “Do the Crime, Do the Time.” But, increasingly, “the time” is endless; felons are permanently locked out of civil society. As Wacquant puts it: “Just as bondage effected the ‘social death’ of imported African captives and their descendants on American soil, mass incarceration also induces the civic death of those it ensnares by extruding them from the social compact.”²⁵

Even those most familiar with our criminal justice system may fail to recognize how comprehensively we banish those who are convicted of crimes. I confess that I did not see the scope of the problem myself, even during my six years as a public defender. During that time, I counseled many clients about the consequences of pleading guilty, and two questions dominated

²³ *Id.* at 4.

²⁴ See generally JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006) (discussing the current disenfranchisement laws in the United States); ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS (2008) (examining the effects of race, power and politics on the reintegration of recently released prisoners); see also James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 389 (2006) (discussing the existence of state laws which deny convicted criminals certain government benefits and services).

²⁵ Loïc Wacquant, *Deadly Symbiosis*, *supra* note 16, at 82, 106 (emphasis omitted) (citation omitted).

our conversations. First, what were the chances of winning at trial? Second, what was the likely sentence after a guilty plea compared to the likely sentence if we lost at trial? But the Jim Crow analogy has helped me realize how much I overlooked in advising my clients.

Consider all of the consequences of a conviction. Depending on the state and the offense, a person convicted of a crime today might lose his right to vote²⁶ and to serve on a jury.²⁷ He

²⁶ All states and the District of Columbia, except for Maine and Vermont, place some restrictions on felon voting rights. *See* VT. STAT. ANN. tit. 17, § 2121 (2002) (making no exception of vote eligibility for convicted felons); ME. REV. STAT. tit. 21, § 247 (1973) (repealed 1975); THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011) [hereinafter FELONY DISENFRANCHISEMENT], *available at* http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf (describing felon disenfranchisement laws state-by-state). Thirteen states and the District of Columbia prohibit convicted felons from voting only during incarceration. *Id.* Thirty-five states extend this restriction to probation, parole or both. *Id.* In some states disenfranchisement extends beyond completion of the sentence and, under certain circumstances, may last forever. *See id.* (stating that four states deny the right to vote permanently while eight others require a waiting period after sentence completion); *see also* Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 116 (2008) (describing four categories of felon disenfranchisement laws). In other states, voting rights are restored after a waiting period following completion of the sentence, or upon the granting of a pardon. *See* Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 64–65 (2006) (analyzing state systems of felon disenfranchisement).

²⁷ Persons convicted of felonies punishable by at least one year in prison and those with pending felony charges against them are excluded from federal grand and petit jury service, unless the person's civil rights have been restored. 28 U.S.C. § 1865(b)(5) (2006); *see also* U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES 13 (2006), *available at* http://www.justice.gov/pardon/collateral_consequences.pdf (explaining that the restoration of civil rights for voting purposes has been interpreted to require an affirmative action by the state). States vary in the duration of the exclusion of convicted felons from state jury service, ranging from states with no statutory exclusions such as Maine, *see* ME. REV. STAT. ANN. tit. 14, § 1211 (2003) (making no exception for convicted felons), to the majority of states, which exclude felons for life from jury service “unless their rights have been restored pursuant to discretionary clemency rules.” Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 157 (2003); *see, e.g.*, HAW. REV. STAT. § 612-4(b)(2) (Supp. 2009) (excluding felons from jury service unless they are pardoned). Other states fall between these two extremes, excluding convicted felons from jury duty during incarceration, probation and parole, or some other intermediary duration. *See, e.g.*, R.I. GEN. LAWS ANN. § 9-9-1.1(c) (1997) (excluding convicted felons from jury service until completion of sentence, parole, and probation). In addition, some state statutory regimes also disqualify jurors for misdemeanors or other non-felony offenses, such as offenses of moral turpitude. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.16 (West 2006) (excluding those convicted of misdemeanor theft from serving on juries); *see also* James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in*

might become ineligible for health and welfare benefits,²⁸ food stamps,²⁹ public housing,³⁰

the Jury Pool, 73 ALB. L. REV. 1379, 1436–40 (2010) (providing a state-by-state chart listing the duration of the jury exclusion for convicted felons).

²⁸ Section 115 of the 1996 welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act, prohibits anyone convicted of a drug-related felony from receiving Temporary Assistance for Needy Families (TANF), unless states opt out of or modify the ban. 21 U.S.C. § 862a (2006). Currently, only eleven states permanently deny TANF on the basis of this ban, while thirteen states have eliminated it entirely. Legal Action Ctr., *Opting Out of Federal Ban on Food Stamps and TANF: Summary of State Laws*, LAC.ORG, <http://www.lac.org/toolkits/TANF/TANF.htm> (last updated Jan. 2011). The remaining states and the District of Columbia have limited the ban in some way to enable those with drug felony convictions to be eligible for TANF if they meet certain conditions. *Id.* In the majority of these states, drug felons become eligible again if they have completed their sentences or are complying with the terms of their judgment, parole, or probation, *e.g.*, CONN. GEN. STAT. ANN. § 17b-112d (West 2006); if they participate in alcohol or drug treatment, *e.g.*, KY. REV. STAT. ANN. § 205.2005 (LexisNexis 2007); or if they submit to random drug testing, *e.g.*, MINN. STAT. ANN. § 256J.26 (West 2007). In a few states, the ban applies only to individuals convicted of distribution or manufacture but not possession. *E.g.*, ARK. CODE ANN. § 20-76-409 (2001). Two states impose the ban for a limited period of time after release from prison, such as Louisiana’s one-year ineligibility period. *E.g.*, LA. REV. STAT. ANN. § 46:233.2 (1999).

²⁹ Eligibility for federally funded food stamps is also covered by the Personal Responsibility and Work Opportunity Reconciliation Act. *See* 21 U.S.C. § 862a (denying those convicted of a drug-related felony benefits under the food stamp program unless states opt out of or modify the ban). Ten states permanently deny food stamps on the basis of the federal ban, while fifteen states and the District of Columbia have eliminated it entirely. Legal Action Ctr., *supra* note 31. Twenty-five states have modified the ban to enable drug felons to become eligible if they meet certain conditions, the categories of which are nearly identical to those imposed for TANF qualification. *See id.* (tabling state policies on banning food stamps to individuals convicted of drug felonies).

³⁰ In determining eligibility for public housing, federal law requires local housing agencies to bar permanently two categories of convicts: 1) individuals who are subject to a lifetime sex offender registration requirement, 42 U.S.C. § 13663 (2006); and 2) individuals convicted of manufacturing or producing methamphetamine on public housing premises, 42 U.S.C. § 1437n (2006). Additionally, the Department of Housing and Urban Development (HUD) requires Public Housing Authorities (PHAs) to establish standards that prohibit admission to public housing if any household member is using or has recently used illegal drugs, or if the PHA “has reasonable cause to believe” that an individual’s illegal behavior will threaten the health and safety of the premises. 24 C.F.R. § 960.204 (2010). A household will also be barred from public housing for at least three years if one of its members was evicted from federally assisted housing for drug-related criminal activity, unless the PHA determines that the offender successfully completed a supervised drug rehabilitation program approved by the PHA. *Id.* Under HUD’s “One-Strike” policy, PHAs are required to include a provision in their leases stating that if any member of a household, or a guest of that household, engages in “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity,” the entire household may be evicted, regardless of whether the activity takes place on or off the premises. 42 U.S.C. § 1437d(1)(6) (2006); *see also* Dep’t of Hous. & Urban

student loans,³¹ and certain types of employment.³²

Dev. v. Rucker, 535 U.S. 125, 130 (2002) (holding that 42 U.S.C. § 1437d(1)(6) grants public housing authorities the discretion to evict tenants for “drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity”). PHAs retain a great deal of discretion and can make individualized determinations about applicants; only three states flatly ban applicants with a wide range of criminal records. In practice, however, many PHAs do not conduct individualized assessments and adhere, in effect, to “zero tolerance” policies. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 566 (2005).

³¹ The Higher Education Act (HEA) of 1965, Pub. L. No. 89-329, 79 Stat. 1219, which provided for financial assistance to students in postsecondary and higher education, contained no provisions barring aid to students with criminal records. In 1998, Congress amended the HEA with the Drug Free Student Loans Act, which made students convicted of a drug offense ineligible for any grant, loan, or work assistance for a specified period of time unless they completed a drug rehabilitation program. Higher Education Amendments of 1998, Pub. L. No. 105-244, sec. 484, § 483, 112 Stat. 1581, 1735–36. A report by the Government Accountability Office (GAO) estimated that 23,000 students were denied Pell Grants because of their drug convictions during the 2001–2002 academic year alone. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 57 (2005). In 2005, Congress amended the HEA again to ease the 1998 restrictions. Under the revised law, students face ineligibility only if they are convicted of a drug-related offense while receiving federal aid. 20 U.S.C. § 1091(r) (2006). Financial aid is suspended on the date of conviction for varying lengths of time, depending on the type of offense and whether or not it is a repeat offense. *Id.* Eligibility may also be restored if the student completes a drug rehabilitation program. *Id.* This federal legal barrier cannot be altered by the states. No other class of offense, including violent offenses, sex offenses, or repeat offenses, results in the automatic denial of federal financial aid eligibility. Legal Action Ctr., *After Prison: Roadblocks to Reentry*, LAC.ORG, <http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=7> (last visited Oct. 4, 2011). In September 2009, the U.S. House of Representatives passed a bill that would have limited HEA’s drug conviction penalty to those convicted of drug sales, not drug possession, but it never reached a Senate vote. H.R. 3221, 111th Cong. (2009).

³² Modern occupational licensing laws regulate professional as well as unskilled and semi-skilled occupations. As of 2000, roughly twenty percent of the national workforce was licensed. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 105 (2006) (explaining that this statistic ranges from state-to-state with California having 30.4% of its workforce licensed and Mississippi only 6.1%). The statutory requirements for obtaining occupational licenses vary among the states and according to the type of license. In some instances, a criminal conviction will bar a license. For example, a person cannot become a real estate appraiser in Alaska if he has been convicted of a crime “involving moral turpitude,” ALASKA STAT. § 08.87.110 (1995), or obtain a liquor license in South Dakota if he has ever committed a felony, S.D. CODIFIED LAWS § 35-2-6.2 (2004). Some state statutes identify occupations in which a licensing board can refuse an application solely on the basis of a criminal record. In Ohio, a license to become a barber may be denied based on a felony conviction, OHIO REV. CODE ANN. § 4709.13 (West 2004) and in New Jersey, any “criminal history” (presumably including arrests without conviction) may disqualify an individual from becoming a health care

These restrictions exact a terrible toll, especially given that most offenders *already* come from backgrounds of tremendous disadvantage. Yet we heap additional disabilities upon existing disadvantage. By barring the felon from public housing, we make it more likely that he will become homeless and lose custody of his children. Once he is homeless, he is less likely to find a job. Without a job he is, in turn, less likely to find housing on the private market—his only remaining option. Without student loans, he cannot go back to school to try to create a better life for himself and his family. Like a black person living under the old Jim Crow, a convicted criminal today becomes a member of a stigmatized caste, condemned to a lifetime of second-class citizenship.³³

professional, N.J. STAT. ANN. § 45:1-29 (West Supp. 2011). Other states require a nexus between crime and occupation for the denial of occupational licenses. In California, for example, a criminal record can affect one's application for a professional license only if "the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made." CAL. BUS. & PROF. CODE § 480 (West Supp. 2011). In Texas, licensing authorities must also consider factors such as the nature and seriousness of the crime. TEX. OCC. CODE ANN. § 53.022 (West 2004). Another hurdle faced by individuals with criminal records is the "good moral character" requirement included in most licensing laws. Many states have failed to define what constitutes "good moral character"; others have applied a definition that can be broadly construed to exclude anyone with a criminal record. *See* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 194–95 (1995) (arguing that the "good moral character" requirement poses the greatest obstacle to obtaining an license); *see also* S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833, 850–52, 879 app. VII, 882 app. VIII, 885 app. IX (summarizing state licensing laws).

³³ *See* ALEXANDER, *supra* note 22, at 139–40 (describing the possible "collateral consequences" that await ex-offenders (internal quotations omitted)). It is important to note that the recent trend in many states and the federal government is toward reducing the severity of the restrictions placed on those with criminal convictions. For example, the Sentencing Project reports that "since 1997, 23 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility." NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2010, at 1 (Oct. 2010), *available at* www.sentencingproject.org/doc/.../vr_ExpandingtheVoteFinalAddendum.pdf. Also, the federal ban on student loans for those convicted of drug offenses has been substantially narrowed; it now limits only those who are convicted of a drug offense *while already receiving* federal aid. *See supra* note 31 (describing the amendments to the HEA). In addition, since the Personal Responsibility and Work Opportunity Reconciliation Act was passed in 1996, thirty-nine states

While the Jim Crow analogy is most compelling as applied to those convicted of crimes, it applies more broadly as well. Just as Jim Crow defined blacks as inferior, mass imprisonment encourages the larger society to see a subset of the black population—young black men in low-income communities—as potential threats. This stigma increases their social and economic marginalization and encourages the routine violation of their rights.³⁴ Intense police surveillance of black youths becomes accepted practice.³⁵ Misbehavior in school is reported to the police and leads to juvenile court.³⁶ Employers are reluctant to hire them.³⁷ Thus, even young low-income

and the District of Columbia have opted out of or modified the federal ban on TANF for individuals convicted of drug-related felonies, and forty states and the District of Columbia have done so with respect to food stamps. *See supra* notes 28-29 and accompanying text (detailing state laws which modify the federal ban).

³⁴ *See* James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 22–25 (2004) (describing the misleading theme of inner city youth as “super-predators” (internal quotations omitted)).

³⁵ *Id.* at 20–21 (explaining that the young are significantly more likely to be disrespected, illegally searched, and have force used against them when stopped by police); *see also* Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS, 309, 314 (Stephen K. Rice & Michael D. White eds., 2010) (discussing surveys which indicate that African Americans are more likely than other Americans to report being stopped on a highway by police); Report of Jeffrey Fagan, Ph.D. at 22 tbl.3, *David Floyd v. City of New York*, No. 08 Civ. 01034 (S.D.N.Y. Oct. 15, 2010) (showing that NYPD officers conducted a greater number of stop and frisks of young black men aged 16-19 in New York City than Hispanic and white men in the same age group), *available at* http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf; William Terrill & Stephen D. Mastrofski, *Situational and Officer-Based Determinants of Police Coercion*, 19 JUST. Q. 215, 236 (2002) (stating that officers in one study were significantly more likely to use force on “males, nonwhites, young suspects and poor suspects”).

³⁶ *See* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 119 (2010) (stating that schools have increased their reliance on outside forces to handle discipline and, as a result, children are arrested for school misbehavior at a growing rate).

³⁷ *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 90–91 & 91 fig.5.1 (2007) (finding that black applicants with a criminal record had a lower chance of receiving a callback from an employer than white applicants with a criminal record: five percent and seventeen percent, respectively).

black men who are never arrested or imprisoned endure the consequences of a stigma associated with race.

Taken together, these two forms of exclusion—making permanent outcasts of convicted criminals while stigmatizing other poor blacks as potential threats—have had devastating effects on low-income black communities. While the New Jim Crow writers are not the first to have raised these issues,³⁸ their analogy usefully connects the dots: It highlights the cumulative impact of a disparate set of race-related disabilities. Alexander is especially persuasive in this regard. Invoking the “birdcage” metaphor associated with structural racism theorists, she documents in depressing detail how mass incarceration intersects with a wide variety of laws and institutions to trap low-income black men in a virtual cage.³⁹ Her elaboration of the Jim Crow analogy is also useful because, by skillfully deploying a rhetorically provocative claim, she has drawn significant media attention to the often ignored phenomenon of mass imprisonment.⁴⁰

³⁸ See generally DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (describing far-reaching effects of incarceration on the social life of families and communities); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007) (discussing how the increasing criminalization of black men has led to their stigmatization); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008) (analyzing the paradoxical effects that incarceration has on minority communities); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (detailing ways in which the mass incarceration of African-Americans has damaged social networks, distorted social norms, and destroyed social citizenship).

³⁹ ALEXANDER, *supra* note 22, at 179–80.

⁴⁰ E.g., Darryl Pinckney, *Invisible Black America*, N.Y. REV. OF BOOKS, Mar. 10, 2011, at 34 (“Now and then a book comes along that might in time touch the public and educate social commentators, policymakers, and politicians about a glaring wrong that we have been living with that we also somehow don’t know how to face. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander is such a work.”) Charles M. Blow, *Smoke and Horrors*, N. Y. TIMES, Oct. 23, 2010, at A21 (citing the Jim Crow analogy with approval). Alexander’s book has also been featured on National Public Radio and The Bill Moyers Journal. *Scholar: Jim Crow Is Far From Dead* (NPR radio broadcast June 2, 2010),

So, especially for those of us who believe that America incarcerates too many people generally, and too many African-Americans specifically, what objection could there be to the claim that our criminal justice system is the New Jim Crow? Before answering that question, let me pause to clarify what I am *not* arguing. I do not suggest that mass incarceration is anything less than a profound social ill; nor do I argue that racial disparity, racial indifference, and even outright racial animus in the criminal justice system are yesterday's concerns. Furthermore, I am not suggesting that the Jim Crow analogy fails because mass incarceration is not *exactly* the same as Jim Crow. After all, analogies are by definition partly true and partly false, and the New Jim Crow writers—especially Alexander—acknowledge important differences between the two racial caste systems.⁴¹ Finally, I am not suggesting that the New Jim Crow writers are unworthy of serious attention. To the contrary, I believe they have made and continue to make a hugely important contribution to the criminal justice literature.

My objection to the Jim Crow analogy is based on what it obscures. Proponents of the analogy focus on those aspects of mass incarceration that most resemble Jim Crow and minimize

<http://www.npr.org/templates/story/story.php?storyId=127368484>, *Bill Moyers Journal*, Bryan Stevenson and Michelle Alexander (PBS television broadcast Apr. 2, 2010).

⁴¹ The best of the New Jim Crow writers recognize that the analogy between Jim Crow and mass incarceration is imperfect. ALEXANDER, *supra* note 22, at 195-208. For example, Alexander points out that while the Old Jim Crow never purported to be colorblind, the New Jim Crow operates under the myth of colorblindness. *Id.* at 11-12 (explaining that “[t]he colorblind public consensus that prevails in America today—i.e., the widespread belief that race no longer matters—has blinded us to the realities of race in our society and facilitated the emergence of a new caste system.”). *See also* Roberts, *supra* note 21, at 263 (“[u]nlike state violence inflicted in the Jim Crow era explicitly to reinstate blacks’ slave status, today’s criminal codes and procedures operate under the cloak of colorblind due process. The racism of the criminal justice system is therefore invisible to most Americans.”). The myth of colorblindness has provided a cover for egregious injustices in the criminal justice system, and Alexander effectively employs the Jim Crow analogy to unmask some of them. Consider the recently narrowed disparity in federal sentences for possessing crack versus powder cocaine. The law does not *say* that black drug offenders will be treated more harshly than white offenders; it makes no reference to race. But the facially race-neutral law has been anything but race-neutral as applied; its impact on African-American defendants has been devastating.

or ignore many important dissimilarities. As a result, the analogy encourages an incomplete account of mass incarceration—one in which most prisoners are drug offenders, violent crime and its victims merit only passing mention, and white prisoners are largely invisible. In sum, as I outline in the Parts that follow, the analogy directs our attention away from important features of crime and punishment in America which require our attention if we are to understand mass incarceration in all of its dimensions.

III. OBSCURING HISTORY: THE BIRTH OF MASS INCARCERATION

The New Jim Crow writers typically start their argument with an historical claim, grounded in a theory of backlash.⁴² The narrative goes like this: Just as Jim Crow was a response to Reconstruction and the late-nineteenth-century Populist movement that threatened Southern elites, mass incarceration was a response to the civil rights movement and the tumult of the 1960s. Beginning in the mid-1960s, Republican politicians—led by presidential candidates Goldwater and Nixon—focused on crime in an effort to tap into white voters’ anxiety over increased racial equality and a growing welfare state. Barry Goldwater cleared the way in 1964 when he declared, “Choose the way of [the Johnson] Administration and you have the way of

⁴² Dorothy Roberts summarizes the historical claim: “Thus, the shift in law enforcement policies at the end of the 1970s that started the astronomical U.S. prison expansion can be seen as a backlash against the reforms achieved by civil rights struggles.” Roberts, *supra* note 21, at 272. For similar accounts, see ALEXANDER, *supra* note 22, at 40–47; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1031–37 (2010). See also Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “race question” in the US*, 13 NEW LEFT REV. 41, 52 (2002) (“By the end of the seventies, then, as the racial and class backlash against the democratic advances won by the social movements of the preceding decade got into full swing, the prison abruptly returned to the forefront of American society and offered itself as the universal and simplex solution to all manners [sic] of social problems.”).

mobs in the street.”⁴³ In 1968, Nixon perfected Goldwater’s strategy. In the words of his advisor H. R. Haldeman, Nixon “emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”⁴⁴ Ehrlichman, another advisor, characterized Nixon’s campaign strategy as follows: “We’ll go after the racists.”⁴⁵

There is much truth to this account, and its telling demonstrates part of what is useful about the Jim Crow analogy. Today, too many Americans refuse to acknowledge the continuing impact of race and prejudice on public policy. By documenting mass imprisonment’s roots in race-baiting political appeals, the New Jim Crow writers effectively demolish the notion that our prison system’s origins are exclusively colorblind.

But in emphasizing mass incarceration’s racial roots, the New Jim Crow writers overlook other critical factors. The most important of these is that crime shot up dramatically just before the beginning of the prison boom.⁴⁶ Reported street crime quadrupled in the twelve years from 1959 to 1971.⁴⁷ Homicide rates doubled between 1963 and 1974,⁴⁸ and robbery rates tripled.⁴⁹

⁴³ ALEXANDER, *supra* note 22, at 41 (quoting Barry Goldwater, Peace Through Strength, in 30 VITAL SPEECHES OF THE DAY 744 (1964)).

⁴⁴ *Id.* at 43 (citing WILLARD M. OLIVER, THE LAW & ORDER PRESIDENCY 127–28 (2003)).

⁴⁵ *Id.* at 44 (quoting JOHN EHRLICHMAN, WITNESS TO POWER 233 (1970)).

⁴⁶ DAVID GARLAND, THE CULTURE OF CONTROL 90 (2001) (“In the USA, crime rates rose sharply from 1960 onwards, reaching a peak in the early 1980s when the rate was three times that of twenty years before, the years between 1965 and 1973 recording the biggest rise on record. Moreover, the increases occurred in all the main offence categories, including property crime, crimes of violence and drug offending.”).

⁴⁷ GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 20 (1998) (providing an estimate including Uniform Crime Reports (UCR) categories for murder, robbery, rape, aggravated assault, battery, burglary, motor vehicle theft, and larceny).

Proponents of the Jim Crow analogy tend to ignore or minimize the role that crime and violence played in creating such a receptive audience for Goldwater's and Nixon's appeals. Alexander, for example, characterizes crime and fear of crime as follows:

Unfortunately, at the same time that civil rights were being identified as a threat to law and order, the FBI was reporting fairly significant increases in the national crime rate. Despite significant controversy over the accuracy of the statistics, these reports received a great deal of publicity and were offered as further evidence of the breakdown in lawfulness, morality, and social stability.”⁵⁰

In this account, the stress is not on crime itself but on the FBI's reporting, about which we are told there is “significant controversy.”⁵¹ But even accounting for problems with the FBI's crime statistics, crime increased dramatically.⁵²

Nor were white conservatives such as Nixon and Goldwater alone in demanding more punitive crime policy. In *The Politics of Imprisonment*, Vanessa Barker describes how, in the late 1960s, black activists in Harlem fought for what would become the notorious Rockefeller drug laws, some of the harshest in the nation. Harlem residents were outraged over rising crime (including drug crime) in their neighborhoods and demanded increased police presence and stiffer penalties. The NAACP Citizens' Mobilization Against Crime demanded “lengthening

⁴⁸ *Id.* at 21–22.

⁴⁹ *Id.* at 22.

⁵⁰ ALEXANDER, *supra* note 22, at 41.

⁵¹ *Id.*

⁵² See GARLAND, *supra* note 46, at 90 (noting the significant rise in crime rates from 1960 through the 1980s); LAFREE, *supra* note 47, at 20–22 (citing quadrupling of street crime rates between 1959 to 1971) see also HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 75 (2003) (comparing UCR data to other available sources and concluding that “our best educated guess is that rates of offending for serious violent crimes roughly doubled from 1960 to 1975, and remained somewhere in that 200 percent ballpark for the next fifteen to twenty years”).

minimum prison terms for muggers, pushers, [and first] degree murderers.”⁵³ The city’s leading black newspaper, *The Amsterdam News*, advocated mandatory life sentences for the “non-addict drug pusher of hard drugs” because such drug dealing “is an act of cold, calculated, pre-meditated, indiscriminate murder of our community.”⁵⁴

Rising levels of violent crime and demands by black activists for harsher sentences have no place in the New Jim Crow account of mass incarceration’s rise. As a result, the Jim Crow analogy promotes a reductive account of mass incarceration’s complex history in which, as Alexander puts it, “proponents of racial hierarchy found they could install a new racial caste system.”⁵⁵

IV. OBSCURING BLACK SUPPORT FOR PUNITIVE CRIME POLICY

The Harlem NAACP’s push for tougher crime laws raises an important question, which the Jim Crow analogy obscures: What does it mean if black citizens support the policies that produce mass imprisonment? The old Jim Crow, after all, was a series of legal restrictions, backed by state and private violence, imposed on black people by the white majority. When given the opportunity, blacks rejected it. Three states—Mississippi, Louisiana, and South Carolina—had black voting majorities during Reconstruction, and all three banned racial segregation in public schools and accommodations.⁵⁶ The Jim Crow analogy encourages us to

⁵³ VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 151 (2009).

⁵⁴ *Id.*

⁵⁵ ALEXANDER, *supra* note 22, at 40.

⁵⁶ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 790 (1991).

understand mass incarceration as another policy enacted by whites and helplessly suffered by blacks. But today, blacks are much more than subjects; they are actors in determining the policies that sustain mass incarceration in ways simply unimaginable to past generations.

So what do African-Americans think? Various writers have addressed the question of black attitudes toward crime policy, typically through opinion polling.⁵⁷ But no one has yet

⁵⁷ With respect to attitudes toward sentencing policy in particular, the evidence suggests that Americans across racial lines agree broadly about appropriate sentences for specific crimes and those crimes' relative seriousness. See PRINCETON SURVEY RESEARCH ASSOCS. INT'L FOR THE NAT'L CTR. FOR STATE COURTS, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 2 (July 2006), available at http://www.ncsonline.org/d_research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf [hereinafter NCSC SURVEY] (noting the broad consensus among Americans that violent crimes should result in tougher sentences than non-violent crimes); Donald Braman, Dan M. Kahan, & David A. Hoffman, *Some Realism about Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1543–44 (2010) (discussing a study by Paul J. Robinson and Robert Kurtzban which analyzed individuals' ranking of the wrongfulness of various actions and concluding that the "rankings [are] highly consistent... across a broad array of demographic variables"); J.L. Miller, Peter H. Rossi, & Jon E. Simpson, *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 LAW & SOC'Y REV. 313, 32–30 (1986) ("Compared to whites, in making their judgments blacks generally are less strongly influenced by crime seriousness, more influenced by offender characteristics and the mitigating circumstances surrounding the crime."). Although there are some differences between African-Americans and whites in judgments about appropriate sentences, often with African-Americans imposing more lenient sentences, those differences are eclipsed by variation along other demographic lines, including class and education level. See PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 205 (1997) (concluding that educational attainment is strongest demographic correlate for sentencing attitudes); Carroll Seron, Joseph Pereira, & Jean Kovath, *Judging Police Misconduct: 'Street-Level' versus Professional Policing*, 38 L. & SOC'Y REV. 665, 678–79 (2004) (noting that several studies suggest that "minorities, and blacks in particular, do not hold significantly different attitudes or expectations about issues related to the administration of the criminal justice system than whites"). Recent research paints a complicated picture of public attitudes toward sentencing, showing that these attitudes are related to a broad variety of factors, including judgments about the fairness of crime control and the judicial system more broadly, the survey respondent's knowledge about current sentencing policies and sentencing alternatives, and the survey respondent's personal involvement with the court system. See NCSC SURVEY, *supra*, at 28 (stating that "[k]nowledge of crime and incarceration rates and personal involvement with the court system also influence opinions about sentencing in general"); ROSSI & BERK, *supra*, at 167–206 (concluding that individuals who had been involved in the criminal justice system as a juror, plaintiff, or witness, or who had been accused or convicted of a crime were inclined to give longer prison sentences). For analysis of black attitudes toward other aspects of crime policy, see generally Richard R. W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000); Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law*

asked the following question: What sort of crime policies do black-majority jurisdictions enact? After all, if mass incarceration constitutes the New Jim Crow, presumably a black-majority jurisdiction today would rapidly move to reduce its reliance on prisons.

Of course, one reason no one has asked this question is that, unlike during Reconstruction, there are no states today with black voting majorities. Still, one jurisdiction warrants scrutiny. Washington, D.C. is the nation's only majority-black jurisdiction that controls sentencing policy.⁵⁸ The District is 51% African-American.⁵⁹ Since home rule was established in 1975, all six of its mayors have been black, and the city council has been majority-black for most of that time.⁶⁰ The police are locally controlled, and the mayor appoints the police chief. African-Americans are overrepresented in the police force: African-Americans make up 66% of

Enforcement: Lessons for Federal Criminal Law, 1 BUFFALO CRIM. L. REV. 137 (1997). For non-empirical perspectives on the same issue, see generally Randall Kennedy, *RACE, CRIME AND THE LAW* (1997), and Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

⁵⁸ Robert L. Wilkins, *Federal Influence on Sentencing Policy in the District of Columbia: An Oppressive and Dangerous Experiment*, 11 FED. SENT'G REP. 143, 143 (1998-1999) (explaining that "even though Congress and the President have veto power over D.C. legislation and the power to pass legislation exclusively applicable to the District of Columbia, they had generally respected . . . 'home rule' . . . and not forced many major legislative changes in the sensitive and inherently local area of criminal law," including in the area of sentencing).

⁵⁹ *2010 Census: District of Columbia Profile*, U.S. CENSUS BUREAU 1 (last revised Oct. 6, 2011), http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_District_of_Columbia.pdf.

⁶⁰ The D.C. Council was majority black from 1975 until 1999, then majority white until 2009, when it went back to majority black. See *Quiet Revolution on the D.C. Council*, WASH. TIMES, Nov. 9, 1998, at A18 (explaining that the 1998 election resulted in the first majority white Council since the establishment of home rule); Nikita R. Stewart, *D.C. Wire: News and Notes on District Politics: Schwartz Concedes to Michael Brown*, WASH. POST. (Nov. 5, 2008, 2:18 PM), http://voices.washingtonpost.com/dc/2008/11/schwartz_concedes_to_michael_b.html (reporting that Michael Brown took Carol Schwartz's seat in the 2008 City Council election, which meant that seven of the Council's 13 seats were held by African Americans); see also *Previous Councils, Council of the District of Columbia*, <http://www.dccouncil.washington.dc.us/previouscouncils> (last visited Oct. 7, 2011) (listing all previous council members in each term).

the Metropolitan Police Department (MPD),⁶¹ and the MPD has the highest percentage of black officers in supervisory positions of any large majority-black city in the country.⁶² Because of its unique status, the city assumes both state and municipal functions in many aspects of the criminal process. Most important for purposes of this analysis, the D.C. city council and the mayor operate like a state government in terms of sentencing policy; they determine statutory maximums for all offenses, decide whether to impose mandatory minimums, and so on. Similarly, because the mayor appoints—and the city council confirms—the police chief, local officials exercise significant control over policing practices. This control is important because policing practices are a significant source of racial disparity in incarceration rates.⁶³

I acknowledge that the state analogy is imperfect. D.C. has less autonomy than a state in a number of important ways. For example, while the process for selecting judges for D.C. courts includes significant input from a local commission and from the office of D.C.’s elected representative to Congress (currently Eleanor Holmes Norton⁶⁴), the White House ultimately

⁶¹ Brian A. Reaves & Matthew J. Hickman, *Law Enforcement Management and Administrative Statistics, 2000: Data for Individual State and Local Agencies with 100 or More Officers* 27, BUREAU OF JUSTICE STATISTICS (2004), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1052> (click on “Full Report”).

⁶² Ronald Weitzer, Steven A. Tuch & Wesley G. Skogan, *Police-Community Relations in a Majority Black City*, 45 J. RES. CRIME AND DELINQUENCY 398, 407 (2008). Even so, the MPD is not immune to racial divisions within its ranks. Last July, a federal jury awarded close to \$1 million in damages to four black MPD officers who had been retaliated against by their supervisors for complaining of discrimination. See Spencer S. Hsu, *Jury Orders District To Pay \$900,000 to 4 Police Officers in Retaliation Case*, WASH. POST, July 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904938.html>. (reporting on the jury’s order).

⁶³ See Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited*, *supra* note 35, at 314 (“Recent empirical evidence on police stops supports perceptions among minority citizens that police disproportionately stop African American and Hispanic motorists, and that once stopped, these citizens are more likely to be searched or arrested.”) (citations omitted).

⁶⁴ See Biography of Congresswoman Elizabeth Holmes Norton, United States House of Representatives,

makes judicial appointments.⁶⁵ In addition, although local officials prosecute juvenile offenses, the United States Attorney's Office prosecutes more serious offenses.⁶⁶

And yet, despite these external forces, local black elected officials exert considerable power over crime policy and have the ability to push back against federal actors. For example, if the mayor and the city council think that federal prosecutors are targeting too many low-level drug offenders, or that federally-appointed judges are imposing excessive sentences for drug offenses, they can lower the maximum penalties for these offenses. And they have, in fact, exercised this power. For example, in 1982, by a vote of 72% to 28%, D.C. residents adopted an initiative providing for mandatory minimum penalties for defendants who distributed controlled substances or who possessed such substances with the intent to distribute them.⁶⁷ Twelve years later, in December 1994, the city council voted to abolish mandatory minimums for nonviolent drug offenses.⁶⁸ Councilmembers defended the move as a recognition that mandatory minimums had "failed to deter drug use and drug sales."⁶⁹

http://www.norton.house.gov/index.php?option=com_content&view=article&id=189&Itemid=94 (last visited Oct. 7, 2011) (discussing Congresswoman's right to recommend federal judges when granted senatorial courtesy).

⁶⁵ D.C. CODE § 1-204.33 (2011).

⁶⁶ See D.C. CODE § 23-101(a)–(c) (2011) (detailing how local prosecutors prosecute municipal crimes where the penalty doesn't exceed a fine or one year of imprisonment, as well as crimes relating to disorderly conduct and lewd, indecent, or obscene behavior while the US Attorney, according to this section, prosecutes everything else, except as otherwise provided by law.)

⁶⁷ See D.C. Law 4-166, §§ 9 & 10, 30 D.C. Reg. 1082 (Mar. 9, 1983), codified in D.C. CODE § 33-541(e) (1993) (repealed 1994) (describing the act and giving referendum vote totals).

⁶⁸ District of Columbia Nonviolent Offenses Mandatory-Minimum Sentences Amendment Act of 1994, D.C. Law 10-258, § 3, 42 D.C. Reg. 238 (effective May 25, 1995) (codified at D.C. CODE § 48-904.01(c) (2011) (repealing the provision).

⁶⁹ Matt Neufeld, *Minimum Terms' Demise Wins Praise: But Prosecutors Say Bad Message Sent*, WASH. TIMES, Nov. 3, 1994, at C5 (quoting Councilmember William Lightfoot).

To be sure, local legislators do not operate with total autonomy from the federal government. If the mayor and city council stray too far from what Congress deems appropriate, Congress retains the authority to overrule them.⁷⁰ However, Congress has rarely interfered with D.C. autonomy in matters of criminal law. When it has, its interventions have typically related to hot-button issues such as medical marijuana and needle exchanges for drug addicts.⁷¹ In addition, although D.C. officials cannot veto congressional actions, they retain the right to protest, if only symbolically, against those with whom they disagree. In certain areas—most notably the denial of voting rights to D.C. residents—they have done exactly that. Former Mayors Sharon Pratt Kelly, Anthony Williams, and Adrian Fenty, and current Mayor Vincent Gray have all led protests—almost always with D.C.’s elected representative to Congress Eleanor Holmes Norton—to demand representation or to object to congressional proposals that threaten home rule.⁷² Mayor Kelly and Councilmember Kevin Chavous were arrested in 1993 as part of a pro-Statehood rally.⁷³ In 2011, Mayor Gray and five councilmembers were arrested on

⁷⁰ See Wilkins, *supra* note 58, at 143.

⁷¹ Victoria Benning, *Calling for Equality to Begin at Home; Gay Rights Rally Decries Discrimination, Congressional Action Against D.C. Measures*, WASH. POST., Mar. 22, 1999, at B03.

⁷² See Leroy Tillman, *D.C. Mayor, Jackson Arrested in Protest*, FRESNO BEE, Aug. 27, 1993, at A6 (reporting on a protest at which Sharon Pratt Kelly was arrested); Katie Drake, *D.C. Demands Voting Rights*, THE LEADERSHIP CONFERENCE, Apr. 17, 2002, <http://www.civilrights.org/voting-rights/dc-voting-rights/dc-demands-voting-rights.html> (reporting on a rally for D.C. voting rights addressed by Eleanor Holmes Norton and Anthony Williams); *Thousands March for D.C. Voting Rights*, WTOP, Apr. 16, 2007, <http://www.wtop.com/?nid=25&sid=1116494&sidelines=1> (reporting on a march for voting rights led by Norton and Adrian Fenty and attended by Anthony Williams and D.C. Councilmembers); Ashley Southall, *D.C. Officials Protest Proposed House Rule*, N.Y. TIMES, Jan. 4, 2011, <http://thecaucus.blogs.nytimes.com/2011/01/04/d-c-officials-protest-proposed-house-rule/>. (reporting on Norton and Vincent Gray’s protest of a proposal to strip Norton of her right to vote on amendments and procedures when the House of Representatives convenes as a Committee of the Whole).

⁷³ Tillman, *supra* note 72, at A6.

Capitol Hill while protesting riders to the federal spending bill restricting how D.C. may spend its tax dollars.⁷⁴

In matters of criminal law, however, they have largely remained silent. There is little evidence that D.C. officials have sought more lenient criminal policies, only to be overruled by Congress. To the contrary, local elected officials have recently pushed for *tougher* criminal penalties. In 2008, for example, Mayor Fenty introduced an omnibus crime bill that included a variety of provisions sought by prosecutors.⁷⁵ As Fenty argued, “we are giving the police and the U.S. attorney more resources to put more people in jail.”⁷⁶ The city council passed the law with few modifications.⁷⁷

So what do incarceration rates look like in this majority-black city with substantial local control over who goes to prison and for how long?⁷⁸ They mirror the rates of other cities where

⁷⁴ Ben Pershing, *Gray, Council Members at Protest of D.C. Riders in Spending Bill*, WASH. POST, Apr. 12, 2011, available at http://www.washingtonpost.com/local/politics/gray-council-members-arrested-at-protest-of-dc-riders-in-spending-bill/2011/04/11/AFRWPBND_story.html.

⁷⁵ *Fenty Administration Introduces Anti-Crime Bill*, WHAT’S NEW IN THE METROPOLITAN POLICE DEP’T (Oct. 10, 2008), available at http://newsroom.dc.gov/file.aspx/release/15141/wn_081010.pdf.

⁷⁶ See Hamil R. Harris, *Inmates Get Tools for Life Outside Jail*, WASH. POST, Feb. 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021101546.html> (discussing city council’s passage of the law after debate over a single amendment).

⁷⁷ Nikita R. Stewart, *Council Approves Crime Bill in 10-3 Vote*, WASH. POST, June 30, 2009, http://voices.washingtonpost.com/dc/2009/06/council_approves_crime_bill_in.html. I do not mean to argue that D.C. officials have *never* advocated for less punitive crime policy. They have occasionally done so—for example, as I mentioned earlier, when the D.C. Council eliminated mandatory minimums for drug offenses. My point is that, despite the federal involvement in District affairs, the D.C. Council retains substantial authority over its criminal justice system and sentencing structure. In sum, D.C. largely has the criminal justice system that it has chosen for itself.

⁷⁸ There are a variety of measures we might use to assess a jurisdiction’s relative punitiveness. Does the jurisdiction have a death penalty, and, if so, how frequently is it used? Does it have mandatory minimums for sentencing or three-strikes provisions? Does it permanently

African-Americans have substantially less control over sentencing policy. Washington, D.C. (a majority-black jurisdiction) and Baltimore (a majority-black city within a majority-white state) have similar percentages of young African-American men under criminal justice supervision.⁷⁹ Detroit, an overwhelmingly African-American city in a majority-white state,⁸⁰ has a *smaller* proportion of adults under criminal justice supervision than Washington, D.C. One in twenty-five Detroit⁸¹ adults are in jail or prison, on probation, or on parole, compared to one in twenty-one adults in D.C.⁸²

These data raise an important challenge to the Jim Crow analogy, since the analogy

disenfranchise felons? What are conditions like inside its prisons? How adequately does it fund its indigent defense system? And the list goes on. But incarceration rates are the most commonly used criteria, for at least two reasons. First, they allow for relatively straightforward comparisons across jurisdictions. Second, incarceration rates usefully aggregate a number of other measures. Whether a jurisdiction has mandatory minimums, what maximum sentence length it authorizes for a particular offense, whether it has “three strikes” or other repeat offender provisions, whether it punishes crack and powder cocaine offenses differently—these all factor into that jurisdiction’s incarceration rates. For a thoughtful discussion of the advantages and disadvantages of using incarceration rates to compare penal policies across jurisdictions, see Michael Tonry, *Determinants of Penal Policies*, in 36 CRIME AND JUST.: REV. RES. 1, 7–13 (Michael Tonry, ed. 2007).

⁷⁹ See ERIC LOTKE & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, TIPPING POINT: MARYLAND’S OVERUSE OF INCARCERATION, AND THE IMPACT ON COMMUNITY SAFETY 2–3, 9 (2005) (noting the incarceration rate for young African-American men in Baltimore was 56% in 1992 and 52% in 2004); ERIC LOTKE, *Hobbling a Generation: Young African American Men in Washington, D.C.’s Criminal Justice System – Five Years Later*, 55 CRIME & DELINQUENCY 355, 357 (1998) (noting the incarceration rate for young African-American men in Washington, D.C. was 50% in 1997).

⁸⁰ KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. DEP’T OF COMMERCE, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 18 (2011) (noting that Michigan is 77% non-Hispanic white).

⁸¹ THE PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 8–9 (2009).

⁸² *Id.* at 7, 42.

attributes mass incarceration entirely to the animus⁸³ or indifference⁸⁴ of white voters and public officials toward black communities. While the analogy might explain the sky-high African-American incarceration rates in Baltimore and Detroit, it does not explain those in Washington, D.C. And just as the analogy fails to explain why a majority-black jurisdiction would lock up so many of its own, it says little about blacks who embrace a tough-on-crime position as a matter of racial justice.

When I was a public defender in D.C., my African-American counterparts in the U.S. Attorney's Office often informed me that they had become prosecutors in order to "protect the community." Since I started teaching, I have met many students with prosecutorial ambitions who feel the same way. And they have a point:⁸⁵ If stark racial disparities within the prison system motivate mass incarceration's critics, stark racial disparities among crime victims motivate tough-on-crime African-Americans. Young black men suffer a higher rate of both fatal and nonfatal violence.⁸⁶ In 2006, the homicide rate for young black men was nineteen times

⁸³ See, e.g., JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 2 (1996) ("The white majority embraced the draconian [criminal] measures with enthusiasm, particularly as it became clear that they were falling heaviest on minorities in general, and on African-American males in particular.").

⁸⁴ See, e.g., Michael Tonry & Matthew Melewski, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, in *THINKING ABOUT PUNISHMENT: PENAL POLICY ACROSS SPACE, TIME AND DISCIPLINE* 81, 87 (Michael Tonry ed. 2009) ("The history of American race relations has produced political and social sensibilities that made white majorities comparatively insensitive to the suffering of disadvantaged blacks."); *id.* at 111 ("[I]nsensitivity to the interests of black Americans continues to characterize American crime policies.").

⁸⁵ Cf. Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* 137, 153 (Stephen E. Gottlieb ed. 1993) ("[I]t is the failure vigorously to enforce the criminal law in black neighborhoods—an especially notorious practice a generation ago—that constitutes a denial of liberty to black citizens. Securing greater personal liberty for black law abiders by enforcing the criminal law is not racial discrimination; it is black liberation.").

⁸⁶ JOHN A. RICH, *WRONG PLACE, WRONG TIME: TRAUMA AND VIOLENCE IN THE LIVES OF YOUNG BLACK MEN*, at ix (2009).

higher than the rate for young white men.⁸⁷ Most crime is intra-racial; over 90% of black homicide victims are killed by other blacks, and more than 75% of all crimes against black victims are committed by blacks.⁸⁸ Many of the black prosecutors I know are very much like Paul Butler, who, though now a critic of American crime policy, originally became a prosecutor to help low-income black communities. As Butler recounts:

My friends from law school thought it was kind of wack that I was a prosecutor. I had been the down-for-the-cause brother who they had expected to work for Legal Aid or as a public defender. I told them I was helping people in the most immediate way—delivering the protection of the law to communities that needed it most, making the streets safer, and restoring to victims some measure of the dignity that a punk criminal had tried to steal.⁸⁹

Butler, writing before his “conversion,” speaks for people who care deeply about other blacks, and see tough-on-crime policies as pro-black.⁹⁰ I disagree with them because I view mass incarceration as doing much more harm than good, and I would opt for a radically different approach to combating violence. However, their numbers and their passion have no analogue in the Jim Crow era.

The New Jim Crow writers are not oblivious to the fact that some blacks support tough-on-crime policies. The standard response is to argue that blacks do not *support* the policies that

⁸⁷ *Id.*

⁸⁸ JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES: 1998 UPDATE 3 (2000); CALLIE RENNISON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION AND RACE, 1993–1998 10 tbl.14 (2001), *available at* <http://www.bjs.gov/content/pub/pdf/vvr98.pdf>.

⁸⁹ PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 24 (2009).

⁹⁰ *Cf.* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1258–59 (1994) (“[S]ome of the policies most heatedly criticized by certain sectors of black communities are supported and enforced by other African-Americans within these same communities.”).

sustain mass incarceration, but simply *comply* with them:

In the era of mass incarceration, poor African Americans are not given the option of great schools, community investment, and job training. Instead, they are offered police and prisons. If the only choice that is offered blacks is rampant crime or more prisons, the predictable (and understandable) answer will be “more prisons.”⁹¹

This answer compellingly demonstrates how choice is constrained for ghetto residents.

But it is not a complete response to the black prosecutor phenomena. Prosecutors like Paul Butler do not live in a world of constrained choices. They studied at prestigious law schools and received appellate clerkships. They could work to promote alternatives that the New Jim Crow writers and I believe will combat crime more effectively than locking up more black men. Instead, they *choose*—in the most robust and unfettered sense of that word—a different path. And the fact that they make this choice, combined with their (at least in some cases) racial justice orientation, raises an important question about whether the ends they seek can be fairly analogized to Jim Crow.

The Washington, D.C. phenomenon raises a similar set of questions. Admittedly, the District’s mayor and city council do not have unlimited options in deciding how to fight crime; their choices are not as unconstrained as Paul Butler’s choice to become a prosecutor when he graduated from Harvard Law School. Yet they have real choices around criminal justice policy. I know this in part because my former colleagues at the Public Defender Service (PDS) regularly testify against tough-on-crime legislation before the city council, and they regularly present less punitive alternatives—sometimes including the education, community investment, and job training programs that Alexander hypothesizes blacks will choose over prison if given the option.

⁹¹ ALEXANDER, *supra* note 22, at 205. *See also* López, *supra* note 42, at 1058 (“Forced into a ‘choice’ between governmental neglect versus neglect combined with aggressive policing, it seems cruel to defend such policing on the ground that it is ‘preferred’ by those trapped in impoverished nonwhite neighborhoods.”).

Yet, PDS often fails to persuade the black-majority legislative body. This hardly means the city council is acting wisely. But it is more than *compliant* with the laws it enacts. It *chooses* the laws it enacts—and absent evidence that the council is forced into its choices the most reasonable conclusion is that that it *supports* the laws it enacts.⁹²

V. OBSCURING VIOLENCE

To this point, I have focused principally on crimes of violence and the state’s response to such crimes. I part company with the New Jim Crow writers in this regard. They focus almost exclusively on the War on Drugs. This approach made sense for early ACLU advocates such as Glasser and Boyd, who explicitly limited the Jim Crow analogy according to their stated goal of curtailing the War on Drugs.⁹³ More recent proponents of the analogy have expanded the critique beyond the bounds of the drug war to attack the broader phenomenon of mass incarceration. Nonetheless, those making the New Jim Crow claim still restrict their attention to

⁹² I do not mean to ascribe a punitive motive to individual Council members or those of the Council as a whole. It is difficult to divine motive in cases such as these. Perhaps the Council is acting because of hostility or indifference to blacks accused of crime. Maybe its choices result from perceived budget constraints, or a perception of what voters want, or something else. My goal here is not to argue that any of these motives predominates. Instead, I seek to raise questions about a motive argument that others have made. Specifically, I use the evidence from the D.C. Council to challenge the claim that blacks only choose prison because *they have no other choice* and that they would opt for less punitive alternatives *if such were available*. See note 88 and accompanying text. Faced with evidence that a legislative body chooses A over B when presented with both options, those who assert that the legislature really wanted B but was forced to choose A bear the evidentiary burden to show coercion. And, at least to this point, those who make the claim that black legislators are coerced into policies that sustain mass incarceration have produced no evidence of such.

⁹³ Glasser expressly excluded non-drug offenders from his campaign, saying that “[t]he police power of the state, according to the ACLU, is legitimately used to prevent one citizen from harming others, from attacking others, and to punish him when he does.” Glasser, *supra* note 12, at 715.

drug offenders.⁹⁴ Other crimes—especially violent crimes—are rarely mentioned.⁹⁵

The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow.⁹⁶ One of Jim Crow’s defining features was that it treated similarly-situated blacks and whites differently. For writers seeking analogues in today’s criminal justice system, drug arrests and prosecutions provide natural targets, along with

⁹⁴ This theme in the discourse on mass incarceration not only exists among the New Jim Crow writers, but also extends to others writing on crime and racial justice. *See, e.g.*, Geneva Brown, *White Man’s Justice, Black Man’s Grief: Voting Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 287, 297 (2008) (arguing that the racial disproportionality in mass incarceration “is evidence that the War on Drugs was a War on African-American men.”); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ Was a ‘War on Blacks’*, 6 J. GENDER RACE & JUST. 381, 393 (2002) (“The mass incarceration of African-Americans is a direct consequence of the War on Drugs.”); Tyson, *supra* note 21, at 364 (arguing that “[a]t the heart of racialized mass imprisonment are questions regarding the appropriateness of non-violent offender sentencing,” specifically drug law policies).

⁹⁵ The New Jim Crow writers take varied approaches to violence. Some ignore it entirely. *See generally* Gary Ford, *The New Jim Crow: Male and Female, South and North, From Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America’s Criminal Justice System*, 11 RUTGERS RACE & L. REV. 323 (2010) (discussing the racial disparities in the criminal justice system through empirical and ethnographic studies, but never mentioning violent crime); Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007) (expanding the analogy through a focus on the disenfranchisement of black males achieved through mass incarceration, but never discussing the impact of violent crime). The most careful of the writers mention it, but without emphasis. *See, e.g.*, ALEXANDER, *supra* note 22, at 204 (“[B]lack men do have much higher rates of violent crime, and violent crime is concentrated in ghetto communities.”).

⁹⁶ I should clarify that the New Jim Crow writers are not alone in choosing to focus on drugs rather than violence. This tendency is widespread among civil rights and racial justice advocates, as I experienced when serving on a panel addressing mass incarceration at a conference hosted by one of the nation’s leading civil rights organizations. The audience appeared moved by the magnitude of the crisis that mass incarceration presents. But despite my attempts to broaden the conversation, it remained rooted in the most comfortable place, with everyone condemning the War on Drugs and no one addressing the issue of violent crime. The tendency is common in the academic community as well. Consider Dorothy Roberts, who calls for the abolition of capital punishment but offers no other relief for violent offenders in her list of stated goals. Roberts, *supra* note 19, at 284 (describing her proposal “to drastically reduce the prison population by seeking state and federal moratoriums on new prison constructions, amnesty for most prisoners convicted of *nonviolent crimes*, and repeal of excessive, mandatory sentences for *drug offenses*; to abolish capital punishment; and to implement new procedures to identify and punish patterns of police abuse.”) (emphasis added) (footnote omitted).

racial profiling in traffic stops. Blacks and whites use drugs at roughly the same rates, but African-Americans are significantly more likely to be arrested and imprisoned for drug crimes.⁹⁷ As with Jim Crow, the difference lies in government practice rather than the underlying behavior. The statistics on selling drugs are less clear-cut, but here too the racial disparities in arrest and incarceration rates exceed any disparities that might exist in the race of drug sellers.⁹⁸

But violent crime is a different matter. While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses. For example, the African-American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate.⁹⁹ Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending.¹⁰⁰

In making this point, I do not mean to suggest that discrimination in the criminal justice system is no longer a concern. There is overwhelming evidence that discriminatory practices in drug law enforcement contribute to racial disparities in arrests and prosecutions, and even for violent offenses there remain unexplained disparities between arrest rates and incarceration

⁹⁷ Tonry & Melewski, *supra* note 84, at 104–05.

⁹⁸ *Id.* at 105–09.

⁹⁹ RUTH & REITZ, *supra* note 52, at 33. For other crimes the differences are smaller. For burglary, larceny, and motor vehicle theft, for example, the black arrest rates in 1990 were three to four times the white arrest rates. *Id.*

¹⁰⁰ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 752 (1993); LAFREE, *supra* note 47, at 49 (“Both critics and supporters of UCR [Uniform Crime Reports] agree that its quality is generally highest for more serious crimes . . . because citizens are more likely to report more serious crimes to police and police are more likely to make arrests for more serious crimes.”).

rates.¹⁰¹ Instead, I make the point to highlight the problem with framing mass incarceration as a new form of Jim Crow. Because the analogy leads proponents to search for disparities in the criminal justice system that resemble those of the old Jim Crow, they confine their attention to cases where blacks are like whites in all relevant respects, yet are treated worse by law. Such a search usefully exposes the abuses associated with racial profiling and the drug war. But it does not lead to a comprehensive understanding of mass incarceration.

Does it matter that the Jim Crow analogy diverts our attention from violent crime and the state's response to it, if it gives us tools needed to criticize the War on Drugs? I think so because, contrary to the impression left by many of mass incarceration's critics, the majority of America's prisoners are not locked up for drug offenses. Some facts worth considering: According to the Bureau of Justice Statistics, in 2006 there were 1.3 million prisoners in state prisons, 760,000 in local jails, and 190,000 in federal prisons.¹⁰² Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug offenses, and 8% for public order offenses.¹⁰³ In jails, the split among the various categories is more equal,

¹⁰¹ In addition to the discretionary decisions by police evidencing racial disparities, drug cases present the strongest evidence for disparate treatment in the court system itself. In his landmark studies comparing arrest rates to incarceration rates for various offenses, Blumstein found that drug prosecutions offered the largest unexplained racial disparities. Alfred Blumstein, *On the Racial Disproportionality of the United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1274 (1982); Blumstein, *supra* note 100, at 751–52 (1993).

¹⁰² WILLIAM J. SABOL, HEATHER COUTURE, & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2006, at 4 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/p06.pdf>. I use the 2006 numbers because they are the most recent for which the Bureau of Justice Statistics has published the breakdown by offense type for state prisoners.

¹⁰³ SABOL, WEST & COOPER, *supra* note 1, at 37 app. tbl.15. Of the 1,333,100 state prisoners, 667,900 were serving time for violent offenses, 277,900 for property offenses, 265,800 for drug offenses, and 112,300 for public order offenses (7200 were other/unspecified). The percentages for African-American offenders are similar, with 50% serving time for violent offenses, 19% for property offenses, 23% for drug offenses, and 7% for public order offenses. *Id.*

with roughly 25% of inmates being held for each of the four main crime categories (violent, drug, property, and public order).¹⁰⁴ Federal prisons are the only type of facility in which drug offenders constitute a majority (52%) of prisoners, but federal prisons hold many fewer people overall.¹⁰⁵ Considering all forms of penal institutions together, more prisoners are locked up for violent offenses than for any other type, and just under 25% (550,000) of our nation's 2.3 million prisoners are drug offenders.¹⁰⁶ This is still an extraordinary and appalling number. But even if every single one of these drug offenders were released tomorrow, the United States would still have the world's largest prison system.¹⁰⁷

¹⁰⁴ DORIS J. JAMES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002 3 (2004), *available at* <http://www.bjs.gov/content/pub/pdf/pji02.pdf>. These numbers are from 2002, the most recent for which data on jail inmates by offense category are available.

¹⁰⁵ In federal prisons in 2008 (the most recent year for which Bureau of Justice Statistics data are available), 52% were serving time for drug offenses, 33% for public order offenses (including immigration offenses), 8% for violent offenses, and 6% for property offenses. SABOL, WEST & COOPER, *supra* note 1, at 38 app. tbl.17.

¹⁰⁶ This is simply an estimate based on the most current available data. My calculation is as follows: 265,000 drug offenders in state prison and 95,000 in federal prison, SABOL, WEST, & COOPER, *supra* note 1, at 37–38, plus 192,000 drug offenders in local jails. The jail figure uses the most recent data for the number of inmates confined in local jails (767,000 in 2009) and assumes that 25% of them have a drug offense as their most serious crime—which was the case in 2002, the last year for which data on jail inmates by offense category are available. TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 4 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>.

¹⁰⁷ If the 550,000 drug offenders were released, the United States would have 1.75 million prisoners. International comparisons should be made with caution. Nonetheless, using the best available numbers, this would still exceed China's prison population, which stands at 1.57 million. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, KING'S COLL. LONDON, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), *available at* http://www.prisonstudies.org/info/downloads/wpp1-8th_41.pdf. The Chinese number does not include administrative detention figures, which, if included, would make China the world's largest jailer. *Id.* at 4. The United States, given its smaller population, would still have the highest incarceration rate.

In distinguishing between drug offenses and violent crime, I recognize the argument that the War on Drugs itself produces some violent crime.¹⁰⁸ While it is impossible to dispute the relationship between drugs and violence, we should be careful not to overstate it. The Bureau of Justice Statistics estimates that of the 14,831 homicides committed in 2007—the most recent year for which statistics are available—only 3.9% were drug-related.¹⁰⁹ In 1989, at the height of the crack epidemic, 7.4% of homicides were drug-related.¹¹⁰

Moreover, our prison system has grown so large in part because we have changed our sentencing policies for *all* offenders, not just drug offenders. We divert fewer offenders than we once did, send more of them to prison, and keep them in prison for much longer.¹¹¹ An exclusive focus on the drug war misses this larger point about sentencing choices. This is why it is not enough to dismiss talk of violent offenders by saying that “violent crime is not responsible for the prison boom.”¹¹² The prison population in this country has continued to grow even after violent crime began to decline dramatically. But while violent *crime* may not by itself be responsible for mass incarceration in the simple way that tough-on-crime conservatives often suggest, the *state’s response* to it (in the form of less diversion and longer sentences) is

¹⁰⁸ Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 24 (2009) (arguing that figures such as those I rely on here tell “only part of the story, for . . . drug prohibition is criminogenic in myriad ways”).

¹⁰⁹ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Drug and Crime Facts*, <http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm> (last visited Feb. 25, 2011).

¹¹⁰ *Id.*

¹¹¹ WESTERN, *supra* note 2, at 43–45.

¹¹² ALEXANDER, *supra* note 22, at 99 (emphasis omitted). *See also* Kennedy, *supra* note 21, at 489 (“The increase in incarceration that ensued over the following decades was far out of proportion to the crime increase. Over time the level of incarceration remained high even when crime rates dropped.”); López, *supra* note 42, at 1031 (“In short, rising incarceration rates cannot be explained by increasing crime rates, as after 1980 crime largely declined even as incarceration rapidly accelerated.”).

responsible. Thus, changing how governments respond to *all* crime, not just drug crime, is critical to reducing the size of prison populations.¹¹³

I am sympathetic to the impulse to avoid discussing violent crime. Like other progressives, the New Jim Crow writers are frustrated by decades of losing the crime debate to those who condemn violence while refusing to acknowledge or ameliorate the conditions that give rise to it.¹¹⁴ “As a society,” Alexander writes, “our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep them locked up and locked out

¹¹³ In the preceding pages I have focused on the prison population, rather than the larger group of individuals who is under correctional control (including probation, parole, and pre-trial release). But perhaps I am wrong to focus on prisoners; one response to my argument would be to point out that although drug offenders are vastly outnumbered by violent ones in our nation’s prisons, the percentages are closer when we include all those who are under criminal justice supervision outside of prison. The distinction matters because the New Jim Crow writers are rightly concerned about a broader system that subjects more blacks to state supervision and collateral consequences. *See* Part II, *supra* pp. 11–14. This is a fair response. But not a complete rejoinder. First, because deprivation of liberty in prison is the most fundamental form of subjugation our criminal system imposes (other than death), the growth of the prison system itself plays a prominent role in critiques of mass incarceration, including those of the New Jim Crow writers. Second, even looking at probationers and parolees, it is a mistake to focus exclusively on drug offenders, for drug offenders still do not constitute a majority of those under criminal justice supervision. For example, twenty-six percent of the 4.2 million Americans on probation have a drug crime as their most serious offense. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 26 app. tbl. 5, 27 app. tbl.6 (2010) (reporting that the break-down for probationers, by most serious offense, was as follows: 19% violent, 26% property, 26% drug, 18% public-order, and 10% other). Thirty-six percent of the 800,000 Americans on parole have a drug crime as their most serious offense. *Id.* at 36 app. tbl.15, 27 app. tbl.6 (finding that the break-down for parolees, by most serious offense, was: 27% violent, 23% property, 36% drug, 3% weapon, and 10% other).

¹¹⁴ Ronald Reagan provides an example of the point of view to which progressives are reacting:

“Choosing a career in crime is not the result of poverty or of an unhappy childhood or of a misunderstood adolescence; it’s the result of a conscious, willful, selfish choice made by some who consider themselves above the law, who seek to exploit the hard work and, sometimes, the very lives of their fellow citizens.”

Ronald W. Reagan, Remarks at the Annual Conference of the National Sheriffs’ Association in Hartford, Connecticut (June 20, 1984), *in* 1 PUB. PAPERS 884, 886 (1986).

says far more about ourselves than it does about them.”¹¹⁵ Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid, or change, the subject.¹¹⁶

But this approach, while understandable, is a mistake.¹¹⁷ Avoiding the topic of violence disserves the very people on whose behalf the New Jim Crow writers advocate;¹¹⁸ the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime.¹¹⁹ And the two phenomena are mutually reinforcing.

I had long known this as an intellectual matter, but it was driven home for me in 1997, when I helped to open an alternative school for teens from the juvenile court system.¹²⁰ Our application asked students to tell us the best and worst aspects of their last school. “Too many fights” was the most common response to the question about the worst aspects, and many students reported that “too many people get jumped,” “school is chaos,” and the environment was “too hectic!!”. The kids we served were typically considered to be the troublemakers; a

¹¹⁵ ALEXANDER, *supra* note 22, at 171.

¹¹⁶ *See supra* note 95 and accompanying text (discussing how New Jim Crow writers avoid discussion of violent crime when addressing mass incarceration).

¹¹⁷ Although my primary concern is analytical, overlooking violence is also a strategic error because those who seek to challenge mass incarceration render themselves ineffectual in policy debates when they avoid discussing violent crime. After all, advocates for tough-on-crime measures are not going to stop discussing violence; and, by ceding this terrain to them, progressives and the civil rights community allow those who seek more punitive crime policy to present themselves as the sole defenders of public safety. This, in turn, diminishes progressives’ chances of building an effective movement to counter mass incarceration.

¹¹⁸ *Cf.* Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988) (describing and problematizing a categorical dichotomy between socially constructed concepts of blackness and victimhood).

¹¹⁹ *See, e.g.*, Forman, *supra* note 34, at 27–28 (arguing that because low-income youth are both disproportionately victimized by crime and targeted for aggressive policing, it is important to seek their participation in well-designed community policing programs).

¹²⁰ For a more detailed account, see Domenici & Forman, *supra* note 7.

good portion had been kicked out of school for fighting. They had been arrested for selling drugs, stealing cars, gun possession, aggravated assault, robbery, and, in one case, murder. Yet their applications reminded us that even the “tough” kids seek safety and security. Their acts of violence, we came to understand, had often been closely connected to being in an environment that felt unsafe.¹²¹

Over time, as we got to know our students better, we began to appreciate the toll that violence had taken, and continued to take, in their lives. For example, Bobby, one of our very first students, described being robbed and watching his friend get killed.

I try not to always do my best too much because I know, why do your best when it can all be taken away from you in mere seconds, over something stupid? Because my friend that get killed in front of me, I mean he didn't do nothing, he didn't do nothing, he was always good, he got killed for his jacket, because he didn't want to give up his jacket. . . .

When he was shot, I was lucky I didn't get shot. I got stabbed. Stabbed with an ice pick. . . . Lost a lot of blood and everything, passed out, blood clogged up. . . .

All I kept doing was looking at him, looking at him, and wondering was we both going to be all right, was we gonna be able to think about this, and get back at our person. . . .

That right there I think, inspired me to say man, what the fuck man, if a nigger can get away with killing somebody cold blood straight like that, what can't they get away with? What can't you get away with?

If people can do stuff like that and get away with it, and not be caught, not be arrested, not be locked up, not be killed, or suffer in no type of way, why can't I do that? Why can't I do that? If somebody can take my friend's life from me, somebody that I cared about, if they can take that from me, why can't I do that to about anybody else, to anybody else, and not care about it? Not care about who I

¹²¹ As we attempted to create a safe school for these students, we learned that we could take safety seriously without adopting the zero-tolerance measures that were growing in popularity at that time. For a more thorough discussion of our alternative approach to combating violence, see *id.* (manuscript at 15–19, on file with authors).

hurt, who I make feel my pain. Just don't even care, don't have no sympathy for nobody.¹²²

There are no easy answers to the tragedy conveyed by Bobby's story. But those who write about mass incarceration from a racial justice perspective should not avoid the questions it raises. The attack terribly damaged Bobby's psyche. As educators who fervently believed that studying hard was key to a better life for our students, we were haunted by the question: *Why do your best when it can all be taken away from you in mere seconds?* Bobby pleads for accountability; if he is not able to "get back at our person" himself, he wants him arrested and punished. It is this part of Bobby's plea, I suspect, that causes many of the New Jim Crow writers to avoid the topic of violent crime. After all, won't discussing it simply reinforce the case for more punitive crime policy?

But allowing ourselves to hear Bobby's painful story need not mandate "harsh justice" as a response.¹²³ The New Jim Crow writers might have important contributions to make to this debate. What does accountability mean? Bobby's assailant should surely be locked up, but for how long? One in eleven American prisoners are serving life sentences, and about a third of those sentences are life without parole.¹²⁴ In what conditions? What might we have done to

¹²² This quotation is from an interview with Bobby in a documentary film about the See Forever school's first year. *INNOCENT UNTIL PROVEN GUILTY* (Big Mouth Productions 1999).

¹²³ *See, e.g.,* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

¹²⁴ ASHLEY NELLIS & RYAN S. KING, *THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA* 3 (2009). As a result of longer sentences, the number of elderly prisoners continues to grow, despite the fact that older prisoners cost more to incarcerate and are less likely to offend if released. *THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008* 12–13 (2008).

reduce the likelihood that Bobby would be attacked in the first place?¹²⁵ And what might we do to reduce the likelihood that Bobby will retaliate against his assailant (“get back at our person”) or some future innocent party (“why can’t I do that to anybody else, to anybody else, and not care about it”)? These are supremely difficult questions that I do not attempt to answer in this Article.¹²⁶ I raise them to highlight their importance and to suggest that, in focusing exclusively on the drug war, the New Jim Crow writers take themselves out of a discussion to which they might make important contributions.

VI. OBSCURING CLASS

In the previous section I argued that one of Jim Crow’s defining characteristics was that it treated similarly-situated blacks and whites differently, and that the New Jim Crow writers are forced by the pressure of the analogy to find modern-day parallels. This leads them to limit their inquiry to the War on Drugs and overlook violent crime. Jim Crow has another distinctive characteristic that threatens to lead us astray when contemplating mass incarceration. Just as Jim Crow treated similarly-situated blacks and whites differently, it treated differently-situated blacks similarly. An essential quality of Jim Crow was its uniform and demeaning treatment of all blacks. Jim Crow was designed to ensure the separation, disenfranchisement, and political and economic subordination of *all* black Americans—young or old, rich or poor, educated or

¹²⁵ While we don’t know anything about the life of Bobby’s assailant, the life histories of others like him demonstrate that the state frequently squanders opportunities to intervene *before* adolescents become murderers.

¹²⁶ I have addressed these questions elsewhere. *See, e.g.,* Domenici & Forman, *supra* note 7 (describing effort to improve educational programs for incarcerated youth in Washington, D.C.); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1006–09 (2010) (reviewing PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009)) (arguing that prisons that treat prisoners well and offer effective programs serve public safety). I return briefly to these themes in the Conclusion.

illiterate.

Indeed, one of the central motivations of Jim Crow was to render class distinctions within the black community irrelevant, at least as far as whites were concerned. For this reason, it was essential to subject blacks of all classes to Jim Crow's subordination and humiliation. That's why Mississippi registrars prohibited blacks with Ph.Ds from voting, why lunch counters refused to serve well-dressed college students from upstanding Negro families, and why, as Martin Luther King, Jr. recounts in his "Letter from Birmingham Jail," even the most famous black American of his time was not permitted to take his six-year-old daughter to the whites-only amusement park she had just seen advertised on television.¹²⁷

Analogizing mass incarceration to Jim Crow tends to suggest that something similar is at work today. This may explain why many—but not all¹²⁸—of the New Jim Crow writers

¹²⁷ At this point in the letter, King was responding to those who counseled Negroes to slow down in their quest for freedom. King's response, in part, was as follows:

I guess it is easy for those who have never felt the stinging darts of segregation to say "wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize, and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she cannot go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky . . . then you will understand why we find it difficult to wait.

Martin Luther King Jr., *Letter from Birmingham Jail* (originally published as *The Negro Is Your Brother*) THE ATLANTIC MONTHLY, Aug. 1963, at 80.

¹²⁸ Among the New Jim Crow writers, Wacquant was among the first to recognize that incarceration most directly harms low-income, uneducated African-Americans Wacquant, *Class, Race, supra* note 15, at 79 ("[T]he rapid 'blackening' of the prison population even as serious crime 'whitened' is due *exclusively* to the astronomical increase in the incarceration rates of *lower-class* African Americans.") (emphasis in original). Alexander also appreciates this point, see *infra* note 148, at 232–34 (arguing that affirmative action has, to some extent, helped affluent African-Americans while serving as an inadequate substitute for the more radical changes to the economic and social structure needed to help poor African-American communities).

overlook the fact that mass incarceration does not impact middle- and upper-class educated African-Americans in the same way as it impacts lower-income African-Americans.¹²⁹ This is an important oversight because one of mass incarceration's defining features is that, unlike Jim Crow, its reach is largely confined to the poorest, least-educated segments of the African-American community. High school dropouts account for most of the rise in African-American incarceration rates. I noted earlier that a black man born in the 1960s is more likely to go to prison in his lifetime than was one born in the 1940s. But this is not true for all African-American men; those with college degrees have been spared. As Bruce Western's research reveals, for an African-American man with some college education, the lifetime chance of going to prison actually *decreased* slightly between 1979 and 1999 (from 6% to 5%).¹³⁰ Consequently, a black man born in the late 1960s who dropped out of high school has a 59% chance of going to prison in his lifetime whereas a black man who attended college has only a 5% chance.¹³¹

Although we have too little reliable data about the class backgrounds of prisoners, what we do

¹²⁹ See, e.g., Black, *supra* note 21, at 184–90 (discussing the racialization of the War on Drugs without acknowledging how middle- and upper-class African-Americans are differently impacted by the policies); Goldman, *supra* note 21, at 628–32 (discussing racial bias in the criminal justice system in the era of mass incarceration without mentioning how the system differentially impacts African Americans at different income and education levels); Nunn, *supra* note 94 at 387 (discussing the ways in which mass incarceration, resulting from the War on Drugs, is a war against African-Americans as a whole, without noting any differential impact based on class); Eric E. Sterling, *Drug Laws and Thought Crime*, 10 TEMP. POL. & CIV. RTS. L. REV. 327, 335–36 (2001) (concluding that the criminal justice system in America today is the new Jim Crow without mentioning the impact of class distinctions). Even writers who understand the role of class in distinguishing *between* whites and African-Americans fail to see the role that class plays *within* the African-American community. See, e.g., Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443 (2001)

¹³⁰ WESTERN, *supra* note 2, at 27–28 fig.1.4. Western does not report whether the decrease is statistically significant.

¹³¹ *Id.*

know suggests that class, educational attainment, and economic status are powerful indicators for other races as well. Western estimates that for white men born in the late 1960s, the lifetime risk of imprisonment is more than ten times higher for those who dropped out of high school than for those who attended some amount of college.¹³²

Government statistics confirm how few college graduates end up in prison. For example, a 1997 federal survey—the most recent available—found that college graduates comprised 2.4% of state prisoners throughout the country.¹³³ By contrast, college graduates comprised 22% of the population as a whole.¹³⁴ In Massachusetts—the only state that routinely reports the educational backgrounds of its prisoners—only 1% of state prisoners have college degrees.¹³⁵ Income data reveal a similar skew—the majority of prisoners in state facilities earned less than \$10,000 in the year before entering prison.¹³⁶

Class differences have always existed within the black community—but never on anything approaching today’s scale. On the one hand, large segments of the African-American community are in extreme distress. Unemployment rates for young black men are high by any

¹³² The lifetime risk of incarceration for whites who dropped out of high school is 11.2%; for those who attended college, it is only 0.7%. WESTERN, *supra* note 2, at 26–28.

¹³³ CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 2 tbl.1 (2003). Federal prisoners were more likely to have graduated from college, with 8% having degrees. *Id.*

¹³⁴ *Id.*

¹³⁵ RESEARCH AND PLANNING DIV., MASS. DEP’T OF CORRECTIONS, JANUARY 1, 2009 INMATE STATISTICS 22 tbl.22 (2009).

¹³⁶ ALLEN BECK ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991, at 3 (1993).

measure, even more so if we factor in incarceration rates.¹³⁷ In some respects, blacks are no better off than they were in the 1960s, and in others (e.g., proportion of children born to unmarried women)¹³⁸ they are much worse off. Yet the black middle-class has expanded dramatically—and to be clear, I’m not talking about the handful of black super-elites. Too many discussions of class differences within the black community adopt a posture of “Obama and Oprah on the one hand, the rest of us on the other.” But that overlooks an important part of the story: the substantial growth of the true middle-class.

Consider that in 1967 only 2% of black households earned more than \$100,000; today, 10% of black families earn that amount.¹³⁹ Going down the income scale from upper-middle-class to middle-class, we also see robust growth. Since 1967, the percentage of black households earning more than \$75,000 a year has more than tripled, from 5% to 18% today. The percentage earning \$50,000 or more a year has doubled—from 17% in 1967 to 33% today. But the percentages alone don’t tell the whole story; it is important to appreciate the sheer numbers of African-Americans who have earned the perks of middle-class American existence. By 2009, there were 2.65 million African-American households in the upper end of the middle-class range—i.e., earning more than \$75,000 a year. The educational attainment numbers reveal a similar pattern. In 1967, 4% of the black population over the age of 25 had a four-year college

¹³⁷ WESTERN, *supra* note 2, at 90–91 (estimating that joblessness among young black men has increased from 27% in 1980 to 32.4% in 2000 once incarceration rates are included).

¹³⁸ WILLIAM JULIUS WILSON, *MORE THAN JUST RACE* 100–05 (2009) (discussing rise in percentage of black children born to unmarried women and documenting how this disadvantages black children).

¹³⁹ All figures in this paragraph reflect inflation-adjusted dollars and are derived from CARMEN DENAVAS-WALT ET AL., U.S. DEP’T OF COMMERCE, P60-238, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009* 36–37 tbl.A-1 (2010).

degree; today, 20% do.¹⁴⁰

Changes of this magnitude require us to modify how we discuss race. Historically, racial justice advocates have been reluctant to acknowledge how class privilege mitigates racial disadvantage. This reluctance is partly a byproduct of the structure of the affirmative action argument. One of the most potent arguments against race-based preferences is the claim that wealthier blacks do not deserve them.¹⁴¹ Affirmative action's defenders often respond by pointing out the various ways in which even privileged blacks suffer racial discrimination.¹⁴² At the same time, racial profiling reinforces the notion that class differences within the black community matter little. After all, racial profiling is the area in which skin color routinely trumps one's bank account or accumulated graduate degrees. As David Harris argues, "'driving while black' is not only an experience of the young black male, or those blacks at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation or social station."¹⁴³

But as I have shown, Harris's argument does not apply with equal force to incarceration. Here, increased income and educational attainment can bring a measure of protection against some of the criminal justice system's historic anti-black tendencies. Accordingly, in considering

¹⁴⁰ U.S. CENSUS BUREAU, CPS HISTORICAL TIME SERIES, TABLE A-2: PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2010 (2010), <http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html>.

¹⁴¹ See, e.g. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 939 (1997) (noting that "one of the flaws of race-based affirmative action is that its main beneficiaries are economically privileged members of the eligible minority groups").

¹⁴² *Id.* at 967–88 (noting that "the lingering effects of past discriminating suppress the economic performance of the black middle class").

¹⁴³ David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 269 n.18 (1999).

mass incarceration, any suggestion that blacks across classes stand similarly-situated in the face of American racism should be abandoned. Malcolm X's assertion that a black man with a Ph.D. is still a "nigger" made sense in the context of Jim Crow.¹⁴⁴ So did its equivalent in the legal literature. As Mari Matsuda argued, "[v]ictims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line. The educated Japanese still comes up against the assumption of Asian inferiority."¹⁴⁵ In support of her claim, Matsuda pointed out that Japanese Americans across classes all shared a similar fate in internment camps during World War II.¹⁴⁶ But prisons, as we have seen, are precisely the opposite of internment camps in this regard. Scholars concerned with race cannot explore the significance of this reversal until they first acknowledge it—and many still do not.¹⁴⁷

For the most part, Wacquant and Alexander avoid this trap. In *The New Jim Crow*, Alexander reminds us again and again that the primary targets of mass incarceration are poor, uneducated blacks. Moreover, she assails the civil rights establishment for focusing its energies on policies that advance the interests of middle-class blacks—such as affirmative action—while overlooking the crisis that mass incarceration represents for the urban poor.¹⁴⁸ Yet, despite her

¹⁴⁴ ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 310 (1964) (recounting a conversation in which he asked a black associate professor, "Do you know what white racists call black Ph.D.'s? . . . 'Nigger!'").

¹⁴⁵ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 376 (1987).

¹⁴⁶ *Id.* at 376 n.222.

¹⁴⁷ See *supra* note 129 and accompanying text (noting instances where other authors failed to acknowledge the importance of class when discussing mass incarceration).

¹⁴⁸ As Alexander puts it:

awareness, Alexander sometimes allows the analogy, and the attendant pressure to find continuity while denying the reality of change, to obscure this insight. For example, Alexander suggests that perhaps “the most important parallel between mass incarceration and Jim Crow is that both have served to define the meaning and significance of race in America.”¹⁴⁹ Specifically, she says, “Slavery defined what it meant to be black (a slave), and Jim Crow defined what it meant to be black (a second-class citizen). Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be black.”¹⁵⁰

This claim reflects the limitations of the Jim Crow analogy. Today nothing “defines the meaning of blackness in America.” In Mississippi in 1950, the totalizing nature of Jim Crow ensured that to be black meant to be second-class; there were no blacks free of its strictures. But mass incarceration is much less totalizing. In 2011, *no* institution can define what it “means to be black” in the way that Jim Crow or slavery once did.

VII. OBSCURING RACE

The Jim Crow analogy also obscures the extent to which whites, too, are mass incarceration’s targets. Since whites were not direct victims of Jim Crow, it should come as little

Try telling a sixteen-year-old black youth in Louisiana who is facing a decade in adult prison and a lifetime of social, political, and economic exclusion that your civil rights organization is not doing much to end the War on Drugs—but would he like to hear about all the great things that are being done to save affirmative action? There is a fundamental disconnect today between the world of civil rights advocacy and the reality facing those trapped in the new racial undercaste.

ALEXANDER, *supra* note 22, at 234.

¹⁴⁹ *Id.* at 192.

¹⁵⁰ *Id.*

surprise that whites do not figure prominently in the New Jim Crow writers' accounts of mass incarceration. Most who invoke the analogy simply ignore white prisoners entirely.¹⁵¹

Alexander mentions them only in passing; she says that mass imprisonment's true targets are blacks, and that incarcerated whites are "collateral damage."¹⁵²

Many whites—most of them poor and uneducated—are now behind bars. One-third of our nation's prisoners are white,¹⁵³ and incarceration rates have risen steadily even in states where most inmates are white.¹⁵⁴ That's a lot of "collateral damage." Those white prisoners are sometimes subjected to ghastly mistreatment, as an ACLU attorney recently alleged in a lawsuit challenging conditions of confinement in a prison in Idaho, where 77% of the prisoners in state facilities are white.¹⁵⁵ He reported: "In my 39 years of suing prisons and jails, I have never confronted a more disgraceful, revolting and inexcusable case of mass abuse and federal rights violations than this one."¹⁵⁶ For some categories of offenses where our laws are especially severe, such as possession of child pornography, most of the defendants are middle-aged white

¹⁵¹ See, e.g., Black, *supra* note 21, at 178 (discussing New Jim Crow analogy while ignoring whites); Kennedy, *supra* note 21, at 505–06 (same); Roberts, *supra* note 21, at 263 (same); Tyson, *supra* note 21, at 348–49 (same).

¹⁵² ALEXANDER, *supra* note 22, at 202.

¹⁵³ SABOL ET AL., *supra* note 1, at 2 (in 2008, 33% of prisoners were white).

¹⁵⁴ Compare CAHALAN, *supra* note 4, at 29 tbl.3-2, with HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008, at 3 tbl.2 (2009).

¹⁵⁵ IDAHO DEP'T OF CORRECTION, ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at 7 (2010).

¹⁵⁶ Press Release, American Civil Liberties Union, ACLU Lawsuit Charges Idaho Prison Officials Promote Rampant Violence (Mar. 11, 2010), available at <http://www.aclu.org/prisoners-rights/aclu-lawsuit-charges-idaho-prison-officials-promote-rampant-violence> (quoting ACLU senior staff attorney Stephen Pevar).

men.¹⁵⁷ Prosecutions for sexually explicit material offenses have risen by more than 400% since 1996.¹⁵⁸ In addition to the dramatic rise in the number of cases filed, the sentences imposed for all child pornography-related offenses have become increasingly severe, rising from an average of 2.4 years in 1996 to almost 10 years in 2008.¹⁵⁹ Moreover, although whites remain relatively underrepresented as drug offenders, the percentage of drug offenders who are white has risen

¹⁵⁷ JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CTR., INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT viii (2003) (a study sponsored by the Department of Justice reporting that the “vast majority of [Internet sex-crime] offenders were non-Hispanic White males older than 25 who were acting alone”); Loren Rigsby, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led To Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1333–34 (2010) (explaining that 85.6% of child pornography defendants are white, and that these defendants are, on average, much older and more educated than the majority of defendants in federal prosecutions); Peggy O’Hare, *Waging the war on child porn / Prosecutors enlist help to track abusers, halt Web images*, HOUS. CHRON., Dec. 2, 2007, at A1, A15 (“The Chronicle’s research revealed almost all those charged with the offense in the greater Houston area between Jan. 1, 2004, and May 31, 2007, were white men, half of them middle-aged or older.”).

¹⁵⁸ See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 27 (2007) (discussing increase after the Child Pornography Prevention Act of 1996, which criminalized the creation of child pornography using new technologies).

¹⁵⁹ U.S. SENTENCING COMM’N, ANN. REP. SOURCEBOOK, 29 tbl.13, 39 tbl.17 (2008); Rigsby, *supra* note 157, at 1331. Over the past fifteen years, the punishment for possession of child pornography has increased and become more complicated through congressional action and changes to the Sentencing Guidelines. Currently, the mandatory minimum for a charge of possession of child pornography is five years. 18 U.S.C.A. § 2252A(b)(1) (Supp. 2011). However, in the vast majority of cases, this sentence is increased through Sentencing Guideline § 2G2.2’s aggravating factors, which include use involving a computer, possession involving large numbers of images, and use involving material portraying sadistic or masochistic conduct or violence. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008). Commentators have been critical of these increases, as have been district courts, which imposed sentences below the Sentencing Guidelines’ suggested length in 43% of cases in 2009. Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 584–85 (2009); Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, 14–15 (2010); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure To Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); John Gabriel Woodlee, Note, *Congressional Manipulation of the Sentencing Guideline for Child Pornography Possession: An Argument For or Against Deference?*, 60 DUKE L.J. 1015, 1016 (2011).

since 1999, while the percentage of drug offenders who are black has declined.¹⁶⁰

Hispanic¹⁶¹ prisoners also receive little attention from the New Jim Crow writers, even though they constitute twenty percent of American prisoners.¹⁶² The fact that quality data on Hispanics in the prison systems is often lacking may be partly to blame for this omission.¹⁶³ But it is important to remember that during the Jim Crow years, Hispanics in many jurisdictions were subject to forms of exclusion, segregation, and disenfranchisement not unlike those inflicted on African-Americans.¹⁶⁴ And given what we do know about current Hispanic incarceration rates,

¹⁶⁰ From 1999 to 2005, the number of blacks serving time for drug offenses in state prisons declined by more than 31,000, while the number of whites serving time for drug offenses increased by slightly more than 20,000. As a result, whereas African-Americans had constituted 58% of those serving time in state prisons for drug offenses in 1999, by 2005 that number had fallen to 45%. MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 5 (2009). Blacks remain overrepresented, of course, but the scale of this overrepresentation has diminished.

¹⁶¹ The Bureau of Justice Statistics (BJS) uses the term “Hispanic” rather than “Latino.” For the sake of consistency, I use the term Hispanic to follow BJS terminology.

¹⁶² Alexander, to her credit, acknowledges this omission, noting that “relatively little is said here about the unique experience of women, Latinos, and immigrants in the criminal justice system, though these groups are particularly vulnerable to the worst abuses and suffer in ways that are important and distinct.” ALEXANDER, *supra* note 22, at 15–16.

¹⁶³ MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 12 n.14 (July 2007) (“Reporting on Hispanics in the criminal justice system has been limited and often inaccurate over many years, as evidenced by the fact that 11 states in this analysis do not provide any data on Hispanic inmates.”); Damian J. Martinez, *Felony Disenfranchisement and Voting Participation: Considerations in Latino Ex-Prisoner Reentry*, 36 COLUM. HUM. RTS. L. REV. 217, 222 (2004) (“[G]overnmentally-collected criminal justice data during the 1980s and 1990s lumped incarcerated Latinos into the racial classifications of whites and African Americans.”); *id.* at 223–24 (noting that even the category Latino is overbroad, and encouraging researchers to focus on differences between Latino sub-groups).

¹⁶⁴ Some of the early important cases challenging segregation involved Hispanics. *See, e.g., Hernandez v. Texas*, 347 U.S. 475 (1954) (striking down Jim Crow jury practices that excluded Mexican-Americans from juries); *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (C.D. Cal. 1946) *aff’d*, 161 F.2d 774 (9th Cir. 1947) (en banc) (striking down segregation of Mexican and Mexican-American students); *see also* Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican-Americans and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273 (Rachel F. Moran & Devon W. Corbado, eds. 2008) (discussing the

it is clear that Hispanic prisoners deserve the attention of all who write about the prison system. The Hispanic prison population climbed steadily during the 1990s, to the point where one in six Hispanic males born today can expect to go to prison in their lifetime.¹⁶⁵ The available data suggest that Hispanic incarceration rates are almost double the rates for whites, and many observers believe that these data undercount the true rate at which Hispanics go to prison.¹⁶⁶ Most Hispanic prisoners, like most blacks and whites, are serving time for violent offenses, and about twenty percent are in prison for drug offenses.¹⁶⁷

Thus, the data on white and Hispanics prisoners reminds us that while African-Americans are incarcerated in numbers grossly disproportionate to their percentage of the overall population, the fact remains that sixty percent of prisoners are not African-American. As I will argue in the conclusion, anyone analyzing mass incarceration must keep that sixty percent squarely in mind.

VIII. OBSCURING HISTORY: THE OLD JIM CROW

Having analyzed the Jim Crow analogy's impact on discussions of modern crime and penal policy, I will now evaluate how the analogy influences our understanding of the past. Specifically, I want to explore whether, by invoking the Jim Crow era in an effort to highlight the injustice of mass incarceration, the New Jim Crow writers end up diminishing our collective memory of the old Jim Crow. My fear is that writers seeking to establish parallels between the

role of *Hernandez v. Texas* as civil rights ruling by the Warren Court, taking place before *Brown v. Board of Education*).

¹⁶⁵ MAUER & KING, *supra* note 163, at 2.

¹⁶⁶ MAUER & KING, *supra* note 163, at 3, 12 n.14; Martinez, *supra* note 163 at 222 (suggesting that poorly collected data contributes to inaccurate and undercounting Latinos).

¹⁶⁷ Martinez, *supra* note 163, at 222, 224–25.

old Jim Crow and mass incarceration overlook (or underemphasize) important aspects of what made the old Jim Crow so horrible.

The New Jim Crow writers devote little attention to the old Jim Crow.¹⁶⁸ The choice to say so little is understandable. After all, most people know what Jim Crow was, and the point of these contributions is to tell people a story they do not know—the one about mass incarceration. But I suspect something else is at work as well. In the interest of drawing the parallels between Jim Crow and mass incarceration as tightly as possible, the New Jim Crow writers typically avoid dwelling on the aspects of the old Jim Crow that have fewer modern parallels. As a result, much that matters is lost.¹⁶⁹

For now, let me focus on one area in particular: the brutal, unremitting violence upon which Jim Crow depended. My generation of African-Americans, fortunately, has no personal experience with this regime. But many of us have experienced its legacy. I confronted this history personally, and unexpectedly, through my father.

It was 1984, the summer before I entered Brown University. My parents had divorced when I was young, and my dad's idea of a good father-son bonding experience was to attend the Democratic National Convention in San Francisco and then drive together to Atlanta, where I

¹⁶⁸ Buckman and Lamberth, for example, invoke the term “Jim Crow” but do not define it. Buckman & Lamberth, *supra* note 10, at 14. Glasser offers only this: “Jim Crow laws enforced a rigid system of segregation following the Civil War and the Reconstruction Era.” Glasser, *supra* note 12, at 703 n.2. Alexander and Wacquant have the most to say about it, but even their treatment is brief—ten pages of a 208-page book for Alexander and two pages of an essay for Wacquant. ALEXANDER, *supra* note 22, at 30–40; Loïc Wacquant, *Deadly Symbiosis: When ghetto and prison meet and mesh*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001); Wacquant, *supra* note 16, at 87–88. One important exception is ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 1, 477, 481 (2010).

¹⁶⁹ I acknowledge that there is an alternative view. Perhaps the New Jim Crow analogy will instead serve to reinforce our memory of that regime. The analogy has the following structure: “X was awful, and Y is a lot like X.” Perhaps this necessarily reaffirms that X (here, Jim Crow) was terrible, even if the proponents of the analogy spend little time arguing the point.

lived with my mom. From California to Texas, we mostly rehashed our ongoing political argument: he supported Walter Mondale and thought it was nuts that I was drawn to Jesse Jackson. As we approached Louisiana on I-20, his mood began to change. He grew tense and withdrawn. After looking at the speedometer—I was driving 65 in a 55 zone, as I had done the whole trip—he told me to slow down because “we don’t want to get stopped around here.” I knew of course that he had grown up in Mississippi and Chicago and had been part of the southern civil rights movement. I was raised with the stories—Emmett Till, Chaney, Goodman and Schwerner—and always the reminder that “those are just the ones people remember.”¹⁷⁰ But the good guys had won in the end, right?

I wanted to stop and call my mom to let her know how long it would be until we reached Atlanta. My dad told me we could only stop at a Howard Johnson’s, a Motel 6, or an Amoco. Moreover, we could only stop once we were in a city. “It can wait until we get to Jackson,” he said. “That’s stupid,” I replied. “It will be late then. Why wake her?” Seventeen years old and headstrong, I turned off at an exit in Mississippi and pulled over at a rundown gas station. A man was behind the counter and another was filling his tank near us. I went to the phone booth while my dad kept watch, peering out into the Mississippi night. I was placing the collect call with the operator when every light in the gas station went out. It was pitch black. My dad hit the headlights and turned the ignition. He screamed, “Get in the car! Now!” I dropped the phone and ran to the car while he leaned on the horn.

¹⁷⁰ See generally SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* (1988) (discussing the untimely death of three young civil rights workers who were murdered shortly after traveling to Mississippi to organize voter registration drive); STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988) (documenting the life and murder of a 15-year old African-American boy who was killed for whistling at a white woman while visiting family in Mississippi).

We never discussed what happened that day. In my mind, though, I was sure I was right—sure that, in 1984, black people didn't get attacked for no reason at a gas station just off the interstate. Not even in Mississippi. But I was equally sure that this wasn't really the point, or at least not the main point. After more than twenty-five years (plus a substantial motive to repress memories of the incident), the details are a little blurry,¹⁷¹ but I still remember clearly the look on my dad's face when I returned to the car and got on the highway. He was terrified in a way that I had never seen. I cried myself to sleep that night, in a Howard Johnson's near downtown Jackson. I was overwhelmed with a boy's shame at watching his father laid low, and the double burden of knowing that I had helped bring it about.

What could do this to my father? The old Jim Crow. The Jim Crow of public torture lynchings, in which a white man could, while on his lunch break, see a black man lynched, buy a postcard with a photo of the dangling body, and send it via regular U.S. mail to a friend with this note:

“Well John—This is a token of a great day we had in Dallas, March 3rd [1910], a negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole.”¹⁷²

The old Jim Crow was the one that gave the U.S. Supreme Court cause to review convictions like those in *Brown v. Mississippi*.¹⁷³ In that case, the Mississippi Supreme Court had affirmed convictions despite the fact that the black suspects were:

[M]ade to strip and they were laid over chairs and their backs were cut to pieces

¹⁷¹ Not long after this incident I was interviewed for a magazine story on the children of civil rights leaders. I related the incident then, and have relied on the article to establish some of the particulars. Seth Cagin, *Children of Radicals*, ROLLING STONE, Sept. 26, 1985, at 91, 95.

¹⁷² David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 794 (2005).

¹⁷³ 297 U.S. 278 (1936).

with a leather strap with buckles on it, and they were likewise made . . . to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.¹⁷⁴

That was Jim Crow—the memories of which so utterly traumatized so many of our parents and grandparents’ generations. This does not mean analogies may never be drawn, but it does require that they be drawn with care. Otherwise, they threaten to further erase our dimming collective memory of the old Jim Crow.

CONCLUSION

The Jim Crow analogy helps us see the toll that mass incarceration has taken on America’s black communities, but in doing so, it obscures other aspects of mass incarceration. Among other claims, I have pointed out that although mass incarceration is a black issue, it is more than just that. After all, more than six out of ten people in U.S. prisons are not African-American. And although it is a drug issue, it is much more than that. Drug offenders make up only 25% of our prison population.

I conclude by briefly indicating a way forward. What follows is not intended as a set of policy prescriptions; instead, I offer three themes that must remain central if we are to scale back our prison system and reduce the damage that incarceration causes. In offering these ideas I want to reiterate that, despite the critique offered in this Article, I share much common ground with the New Jim Crow writers. Without papering over the analytic and

¹⁷⁴ *Id.* at 282.

strategic differences that exist between us, these concluding pages seek to clarify how closely my goals overlap with those of the writers I have discussed throughout the piece.

First, combating mass incarceration will require a multiracial movement. Some of the New Jim Crow writers understand this, yet they do not appreciate the extent to which the Jim Crow analogy pushes non-black prisoners to the margins.¹⁷⁵ The Jim Crow claim is, at the end of the day, an appeal to the base—a metaphor with great potential to mobilize blacks and racial justice advocates to care about mass incarceration. But it comes at a cost—namely, the analogy does not encourage other racial groups to recognize that, on this issue, black interests coincide with their own.¹⁷⁶ As Darren Hutchinson has argued, framing issues in terms of black and white discourages other racial minorities from engaging in coalition politics.¹⁷⁷ A similar point applies here: If whites and Hispanics disappear from view in discussions of mass incarceration, they are less likely to see a campaign against it as speaking to and for

¹⁷⁵ For example, Alexander writes:

White drug “criminals” are collateral damage in the War on Drugs because they have been harmed by a war declared with blacks in mind. While this circumstance is horribly unfortunate for them, it does create important opportunities for a multiracial, bottom-up resistance movement, one in which people of all races can claim a clear stake. For the first time in our nation’s history, it may become readily apparent to whites how they, too, can be harmed by anti-black racism—a fact that, until now, has been difficult for many to grasp.

ALEXANDER, *supra* note 22, at 202.

¹⁷⁶ Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that the law will change to serve black interests only when black interests align with those of whites).

¹⁷⁷ Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1200 (2004) (“The black/white paradigm also prevents persons of color from engaging in coalition politics. By treating racism as a problem that affects blacks primarily (or exclusively), racial discourse in the United States divides persons of color who could align to create formidable political forces in the battle for racial justice.”).

them. This is a missed opportunity—especially now, when fiscal considerations could motivate large numbers of voters to demand reductions in our bloated prison system.¹⁷⁸

Second, an effective response to mass incarceration requires that moral appeals on behalf of mass incarceration’s direct targets be combined with broader arguments on behalf of community safety. In questioning the New Jim Crow writers’ account of the origins of mass incarceration,¹⁷⁹ I have suggested that some of those who push for tough-on-crime laws, and many of those who support them, do so out of a real concern about safety. To be clear, I hardly think this is the only motivation: The New Jim Crow writers make a powerful case that racial animus and indifference play a role as well.¹⁸⁰ But a substantial number of Americans care primarily about being able to walk home without being mugged or seeing drug sellers lurking on the corner. Progressives should acknowledge such concerns and make the case that mass incarceration is detrimental to community safety, rather than necessary to secure it.

The good news is that such a case can be made. In the past decade, even as the nation’s prison population has grown, four states have reduced their prison populations while

¹⁷⁸ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–90 (2005) (noting that budgetary concerns have driven recent state sentencing reforms); Charlie Savage, *Trend To Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14 (describing state penal reforms motivated by cost-cutting considerations).

¹⁷⁹ For example in Part III, I criticized the New Jim Crow writers for advancing a reductionist view of the history of mass incarceration, in which tough-on-crime laws are nothing more than the results of opportunistic politicians pandering to racist voters. In Part IV, I pointed out that even Washington, D.C., with black leaders and a majority-black voting population, has adopted policies that produce sky-high incarceration rates.

¹⁸⁰ See *supra* Part II and accompanying notes (discussing the relevance of the “New Jim Crow” analogy as a method of conveying the disproportionate burden borne by low-income African-American communities under modern mass incarceration).

also cutting crime.¹⁸¹ New York City’s success in lowering crime rates has been widely chronicled, but new research by Franklin Zimring reveals a less well-known fact: New York reduced crime while also reducing the number of residents sent to prison.¹⁸² In the short term, such a policy change requires pulling various criminal justice levers—for example, expanding alternatives to incarceration, reducing the time served in prison, reducing parole revocations, and making better use of probation resources.¹⁸³ Over the longer term, it requires human capital investments of the sort that both the New Jim Crow writers and I endorse.

Chief among these investments is investment in education. As I discussed in Part VI, there is a close connection between incarceration rates and educational attainment: Blacks and whites who have dropped out of high school are ten times more likely to be incarcerated than those who attend college.¹⁸⁴ While correlation is not causation, these facts are

¹⁸¹ See JUDITH GREENE & MARC MAUER, *DOWNSCALING PRISONS: LESSONS FROM FOUR STATES* 60 (2010), available at http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf. (detailing reductions in state prison populations obtained by Kansas, New York, Michigan, and New Jersey respectively during the late 1990s and 2000s).

¹⁸² *The Decline in Crime in New York City (1990–2010)*, VERA INSTITUTE OF JUSTICE (Oct. 29, 2010), <http://www.vera.org/videos/franklin-zimring-decline-crime-new-york-city>.

¹⁸³ See MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 175–84 (2009) (providing recommendations for proven and promising crime control strategies that involve policing, sentencing, probation, and corrections reform); see also Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods In Chicago*, at 2, 9–13 (Univ. of Chicago, Olin Law & Econ. Paper No. 269, Columbia Univ. Law Sch., Public Law & Legal Theory Research Paper Series, Paper No. 05-97), available at <http://ssrn.com/abstract=860685> (discussing Chicago’s Project Safe Neighborhoods, which reduced homicide rates by 35% in targeted neighborhoods).

¹⁸⁴ See *supra* notes 130-132 and accompanying text (listing differences in incarceration rates among African-American men who are college-educated and high school dropouts and whites who are college-educated and high school dropouts).

suggestive evidence that appropriate educational (and other social-service) interventions may be, in addition to their other benefits, crime-fighting measures.¹⁸⁵

Third, an effective response to mass incarceration requires increased attention to how we treat prisoners. Even if the movement to challenge mass incarceration is ultimately successful, America will continue to have an enormous system of prisons and jails for a long time to come. And even if our prison population shrinks substantially, some people will always need to be locked up—hence the urgency of attending to the conditions in which prisoners are held.

Prison conditions receive too little attention among mass incarceration’s critics, including the New Jim Crow writers. It is difficult to say why this is so, but at least for the New Jim Crow writers, the explanation may lie in their focus on the War on Drugs.¹⁸⁶ After all, a strong case can be made that drug offenders (especially drug users, who receive the bulk of the New Jim Crow writers’ attention) should not be incarcerated at all. Having framed the issue in this way, these writers may feel less compelled to focus on improving prison conditions.

Whatever the reasons for the oversight, it must be remedied: how we treat those we incarcerate is a critical front in the battle against mass incarceration. Consider *Brown v. Plata*, in which the Supreme Court recently ruled that California must reduce its prison population in order to mitigate the unconstitutional harms associated with overcrowding.¹⁸⁷

¹⁸⁵ See KLEIMAN, *supra* note 183, at 188–89 (2009) (offering recommendations for effective social-service and other nonpunitive anti-crime measures).

¹⁸⁶ See *supra* notes 93-95 and accompanying text (describing tendency among New Jim Crow writers to focus on drug crimes and ignore violent crimes when discussing mass incarceration).

¹⁸⁷ *Brown v. Plata*, No. 09-1233, slip op. at 1–4 (U.S. May 23, 2011).

The lower court, in finding for the plaintiffs, had warned that “the state’s continued failure to address the severe crowding in California’s prisons would perpetuate a criminogenic prison system that itself threatens public safety.”¹⁸⁸ Justice Kennedy recognized that concern in his majority opinion, quoting then-Governor Schwarzenegger’s acknowledgement that overcrowding “increases recidivism,” as well as the acting secretary of the California prison system, who testified that she “absolutely believe[s] that we make people worse, and that we are not meeting public safety by the way we treat people.”¹⁸⁹ The record in *Plata* clearly illustrates that prison conditions are not only a prisoners’ rights issue,¹⁹⁰ but are also a crime prevention issue. Most prisoners, after all, are serving time for violent offenses. And even with longer prison sentences, the vast majority of American prisoners will be released eventually.¹⁹¹ So we face a choice: Will we take individuals whom we have judged unfit for life in the free world, expose them to further violence, destabilize them psychologically, and deny them treatment for addiction, trauma, and mental illness? Or will we attempt to create a system of support and rehabilitation for the incarcerated? For their sake, and our own, the answer seems clear.

¹⁸⁸ *Coleman v. Schwarzenegger*, No. CIV S-90-0520, at 132 (E.D. Cal. Aug. 4, 2009).

¹⁸⁹ *Brown v. Plata*, No. 09-1233, slip op. at 38 (U.S. May 23, 2011).

¹⁹⁰ See generally Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911–23 (2009) (arguing that the state’s “carceral burden” includes an affirmative obligation to protect prisoners from serious physical and psychological harm).

¹⁹¹ See TIMOTHY A. HUGHES & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2002) <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1138>. (noting that over 95% of state prisoners will be released eventually); MARK MOTIVANS & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 75 (2006) (noting that only 1% of federal prisoners receive life without parole or death sentences and that among the other 99% of federal prisoners the average sentence is 60 months in prison).