WASHINGTON STATE
MINORITY AND JUSTICE COMMISSION

COMMISSION MEETING

PERKINS COIE
SEATTLE, WASHINGTON 98101
FRIDAY, JUNE 14, 2013, AT 8:45 A.M.

WASHINGTON STATE MINORITY AND JUSTICE COMMISSION

COMMISSION MEMBERS

Justice Charles W. Johnson
Co-Chairperson
Washington State Supreme Court

Judge Mary I. Yu
Co-Chairperson
King County Superior Court

Justice Debra L. Stephens
Washington State Supreme Court

Judge Veronica Alicea-Galvan
Des Moines Municipal Court

Mr. Jeffrey A. Beaver
Graham and Dunn

Ms. Ann Benson
Washington Defender Association

Professor Robert C. Boruchowitz
Seattle University School of Law

Judge Vickie I. Churchill
Island County Superior Court

Ms. Jennifer K. Davis-Sheffield
Lane Powell PC

Ms. Callie Dietz, State Court Administrator
Administrative Office of the Courts

Judge Deborah D. Fleck
King County Superior Court

Ms. Bonnie J. Glenn
Models for Change, DSHS

Mr. Russell D. Hauge
Kitsap County Prosecuting Attorney

Mr. Uriel Iñiguez
Washington State Commission on
Hispanic Affairs

Ms. Carla Lee
Center for Children and Youth Justice

Dr. Sandra E. Madrid
University of Washington School of Law

Commissioner Joyce J. McCown
Court of Appeals, Division III

Judge LeRoy McCullough
King County Superior Court

Ms. Karen W. Murray
Associated Counsel for the Accused

Ms. P. Diane Schneider
National Latino Peace Officers Association

Judge Mariane C. Spearman
King County Superior Court

Mr. Jeffrey C. Sullivan
Retired, US Attorney

Judge Gregory D. Sypolt
Spokane County Superior Court

Judge Vicki J. Toyohara
Judge Pro Tem

Judge Dennis D. Yule, Retired

MINORITY AND JUSTICE COMMISSION

PERKINS COIE
FRIDAY, JUNE 14, 2013 (8:45 A.M.)
JUSTICE CHARLES W. JOHNSON, CO-CHAIR
JUDGE MARY YU, CO-CHAIR

AGENDA

CALL TO ORDER

Introductions and Approval of April 5, 2013, Minutes

COMMISSION BUSINESS

Chairs Report • Staffing Update • SCJA Session • Sentencing Guidelines Commission – Racial Impact Statements • Immigration Benchguide • Resignations	Justice Charles Johnson and Judge Mary Yu
Staff Report • Budget Review • LSAC Grant • Tribal/State Court Consortium • GJCOM Report	Ms. Myra Downing

COMMITTEE REPORTS

Collaboration Committee • WASPC • Collaborations Letter	Judge Vickie Churchill Mr. Jeffrey Beaver Ms. Jennifer Sheffield
Publications/Outreach/Website Update	Judge Dennis Yule and Commissioner McCown
Tri-Cities Youth and Justice Forum	Judge LeRoy McCullough and Judge Dennis Yule
Juvenile Justice Committee	Ms. Anne Lee

NEW BUSINESS

1) Newsletter or Other Social Media Outreach 2) Committee Structure 3) Distribution of Art and Note Cards 4) Art Selection Going Forward	Judge Mary Yu and Justice Charles Johnson

Next Meeting: Friday, August 9, 2013, UW Law School

ADJOURNMENT

Washington State Minority and Justice Commission (WSMJC)

Friday, April 5, 2013, (8:45 p.m. – 12:00 p.m.)
Seattle University, School of Law
Sullivan Hall, Room 109, Seattle, Washington

MEETING NOTES

Commission Members Present:
Justice Charles W. Johnson, Co-Chair
Judge Mary I. Yu, Co-Chair
Jeffrey A. Beaver
Robert C. Boruchowitz
Judge Vickie I. Churchill
Carla C. Lee
Sandra E. Madrid, Ph.D.
Commissioner Joyce J. McCown (via phone)
Judge LeRoy McCullough
Karen W. Murray
P. Diane Schneider
Jeffrey C. Sullivan
Judge Mariane C. Spearman
Judge Vicki J. Toyohara
John Yasutake (Representing Rosa M. Melendez)
Judge Dennis D. Yule

Members Not Present:
Ann E. Benson
Jennifer Davis-Sheffield
Callie Dietz
Judge Deborah D. Fleck
Russell Hauge
Bonnie J. Glenn
Uriel Iñiguez
Justice Debra Stephens
Judge Gregory D. Sypolt

AOC Staff Present:
Myra Downing
Pam Dittman
Margaret Fisher
Beth McGrath

Other Guests:
Anne Lee

The meeting was called to order at approximately 8:45 a.m. The meeting minutes from the February 1, 2013 Minority and Justice Commission meeting were approved.

CHAIR REPORTS

Justice Charles Johnson attended the 25th Annual National Consortium on Racial and Ethnic Fairness in the Courts Conference. The program was well-attended and provided many informative sessions. A complete listing of conference topics can be found at http://www.national-consortium.org/.

Justice Johnson shared information about a program he learned about at the conference which was presented by Hong Tran, a public defender who practices in King County. The program is a joint initiative with the King County Prosecutor's Office and is entitled Project LEAD (Law Enforcement Assisted Diversion). It is a project to divert drug offenders from jail to services and can result in a prosecutor not filing charges. Justice Johnson thought it was a concrete way to reduce disproportionality in the criminal justice system and suggested that perhaps they could be invited to attend a Commission meeting and provide a presentation on the program.

Judge Yu mentioned that the King County Prosecutor's Office also has a program entitled 180 which is a pre-filing diversion program for youth. More information can be found at http://www.kingcounty.gov/Prosecutor/news/2012/june/180program.aspx.

Commission members expressed interest in both these programs and asked that the program contacts be invited to present at the June 14, 2013, Commission meeting.

Sentencing Guidelines Commission Meeting
Dr. Sarah Veele, Judge Mary Yu, Kim Ambrose, and Myra Downing attended the Sentencing Guidelines Commission at their request. Commission member Russ Hauge was also present. They were interested in our work on juvenile disproportionality and wanted an update on preliminary review of date being undertaken by the Center for Court Research. The Sentencing Guidelines Commission expressed an interest in working with the Minority and Justice Commission on exploring the idea of attaching racial impact statements to legislation; that is a request to review the impact of legislation on minority populations.

Save the Date: Friday, September 27, 2013. The MJC and the Sentencing Guidelines Commission will have a joint meeting on September 27. Dr. Katherine Beckett, University of Washington will share her research on how prior drug convictions affect the length of sentences. The discussion will explore proposals on how such prior convictions might be "washed out" or discounted when compiling a person's criminal history. Each Commissioner is asked to set the date aside and attend.

Race and Pedagogy Initiative
Justice Johnson was invited to speak at a community forum hosted by the Race and Pedagogy Initiative, a collaboration of the University of Puget Sound which educates students and teachers to think critically about race and act to eliminate racism. Justice Johnson focused on how courts address racial and ethnic bias. Justice Johnson plans to continue the discussion with the group on how the judiciary can be a positive impact in this arena along with addressing issues on youth to prison pipeline, security in schools, and DMC. In addition, the Commission should approach this group on being part of their 2014 conference.

Disproportionality Discussion
The Commission continued the discussion on how we deal with juveniles within our schools, our communities, and our legal systems. The New York Times published an article on April 4, 2013, on this topic. It can be found at http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html?pagewanted=all

Margaret Fisher indicated there are three (3) schools in Washington that have youth courts and employ restorative justice models. Judge LeRoy McCullough expressed that he has been working on this issue in the context of school suspensions and how this causes youth to become further behind in school and the causal effect of increasing the number of youth in the criminal justice system. John Yasatake discussed the Disproportionality Task Force in the Seattle School District which has instituted an independent body of hearing officers who mediate suspensions.

Jeffrey Beaver indicated he will provide a link to Myra Downing from Professor Scott on peer reviewed articles on disproportionate youth in schools.

Judge Vickie Churchill indicated it would be interesting to see any research on the connection between truancy issues and sanctions where students are placed in detention thus enabling students to keep up on work versus being suspended. A type of day-reporting idea would be interesting.

Judge Veronica Alicea-Galvan inquired if there is a joint task force with school districts or the Office of the Superintendent of Public Instruction (OSPI) discussing restorative justice measures. Judge McCullough indicated that JRA and OSPI had a collaborative meeting with stakeholders and there is an effort underway. Anne Lee indicated that part of the discussion was how to start the conversation with the Legislature on education and discipline. We also need to look at these cases as "teachable" moments for students, staff, and the community versus a behavior and disciplinary issue; look beyond the concept of adversarial approach and look at behavior.

Robert Boruchowitz indicated there are scenarios that he can provide which discuss restorative justice models. Judge McCullough indicated that we should continue the discussion with others on not suspending students, but look at the underlying and fundamental issues and provide tools and options for the student to make better life choices.

The question becomes "how does the Commission stay connected, informed, and be an integral part of the discussion and the solution?"

DMC – Phase I Study
The Commission paid for a research project which focused primarily on the differences between specific groups and the differences in their perception and judgments of the criminal justice system. In March 2013, *Justice in Washington, Phase I,* was released.

The Commission is still proposing to follow through with Phase II which would focus on the consequences of the Phase I findings. Phase II would provide qualitative results through engaging others through focus groups. The Commission has approximately $20,000 to spend by June 30, 2013. The proposal is to hire law students to gather preliminary information from jurisdictions on who should be invited to focus groups. Commission members had questions as to how this might affect the validity of the study.

Other items discussed:

1. Does Phase I provide a complete story or does it depend on Phase II to give a complete story?
2. Ask researchers if they would prefer the study to be released piecemeal or after Phase II is completed.
3. Concerns were raised that if there is no funding to complete Phase II, then what happens to Phase I.
4. Ask WSCCR to provide a press release and talking points and how to roll out.
5. Discussion was had on facilitated town hall type of meeting.
6. We need to ensure the credibility of the Commission is not called into question however it is decided to handle the roll out or non-roll out of the report. There could be questions on transparency of the Commission and the findings.

The Commission voted to not release the Phase I report until the question on whether the report can be stand-alone is answered. Further, the Commission agreed to approach WSCCR on the above questions and/or comments and to get some answers before release.

A conference call needs to be initiated with WSCCR, the Commission, and the Researchers. The Commission voted to commit no more than $25,000 in funds to:

1. Complete additional research or promulgate the Phase I information.
2. Hire research students.

3. Answer questions and/or address comments from above.
4. Invite researchers to assist with development of press release or other ways to roll out the information. (Could be used for travel, etc.)

Gideon v. Wainwright
Justice Johnson indicated the Washington State Supreme Court will be reenacting *Gideon v. Wainwright*, a landmark case where the U.S. Supreme Court unanimously ruled that state courts are required under the Fourteenth Amendment to provide counsel in criminal cases for defendants who are unable to afford to pay their own attorneys, extending the identical requirement made on the federal government under the Sixth Amendment. (http://en.wikipedia.org/wiki/Gideon_v._Wainwright). An article in the New York Times addressed this more recently regarding civil matters, which were not covered by the decision, and the effect that is having on poor people. The article can be found at http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=all&_r=0. You can also see the movie "Gideon's Trumpet" via YouTube http://www.youtube.com/watch?v=gAnb40298IU.

Staffing Update
The staff position for the Commission has been opened and posted on the Washington Courts website at www.courts.wa.gov. The position is for a Court Program Analyst. Closing date is April 12, 2013.

SCJA Session
Judge Yu is working with Dr. Sarah Veele, Judge Frank Cuthbertson, Brian Pinto, and Anne Lee to present on the disproportionate minority contact report.

STAFF REPORT

Budget Review
Myra Downing provided a copy of the Minority and Justice Commission's budget. The report shows there is approximately $35,000 in unallocated funds. Ms. Downing asked the Commission to identify projects or items that could be completed on or before June 30, 2013. The Commission members suggested:

1. Printing for Judge McCullough and Rosa Peralta.
2. Tri-Cities Youth and Justice Forum (T-shirts, give-aways, supplies, food).
3. Road Show / town hall type of forum around DMC.
4. June Commission meeting in Yakima in conjunction with an town hall forum.

Gender and Justice Commission (GJCOM) Report
The Gender and Justice Commission is working with the Initiative for Diversity on a Managing Partners CLE scheduled on May 22, 2013. The CLE will focus on ways to increase diversity in firms where lawyers are present.

The GJCOM released a RFP focusing on identifying promising practices when sentencing and monitoring domestic violence and sexual assault cases.

The GJCOM are sponsoring two sessions at the SCJA Spring Conference. One session focuses on the Sexual Assault Protection Orders. The second session focuses on situations that arise in the courtroom and, while not illegal, may create a distraction and is intended to provide judicial officers to answer the question "So how far would you go?"

Tribal State Court Consortium
The purpose of this project is to work with tribal nations and state courts to identify and propose solutions to inter-jurisdictional issues in the management and disposition of domestic violence and sexual assault cases, Indian Child Welfare cases, and to address juvenile disproportionality. Forty thousand dollars ($40,000) has been set aside for this project, of which $20,000 is being provided through the Court Improvement Project to be used to address youth and family issues, and $20,000 is being provided through the GJCOM STOP grant funds which will be used to address domestic and sexual assault cases. An additional $20,000 was included in the Office on Violence Against Women's state grant. This is the first time that GJCOM has been included in the grant. The funds will provide for three student interns to assist with data gathering.

PRESENTATIONS

Jim Bamberger, Office of Civil Legal Aid (OCLA)
OCLA Director, Jim Bamberger, provided copies of the Final Report of the Civil Legal Needs Study Scoping Group convened by the Washington State Office of Civil Legal Aid. The focus of the Scoping Group's work was to assess the need for and purpose of updating our understanding of the civil legal problems experienced by low-income Washingtonians. Mr. Bamberger explained that the civil legal problems of low-income Washingtonians were last documented in the 2003 Civil Legal Needs Study (http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf) published by the Supreme Court Task Force on Civil Equal Justice Funding. In addition to determining that there is an imperative to update our collective understandings given the dramatic changes that have occurred since 2002-03, the Scoping Group's report outlines the focus, scope, and methodology that it recommends be employed in any such update. The Scoping Group's efforts were supported in substantial part by the Washington State Center for Court Research (WSCCR).

Mr. Bamberger reminded members that both the Washington State Gender and Justice and Minority and Justice Commissions were key partners in defining the focus and scope of helping underwrite the research effort associated with the 2003 Civil Legal Needs Study. At the time, the Gender and Justice Commission was particularly interested in ensuring that the civil legal problems of women and children, including domestic violence victims, received a high level of scrutiny in the design and execution of the study methodology. Mr. Bamberger noted that the results of the 2003 study were striking, not only with respect to the overall prevalence and substance of civil legal problems experienced by low-income Washingtonians, but the clearly documented disproportionality of civil problems experienced by women, especially victims of domestic violence.

Mr. Bamberger requested that the Minority and Justice Commission join as a partner in the effort to update Civil Legal Needs Study. He indicated that OCLA will be forming a Blue Ribbon Committee to oversee the effort, and that he intended to seek appointments from key partner entities including, he hoped, both the Minority and Justice and Gender and Justice Commissions.

The Commission voted to support this effort and identified Dr. Sandra Madrid as the Commission's representative. If anyone else is interested in serving as an alternate on this project, contact Judge Yu.

Margaret Fisher, Diversity Pipeline Programs for Youth
Ms. Fisher presented the Diversity Pipeline Programs for Youth – Diversifying the Bench and Bar in Washington State. Ms. Fisher was asked to explore and report on existing diversity pipeline programs for youth. Additionally, Ms. Fisher identified areas she is currently or will be working on:

1. Contact "Other Programs" that reported, such as the Washington Young Lawyers who offer a program in Yakima.
2. Confirm with existing programs that they would like to have a strategic meeting (spring timeframe).
3. Draft and submit a grant proposal to the Law School Advisory Council (LSAC) to assist with the strategic meeting (spring timeframe).
4. Presented this report and findings at the Gender and Justice Commission's January meeting.

The Commission voted that they wanted to be a co-applicant with the GJCOM on a grant to LSAC to fund a project that is intended to bring together the various programs conducting pipeline projects. Dr. Sandra Madrid agreed to assist Myra Downing and Ms. Fisher with the writing the proposal.

COMMITTEE REPORTS

Collaborations Committee, Judge Vickie Churchill, Chair
The Committee has broken into three (3) sub-committees:

- Russ Hauge and Jeffrey Beaver provided an overview of the discussion they are going to have with the Washington Association of Sheriffs and Police Chiefs and the Criminal Justice Training Center. The discussion will be around unjustified disproportionate minority contact.
- Dr. Sandra Madrid and Jennifer Davis-Sheffield drafted a letter to be sent to a targeted group of entities that we are inviting to collaborate with the Commission on DMC and other projects.
- Commissioner Joyce McCown and Judge Dennis Yule discussed ways to assist the Commission's collaboration with other organizations and the dissemination of information to the public through updating the Commission's website, newsletter, poster, and other social media.

  There was discussion about whether to pursue poster artwork for this year and should this continue to be a yearly project.

  They also discussed the quarterly newsletter and additional ways to disseminate the information; especially with the impending update to the Commission's website.

  The sub-committee has been working with Beth McGrath and Paula Odegaard to update the website. At today's meeting, everyone was given the chance to look at it and make any suggestions. The Commission agreed the mock-up was a great start.

Members asked for:

1. A dummy site so they can click through and see how it would work.
2. Revision dates on pages so people are aware of how current the information is.
3. A written protocol from the Committee on how the site will be maintained, who will maintain it, and how content will be added or deleted.

4. A rework of the mission statement to have it be short and compelling.
5. The possibility of the site being available in other languages.
6. An easily identifiable web address.

Juvenile Justice
Anne Lee has agreed to be the Interim Chair for this Committee. The Center for Youth Justice is looking to fill the position (formerly held by Carla Lee) and that person might be willing to take over as Chair, if Anne Lee cannot continue as Chair. The group is developing a work plan around the recommendations from the Task Force on Race and the Criminal Justice System.

The Committee agreed to:

- Revisit areas of focus and the division of labor between the Commission and the Partnership Council.
- Revisit timeline for report to the Supreme Court.
- Follow-up to data released by AOC on the Relative Rate Index.
- Follow-up with Stakeholder Group
    - Draft an e-mail/letter for Justice Johnson and Judge Yu which would be sent to the stakeholder group thanking them for their participation in the December meeting, providing them the notes, and letting them know that they will be contacted for follow-up.
    - Look over the stakeholder notes and identify the list of things that people promised and/or where obvious follow-up can occur. The Committee members will then review the list and volunteer to follow-up.
- Look at revisions to court rules.
- Look at the school to prison pipeline.
- Look at ways to create visibility and take advantage of opportunities for the Commission and the Supreme Court to take the lead on discussing the topic of disproportionate representation of youth of color in the juvenile justice system.

Legislative Role
The Committee asked the Commission what the role of the Committee and the Commission is when advocating for legislation. The Commission discussed whether a Legislative Committee should be put in place during session. Additionally, the question was raised on whether the Commission should take positions on bills and/or actively comment on bills. This discussion was held over to the June Commission meeting.

The Committee scheduled conference calls for April 18, May 16, and June 6, beginning at 8:00 a.m.

Next Commission Meeting
The next meeting is scheduled for Friday, June 14, 2013.

Diversity and Inclusion – Coordinating Pipeline to Legal Career Programs

LSAC Grant Application

EXECUTIVE SUMMARY

Narrative Description of the Project

The Washington State Supreme Court, in conjunction with its partners, is committed to creating and offering pipeline programs that are proven to increase the number of girls, youth of color, and other members of diverse audiences, to consider law as a career option. The Supreme Court has two Commissions – the Gender and Justice Commission (GJCOM) and the Minority and Justice Commission (MJCOM) – each of which have independently been offering pipeline programs. Through the planning and coordination of these programs with our law schools and high schools, it has become apparent that others have been sponsoring equivalent programs as well.

Washington State has a long history of promoting diversity in the legal profession. For example, one of the priorities of the GJCOM is diversifying the bench. They discovered that while "The Color of Justice" pipeline project is very good and well received, it is not coordinated into the curriculum of the schools or coordinated with other entities. This was confirmed when GJCOM funds were used to research and document other similar programs which clearly illustrates the replication of efforts (see Appendix A). The MJCOM offers the Tri-Cities Youth and Justice Forum. While this program is in its 11th year, there has been no participant follow-up or program evaluation to determine its impact.

Washington State finds itself in a unique situation. Pre-college pipeline programs are offered by stakeholders in many of the major communities of Washington. These tend to be the product of the local community without input, collaboration, or communication with other similar programs in the state or country. It appears many of the groups and individuals offering school to law school pipeline projects are very interested in coming together to share information and ideas. This was evident when the Gender and Justice Commission reached out to these groups and received unanimous interest in working with the Commissions on this project. Each of the programs contacted in 2012-13 indicated that they saw the benefit of learning about and sharing resources developed by other state and national programs.

This proposed two-year project, under the joint leadership of the Washington State Supreme Court Gender and Justice and Minority and Justice Commissions, will bring together key people from the pre-college youth diversity pipeline programs in Washington, the State's three law schools, the Washington State Bar Association, and from national programs.

The AOC Diversity Team comprised of Commission staff and other Washington State Administrative Office of the Courts (AOC) employees, will staff the project. This program will be part of the work plan for the Commissions and as a result a

responsibility for the Executive Director and the other members of the AOC Diversity Team.

The project has three goals:

1. Build a working network of stakeholders who offer pre-college youth diversity pipeline programs in Washington State and come to consensus regarding objectives of pipeline programs.

2. Create an on-line interactive repository of pipeline programs that identifies target audience, sample agendas, activities, evaluation tools and best practices.

3. Work with national experts to prepare a paper that documents lessons learned and promising practices.

Contact has already been made and enthusiastic commitments have been made from these stakeholders.[1]

Detailed Description of Goals and Objectives

1. Build a working network of stakeholders who offer pre-college youth diversity pipeline programs in Washington State and come to consensus regarding objectives of pipeline programs.

   a) In coordination with the Commissions, the three major law schools in Washington State, and the local high schools, identify the stakeholders.

   b) Gather information on existing programs prior to the meeting and prepare it for distribution at the meeting.

   c) Arrange for a one and a half day in-person meeting of the stakeholders, including national experts, to begin the dialogue necessary for establishing a collaborative working relationship. The agenda will include:
      i) Introductions and descriptions of existing programs including activities, target audience, resources, and evaluation tools.

[1] These include the state's three law schools: the University of Washington School of Law, the Seattle University School of Law, and Gonzaga University Law School; the Washington State Bar Association; the King County Bar Association's Future of the Law Institute; Pierce County Youth and Law Community Forum; First AME Church of Seattle's Youth and Law Forum; Tri-Cities Youth and Law Forum; Yakima Pre-Law Students' Leadership Conference; Corporate Diversity Pipeline Program, Partnership of Street Law, Inc. and Association of Corporate Counsel; Gonzaga University School of Law's Color of Justice and Street Law programs; Seattle University School of Law's Seattle Youth Traffic Court and Street Law programs; University of Washington Law School's Street Law program; Just the Beginnings Foundation (Chicago); ABA Council on Legal Education Opportunities (Chicago); and, Law School Admissions Council.

ii) Consensus building around goals and objective for pipeline projects.
iii) Identification of evaluation measures. Funds have been requested as part of this grant application, to hire an evaluator to work with Washington State on this project.
iv) Review and identify programs that target overlapping audiences and geographical areas and determine if it would be worth considering combining efforts.
v) Identify joint projects that stakeholders may be interested in pursuing such as a webinar, ongoing education programs, resource sharing, etc.

d) Develop a plan for ongoing communication between the stakeholders.

e) Set up and arrange for an annual meeting of stakeholders.

2. Create an on-line interactive repository of pipeline programs that identifies target audience, sample agendas, activities, evaluation tools, and best practices.

   a) AOC Diversity Team staff will work with AOC in developing a place to host a website for the Pipeline Project. A subcommittee consisting of the stakeholders and Commission members will design the website with final review by all.

   b) With feedback from stakeholders, develop a template for content for the repository.

   c) Information will be gathered from all stakeholders for posting on the website repository.

   d) AOC will take responsibility for updating and adding information.

3. Working with national experts, prepare a paper that documents lessons learned and promising practices.

Throughout this project, an evaluator will work with stakeholders, Commission members, and AOC Diversity Team staff in developing evaluation measures and defining a way to collect and disseminate the data.

The evaluator will assist us in determining promising practices as well as evaluation tools that can be used by stakeholders. We are interested in developing consistent measures so we can increase our confidence in comparing information across sites.

Two follow-up webinars will be hosted by the Commissions and managed by the AOC Diversity Team staff. The purpose of the webinars is to explore the status of the

implementation of projects, presentation of new information, and the further building of the network of stakeholders. These webinars will also include new community members launching their own youth pipeline programs. AOC has the equipment and has conducted numerous webinars. In addition, they have staff that has received specialized training in developing on-line programs.

Date(s) of Event

Given that funds from the LSAC Diversity Initiative are necessary for us to proceed; we cannot provide specific meeting dates. Work has already been conducted and will continue with arrangements to alter plans once we receive funding. We anticipate that the first stakeholder meeting will occur within the first few months after receiving notification since we have already been in contact with them and explained our idea.

As noted earlier, stakeholders have already been contacted and are very interested in working with the Commissions on establishing a collaborative approach for pipeline programs in Washington State.

We would anticipate having a meeting with the evaluator to work with Commission members and staff in establishing the meeting agenda.

Our follow-up meeting would be set up as an annual meeting. Stakeholders would determine what month and time would work best for them. The annual meeting is essential to ensure ongoing collaboration and information sharing because it affords each of us the opportunity to reflect on our past year and share lessons learned with each other.

Target Audience

Ultimately the target audience is secondary school students in diversity pipeline programs in Washington State. However, the focus will be on the stakeholders involved in offering these diversity pipeline programs for pre-college youth.

Expected Outcomes/Impacts

Expected outcomes/impacts include:

1. Secondary students in diversity pipeline programs will experience programs that use best practices and include evaluation tools that measures realistic outcomes from programs.

2. Stakeholder groups will collaborate as a community in supporting pipeline programs, providing materials and resources that meet best practices.

3. New pipeline programs will be developed with resources that incorporate best practices available to them through the website.

STATEMENT OF COMPATIBILITY

There is ongoing research on test bias so LSAC's commitment to reliable, valid, and useful assessments and information continues to be extremely important to diverse populations. Our effort to provide a glimpse into the world of the law for those who may have had limited contact or whose perception may be tainted by a perception of unfairness provides a positive link to the efforts of LSAC's values. We will afford the young people two things: 1) the opportunity to get a glimpse into the value of critical thinking and the law, and 2) a chance to see the positive aspect of the legal profession and the value for them and their communities.

The second obvious LSAC value that is compatible with our work is "diversity and inclusiveness." We are doing this in two ways: 1) through the individual we target for our pipeline projects, and 2) by expanding our influence and depth by collaborating with other stakeholders in this effort.

STATEMENT OF REPLICABILITY IN OTHER LOCATIONS

The Commissions and our stakeholders are committed to learning from each other and from our national experts. We do not believe in recreating programs if successful ones are already in existence. This is demonstrated through our initial inventory of projects and invitation to other stakeholders to partner with us in developing a coordinated approach to pipeline projects and through providing a direct avenue for sharing information. As more of these features are uncovered, new assessment tools are developed and templates of programs devised, we will disseminate them to other programs in the state and country.

In addition, the project has a specific goal of working through existing organizations to create additional pipeline programs within Washington State. This will result in additional participation in pipeline programs in Washington.

ASSESSMENT OF SUSTAINABILITY AFTER LSAC SUPPORT

The Gender and Justice and Minority and Justice Commission have been in existence since 1989 and have always had youth programs as one of their priority areas. They contribute part of their budget and their staff to this effort. Their members (See Appendix C) are invested in increasing young people's confidence in our legal system and at the same time encourage them to consider adding to the diversity in the legal profession and on the bench.

DETAILED EVALUATION PLAN

The project will contract with Dr. Wendy Richardson, (referred to as the Evaluator) an experienced evaluator of youth diversity pipeline programs to conduct the evaluation. The evaluation will be implemented on two levels: 1) developing and assisting local pipeline programs to identify realistic goals and objectives for their programs and develop appropriate assessment tools, and 2) assessing the grant project while in process, including the intermediate and final assessments.

Mentioned earlier, in the fall and winter 2012-13, GJCOM provided funding for Margaret Fisher, AOC staff, to conduct an inventory of existing pre-college pipeline programs in the state of Washington (See Appendix A). Ms. Fisher interviewed staff from each program and compiled a chart of programs, including the staff contact, nature of the program, and objectives of the program. The programs range from one-day events to multiple-year programs. None reported using a formal assessment of goals and objectives tailored to the specific nature of their program. At most, programs had students report back on what they liked and did not like during the program's activities.

In the first level of the evaluation strategy, the Evaluator will develop a survey instrument on existing objectives and goals as well as assessments used by each of the stakeholder programs. The AOC Diversity Team staff will disseminate and collect the information. The Evaluator will analyze the results in preparation for a presentation on appropriate goals and objectives, as well as appropriate assessments during the one and a half day in-person meeting.

By doing the preparation work on the objectives and assessments conducted by the individual programs, the Evaluator will be able to measure the progress that programs make during and after the in-person meeting. In addition, AOC Diversity Team staff will develop and present the template for submitting the material for the website.

The Evaluator will assess any progress made by the pipeline programs in implementing their Action Plan and also document that new information was presented during the webinars. Existing programs will self-report whether they have contacted other pipeline programs.

The Evaluator will document that the template was provided and will inventory the number of programs submitting their agendas, goals and objectives, their teaching resources, and evaluation tools. She will conduct assessments of selected submissions to determine that they meet the best practices presented. In addition, she will document that a dissemination strategies to communities without pipeline programs was conducted.

The second level of the evaluation is an assessment of how well the program has met the goals and objectives set out in the Executive Summary. Information gained through this two-year project along with the evaluation will be the basis for the final report to LSAC.

Project Schedule

GJCOM and MJCOM will announce the program to the in-state and national stakeholders. A Working Committee will be established with representatives from each Commission and the law schools. This Committee will work with AOC Diversity Team staff in scheduling the date of the stakeholder meeting and the involvement of the national speakers, and confirming the locations for posting the diversity pipeline materials.

In addition, the Evaluator will consult with staff on the development of the evaluator tools for the range of programs. The Evaluator will develop the short survey on goals and objectives and evaluation with a deadline in advance of the meeting. Commission staff will disseminate the survey and will submit results to the Evaluator for analysis.

Commission staff will solicit input from the stakeholders on the best dates for the one and half-day meeting. The Washington State Bar Association has already volunteered to host the stakeholder meeting at their offices in downtown Seattle. Within the first few months of the grant's award, the stakeholder meeting will be conducted and will include this draft agenda:

A. Welcome and Overview by Chairs of the Gender and Justice Commission and Minority and Justice Commission: Chief Justice Barbara Madsen, Washington State Supreme Court; Justice Charles Johnson, Washington State Supreme Court; and Judge Mary Yu, King County Superior Court.
B. Current Diversity Report on the Washington Bar and Bench – Washington Bar Association Bar Diversity Program Staff
C. Youth Diversity Pipeline Programs and Best Practices: The National Perspective– National Speaker such as Kent Lollis
D. Presentations from Existing Sample Programs – Selected Washington Programs
E. View from the Minority Law Student and High School Students – Chris Bhang
F. Reviewing the Goals and Objectives and Outcomes- Evaluator
G. Demonstration of Evaluation Tools - Evaluator
H. Action Planning for Application of Best Practices

The AOC Diversity Team staff will schedule the first of the two webinars three to four months after the in-person meeting. The staff will select those areas mentioned in the Action Plan where more work is needed and design the content around measuring what has happened at the local level and providing additional content to the stakeholders.

Prior to this first webinar, AOC Diversity Team staff will circulate an invitation to organizations in Washington with a stake in diversity in the legal profession, including attorneys and judicial officers, to participate in the process by joining a webinar and by viewing items posted on the website of the Commissions. The dissemination will take place by having email from the Chairs of the two Commissions sent to the state, county, and specialty bar associations, colleges and universities in the state, community organizations, and institutions of faith.

The second webinar will build on the first webinar, with reports on further implementation, new content, and more building of the network of stakeholders.

DIVERSITY INITIATIVES FUND GENERAL GRANT

PROJECT BUDGET FORM

YEAR 1

Title of Project Grant: Diversity & Inclusion: Coordinating Pipelines to Legal Careers

Administrator: Myra Downing, Executive Director

Phone Number & E-mail: 360.705.5290 / myra.downing@courts.wa.gov

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6
Expense	**Estimated Total Cost**	**Amount Requested from LSAC**	**List Your Organization's Financial Contributions**	**Source for Remainder of Funding & Amount**	**In-Kind Contributions Cost**
PERSONNEL					
Executive Director	$3,413	**$0 - LSAC does not pay**	$0	$0	$3,413
Program Coordinator	$6,315	**$0 - LSAC does not pay**	$0	$0	$6,315
Snr Court Pgm Analyst	$2,007	**$0 - LSAC does not pay**	$0	$0	$2,007
Guest Speaker(s)	$1,000	**$1,000**	$0	$0	$0
ADVERTISING					
Posters	$0	$0	$0	$0	$0
Flyers	$0	$0	$0	$0	$0
Invitations	$0	$0	$0	$0	$0
Programs	$0	$0	$0	$0	$0
Postage	$100	$0	$0	$0	$100
Telephone Calls	$300	$0	$0	$0	$300
Marketing (ad buys, radio, tv, web etc.)	$0	$0	$0	$0	$0
FOOD					

Catering - Seattle	$3,150	$3,150	$0	$0	$0
Facilities Rental	0	$0	$0	$0	$0
EVALUATION					
Consultant	$11,200	$13,600	$0	$0	$0
Materials	$1,000	$1,000	$0	$0	$0
OTHER EXPENSES					
Consulant/Nat'l Experts					
Travel - Air	$3,900	$3,900	$0	$0	$630
Travel - Hotel	$2,844	$2,844	$0	$0	$0
Travel - Per Diem	$1,278	$1,278	$0	$0	$0
Travel - Misc (car rental, parking, etc)	$1,500	$1,500	$0	$0	$250
Planning Members/Participants					
Travel - Air	$2,100	$2,100	$0	$0	$0
Travel - Hotel	$1,580	$1,580	$0	$0	$0
Travel - Per Diem	$1,420	$1,420	$0	$0	$0
Travel - Misc (mileage, rental, parking, etc)	$2,000	$2,000	$0	$0	$0
Supplies & Materials	$500	$0	$0	$0	$500
Rental	$0	$0	$0	$0	$0
AV Equipment	$0	$0	$0	$0	$0
TOTAL PROJECT BUDGET, YEAR 1	$45,607	$35,372	$0	$0	$13,515

			Estimated Costs
Personnel	Executive Director (.8 FTE)	$55,478 * 5% of time	$2,775
	Program Coordinator (1.0 FTE)	$49,056 * 10% of time	$4,906
	Pipeline Pgm Coordinator (.5 FTE)	$32,370 * 5% of time	$1,619
	Two Guest Speaker(s)	$250 per day * 2 persons at each meeting	$1,000
		Total Personnel	**$10,300**
Benefits (excludes Guest Speakers)	FICA	Salaries (above) $9,300 * 7.65%	$711
	Health Insurance	$800*12 months * percentage of time per	$1,584
	Workmen's Comp	Salaries (above) $9,300 * 1.00%	$93
	Unemployment Comp	Salaries (above) $9,300 * 0.50%	$47
		Total Benefits	**$2,435**
		Total Personnel & Benefits	**$12,735**

The Executive Director (ED) will provide oversight and coordination of the grant, manage the meetings, and assist in the development of the resource materials. This person will dedicate 5% of their .8 FTE during the grant cycle for this project.
The Program Coordinator will be responsible for grant management, reporting requirements, ensuring compliance with program requirements, assisting with day-of-event meeting management, and providing on-site assistance. This person will dedicate 10% of their 1.0 FTE during the grant cycle for this project.
The Pipeline Program Coordinator will be responsible for participating in the development of the resource materials. This person will dedicate 5% of their .5 FTE during the grant cycle for this project.
The Guest Speakers will be asked to participate as part of the event to discuss how their interaction with pipeline programs influenced their decision to pursue employment in the legal field.

Advertising	Postage	estimated	$100
	Telephone Calls	conference calls for program development including webinar	$300
		Total Advertising	**$400**

Funds are being allocated to cover the cost of postage needed to mail out any invites or follow-up information/materials.
Funds are being allocated for pre/post planning conference calls and webinars.

Food

Catering - Seattle	lunch per diem $21 * 75 participants * 2 sessions	$3,150
Facilities Rental	N/A	$0
	Total Food	**$3,150**

Funds are being allocated to cover the cost of lunch for stakeholder meeting participants. Two stakeholder meetings are anticipated. The estimates are based upon Washington State Office of Financial Management Lodging and Per Diem Rates and AOC Travel policies. The Washington State Bar Association has offered their offices for these stakeholder meetings.

Evaluation

Consultant	Per proposed contract w/Dr. Wendy Richardson $100 * 112 hrs	$11,200
Materials	Printing and Supplies (binders etc) for meeting materials	$1,000
	Total Evaluation Consultant	**$12,200**

Dr. Wendy Richardson, Consultant, provided a proposed Scope of Work including tasks such as preparing / conducting / observing / participating in stakeholder workshop sessions; reviewing/ designing/ implementing evaluations of stakeholder meetings and long-term outcomes; assisting with implementation of evaluation tools including drafting survey instrument, analyzing survey data or conducting focus groups; participating in stakeholder webinars; and identifying or creating evaluating tools to help stakeholders in accomplishing program goals.

Other Expenses

Travel - Air	Consultant & National Experts ($650 * 3 persons * 2 trips - estimated from the DC area)	$3,900
Travel - Hotel - Seattle	Consultant & National Experts ($158 per night * 3 persons * 3 nights * 2 trips)	$2,844
Travel - Per Diem - Seattle	Consultant & National Experts ($71 per day * 3 days * 3 persons * 2 trips)	$1,278
Travel - Misc (car rental, parking, shuttle/taxi, etc.)	Consultant & National Experts ($250 per person * 3 persons * 2 trips)	$1,500

Travel - Air	Planning Members/Participants ($210 * 5 members * 2 trips - estimated from Eastern Washington areas)	$2,100
Travel - Hotel - Seattle	Planning Members/Participants ($158 per night * 5 persons * 1 night * 2 trips)	$1,580
Travel - Per Diem - Seattle	Planning Members/Participants ($71 per day * 2 days * 5 persons * 2 trips - estimated from Eastern Washington areas)	$1,420
Travel - Misc (mileage, car rental, parking, shuttle/taxi, etc.)	Planning Members/Participants	$2,000
Supplies & materials	Supplies for meetings	$500
Rental	n/a	$0
AV Equipment	n/a	$0
	Total Other Expenses	**$17,122**

Air travel is estimated based on the DC area. Travel estimates are calculated based on Federal and Washington State Office of Financial Management Lodging and Per Diem Rates and AOC Travel policies.

Funds have been allocated to pay for the Consultant & National Experts to travel to the location to provide the training. Pre-planning meetings will be conducted via e-mail and/or conference calls to minimize the need for consultant/national experts travel prior to the stakeholder meetings.

Funds have been allocated to pay for in-state planning team members and/or other participants from across the state to attend the stakeholder meetings. Air and mileage estimates are based upon travel from the Spokane, Washington area.

Funds have been allocated to pay for printing of materials for use during the stakeholder meetings.

Total Estimated Costs **$45,607**

Tribal State Court Consortium

Tulalip and Snohomish County Superior Court Pilot Project
Truancy/Delinquency/Dependency
Scenarios for Discussion

Scenario #1:
A.Z. is a 15 year old tribal boy. He has been a ward of the Tribal Court since 2009 when he was removed from his mother's custody due to neglect and sexual abuse. In May 2011, A.Z. was charged with a sexual offense against a younger child relative and received a Special Sexual Offender Disposition Alternative through Snohomish County Juvenile Court. He will remain on juvenile court probation until he is nearly 18 years old and must register as sexual offender. As long as A.Z. doesn't violate his probation within that time frame, he is eligible to apply for waiver of sex offender registration as an adult.

A.Z. is currently placed in a B.R.S. foster home located outside of the reservation boundaries in Bremerton. His juvenile court case has been transferred to Kitsap County. Through an IEP, A.Z. receives special education services at his high school. Despite A.Z.'s past circumstances and existing restrictions, he maintains a positive attitude about life and strives to do well academically and socially. He maintains a bonded relationship with his twin sister whom he visits with weekly on the reservation; she is also placed in a foster home outside of the reservation boundaries. Additionally A.Z. desires to stay connected with his tribal culture.

Discussion Questions:

- What services can Tulalip supply and/or does Tulalip supply?
- What services can the County supply and/or does the County supply?

Scenario #2

Y. is a 14 year old tribal girl. She was declared a dependent youth by the Tribal Court in January 2013. However, she was also a dependent child when she was younger, which lead to guardianship with her maternal grandmother. B.Y. is a second generation dependency case. Her mother also grew-up as a dependent youth, in and out of parental care.

Last July, an officer was dispatched to the grandmother's residence because B.Y. was acting out by breaking the TV, punching holes in the wall, and threatening to hurt herself or one of her younger brothers. She was sent to the hospital with her grandmother for an evaluation. Following that incident, B.Y. engaged in a physical argument with her grandmother and the grandmother's boyfriend that resulted in the boyfriend being arrested for domestic violence and B.Y. returned as a ward of the court. B.Y. self-reports that she has tantrums and can't remember what happens when she has them. Until last year, B.Y. was enrolled in and sporadically attended individual mental health counseling.

B.Y. attends middle school. Last year, B.Y. was charged with making threats against her teacher. She is currently on probation and as a condition must be attending school regularly. However B.Y.'s school attendance record reflects many absences. Additionally, her younger brothers, ages 6 and 8, have received Becca Bill consultations.

Discussion Questions:

- What happens to the younger brothers if a petition is filed?
- What would Tulalip do if petitions were filed for the younger brothers?
- What information is the County going to receive if Becca petitions are filed for the younger brothers?
- What is the decision point for Tulalip and the County to communicate in these situations?
- Is there a minimum age when a child has to appear in court?

Scenario #3

W. is a 16 year old tribal boy (Colville). C.W. is the father of a new baby with a 19 year old mother. A dependency case was opened as to the baby in March 2013. C.W. and the respondent mother are together and both abuse substances. Tulalip law enforcement is familiar with C.W. C.W. has yet to really involve himself in reunifying with his son. He is alleged to be in a suboxone program in Marysville, however he admitted in Court during the adjudicatory hearing that he had used heroine recently. In addition, C.W.'s older sister has an open dependency on her three youngest children. The sister has also had other open dependency cases in the past.

C.W. has not attended school in some time; however, the exact time period is not known. One reliable community report is that C.W. has not attended school since 5th grade; he did not attend middle school and he may have briefly engaged in high school but not for long. He had behavioral issues in school including starting a fire, which resulted in suspension. C.W. has had an open Becca Bill petition since 2009 and a warrant was issued as of November 2012.

Discussion Questions:

- What can we do to help C.W.?

Scenario #4

D. is a 14 year old tribal girl. D.D. has been a Youth in Need of Care for nearly one year. She was brought into the dependency system because she was a constant runaway. She refused to go to school, used drugs, and associated with adults. The mother admitted that D.D. was out of her control. D.D. was sent to an inpatient treatment program out of state, and returned in November. Shortly after her return home, she ran away. When she was found, it was learned that she was pregnant after being statutorily raped. The Tribal Court ordered her to go to school, obey the rules of her placement, and remain clean and sober. D.D. ran away again. Within one week, the Court ordered a bench warrant. She was immediately found and transported that night to a secure CRC, then an inpatient treatment facility. While in treatment, D.D. missed a hearing date in Snohomish County Juvenile Court. D.D. is currently engaged in her treatment program, where she receives proper prenatal care, parenting classes, mental health therapy, and credit retrieval for school.

Discussion Questions:

- What services can Tulalip supply and/or does Tulalip supply?
- What services can the County supply and/or does the County supply?

STATE OF WASHINGTON
MINORITY AND JUSTICE COMMISSION

Date

Name
Address
City/State/Zip

Dear

On behalf of the Washington State Minority and Justice Commission, we are writing to explore whether we might have some common interest and goals and whether there might be areas of collaboration for our respective organizations.

As you may know, the Minority and Justice Commission was created by the Washington State Supreme Court in 1990. Our mission and purpose has been to determine whether racial and ethnic bias exists in the courts of the state of Washington and to eradicate it wherever possible. To that end, the Commission's focus areas and projects include:

- Education – improve the administration of justice by eliminating racism and its effects through offer and support of a variety of innovative, high quality education programs designed to improve the cultural and professional competence of judges, court employees, and other representatives of the Washington State Justice System.

- Outreach – facilitate communication between the Commission and the public; specifically, the legal and court communities of Washington State, concerning interaction with and participation in the justice system by minorities and persons of color.

- Research – design, fund, and conduct research projects relating to problems experienced by racial and ethnic minorities in the Washington State Justice System.

- Workforce Diversity – promote equal employment opportunities and seek to increase the number of racial and ethnic minorities employed at all levels of the judiciary.

Administrative Office of the Courts
Post Office Box 41170 ♦ Olympia, Washington 98501-1170
Telephone (360) 705-5290 ♦ Telefacsimile (360) 956-5700
Website: www.courts.wa.gov

Because we believe that collaboration between our organizations might greatly benefit the legal community and help ensure that each of our organizations can more efficiently accomplish its stated goals, members of our Commission would like to meet with you to discuss how best we can collaborate in the future. Such collaboration will enable us to share expertise and lessons learned.

As an initial step, we would love to hear more about your organization and upcoming projects. If you have any interest please email Pam Dittman at pam.dittman@courts.wa.gov and provide us with some preliminary information about your priorities or areas where we might collaborate.

Thank you for your ongoing efforts to improve the justice system in Washington State. We look forward to working with you.

Sincerely,

Justice Charles Johnson
Co-Chair Minority and Justice Committee

Judge Mary Yu
Co-Chair Minority and Justice Committee

The New York Times

April 8, 2013

No Lawyer for Miles, So One Rural State Offers Pay

By ETHAN BRONNER

Matthew Staver for The New York Times

South Dakota's chief justice, David E. Gilberston, with a sign he had made. He foresees a "grim future" with scarce legal services.

MARTIN, S.D. — Rural Americans are increasingly without lawyers even as law school graduates are increasingly without jobs. Just 2 percent of small law practices are in rural areas, where nearly a fifth of the country lives, recent data show.

Here in Bennett County, which is situated between Indian reservations on the Nebraska border, Fredric Cozad is retiring after 64 years of property litigation, school board disputes, tax cases and homicides with no one to take his place. When he hung out his shingle he was one of half a dozen lawyers here. Now there is not a working attorney for 120 miles.

"A hospital will not last long with no doctors, and a courthouse and judicial system with no lawyers faces the same grim future," South Dakota's chief justice, David E. Gilbertson, said. "We face the very real possibility of whole sections of this state being without access to legal services."

In South Dakota, 65 percent of the lawyers live in four urban areas. In Georgia, 70 percent are in the Atlanta area. In Arizona, 94 percent are in the two largest counties, and in Texas, 83

percent are around Houston, Dallas, Austin and San Antonio. Last summer, the American Bar Association called on federal, state and local governments to stem the decline of lawyers in rural areas.

Last month, South Dakota became the first state to heed the call. It passed a law that offers lawyers an annual subsidy to live and work in rural areas, like the national one that doctors, nurses and dentists have had for decades.

Such moves follow a growing call for legal education to model itself on medical training to increase practical skills and employability. They also come amid intense debate on the future of the legal profession, and concerns about a possible glut of lawyers. In the past two years, only about 55 percent of law school graduates, many with large student loans to repay, have found full-time jobs as lawyers.

"In some areas we probably do have an oversupply of lawyers, but in others we have a chronic undersupply, and that problem is getting worse," said David B. Wilkins, who directs a program on the legal profession at Harvard Law School. "In the 1970s, lawyers spent about half their time serving individuals and half on corporations. By the 1990s, it was two-thirds for corporations. So there has been a skewing toward urban business practice and neglect of many other legal needs."

Data from LexisNexis showed that in 2012, firms with fewer than 50 lawyers were heavily concentrated in urban and suburban areas, with only 2 percent in rural regions.

In June at the annual Jackrabbit Bar Conference, for which delegates from South Dakota and similar states like Nevada, Montana and Wyoming will gather near Mount Rushmore, the new South Dakota law is expected to be high on the agenda.

The South Dakota model has also drawn interest in Iowa, where the 33 counties with the smallest populations, among 99 over all, contain fewer than 4 percent of the state's lawyers.

"I sent it to our legislators," Philip L. Garland, chairman of the state bar association's rural practice committee and a lawyer in Garner, Iowa, said of the South Dakota law. Thirty years ago, he said, there were a dozen lawyers in his area. Now there are seven, none of them young.

Last year, the Iowa State Bar Association began encouraging law students to spend summers in rural areas in the hope they might put down roots. In Nebraska, the bar association organized rural bus tours for law students for the first time this year.

Here in South Dakota, Mr. Cozad, who is 86 and came as a boy with his homesteader parents from Iowa, said he had never imagined that younger lawyers would not follow him. Sitting in his modest paneled office, the shelves groaning under aging legal volumes, he said: "The needs of the people are still there. There is plenty of work and opportunity."

That was evident on the day court was in weekly session in this town of 1,100. The lunch place at the Martin Livestock Auction, where 1,000 head of cattle had been sold the previous day, included a table of lawyers, the ones in suits, ties and no hats. All had driven more than two hours from Rapid City and Pierre, paid by Bennett County, which also pays to transport prisoners 100 miles away because it has no functioning jail.

"Between sending out prisoners to Winner and bringing in lawyers and judges, we are breaking the county budget," said Rolf Kraft, chairman of the County Board of Commissioners.

The new law to lure lawyers passed partly because it requires the rural counties and the bar association to contribute to the subsidy before the state pays. Mr. Kraft said the law seemed good, but he worried about finding the money for his county's share and rental properties for young lawyers.

Mayor Gayle Kocer said that landowners in Martin — 42 miles from the site of the Wounded Knee massacre and home to wild turkeys and antelopes, winter wheat and millet — required lawyers for deeds, wills, sales and disputes.

"We need lawyers," she said. "Our state attorney drives down from Rapid City. It's crazy. We haven't had a full-time city attorney in years. For any legal issue, we have to look out of town."

Carla Sue Denis, a drug-rehabilitation counselor in town — addiction is a raging problem — said people seeking a divorce and other legal matters sometimes consulted her since she knew how to do research on the Internet and download forms.

Thomas C. Barnett Jr., executive director of the State Bar of South Dakota, said lawyers serve their towns not only through their professional work but also on school and community boards. He said that in contrast to an earlier era, law graduates seemed increasingly drawn to urban life for the better shopping and dining as well as job opportunities for their spouses. In addition, he said, young graduates need mentors.

But Mr. Barnett, like Chief Justice Gilbertson, said the possibilities for satisfying and highly varied legal work were especially great in rural areas. And the plan is to set up new rural lawyers with mentors and help spouses find work.

The new law, which will go into effect in June, requires a five-year commitment from the applicant and sets up a pilot program of up to 16 participants. They will receive an annual subsidy of $12,000, 90 percent of the cost of a year at the University of South Dakota Law School.

This compares with a 40-year-old federal medical program, the National Health Service Corps, which offers up to $60,000 in tax-free loan repayment for two years of service in underserved areas and up to $140,000 for five years of service. The program consists of nearly 10,000 medical, dental and mental health professionals serving 10.4 million people, almost half in rural communities.

A spokesman for the federal program said research had shown that residents who train in rural settings are two to three times more likely than urban graduates to practice in rural areas.

"The health care model is unbelievably subsidized, and while I favor finding some version of it for legal needs, it is never going to be ratcheted up to that level," Professor Wilkins of Harvard said. "We should think more about public-private partnerships and loosening up some of the restrictions on law practice without junking them all. What we need now is experimentation, like what is happening in South Dakota."

This article has been revised to reflect the following correction:

Correction: April 9, 2013

An earlier version of this article incorrectly attributed a statement in the final paragraph to Philip L. Garland, chairman of the state bar association's rural practice committee and a lawyer in Garner, Iowa. It was Professor David B. Wilkins, who directs a program on the legal profession at Harvard Law School, who made the statement.

SEATTLE PI

Report: Ohio courts illegally jailing the poor

By ANDREW WELSH-HUGGINS, AP Legal Affairs Writer

Updated 3:46 pm, Thursday, April 4, 2013

COLUMBUS, Ohio (AP) — Several courts in Ohio are illegally jailing people because they are too poor to pay their debts and often deny defendants a hearing to determine if they're financially capable of paying what they owe, according to an investigation released Thursday by the Ohio chapter of the American Civil Liberties Union.

The ACLU likens the problem to modern-day debtors' prisons. Jailing people for debt pushes poor defendants farther into poverty and costs counties more than the actual debt because of the cost of arresting and incarcerating individuals, the report said.

"The use of debtors' prison is an outdated and destructive practice that has wreaked havoc upon the lives of those profiled in this report and thousands of others throughout Ohio," the report said.

Chief Justice Maureen O'Connor of the Ohio Supreme Court, responding to the ACLU's request to take action, promised to review the findings. O'Connor told the group in a letter Wednesday: "you do cite a matter that can and must receive further attention." The report says courts in Huron, Cuyahoga, and Erie counties are among the worst offenders.

Among the report's findings:

— In the second half of last year, more than one in every five of all bookings in the Huron County jail — originating from Norwalk Municipal Court cases — involved a failure to pay fines.

— In suburban Cleveland, Parma Municipal Court jailed at least 45 defendants for failure to pay fines and costs between July 15 and August 31, 2012.

— During the same period, Sandusky Municipal Court jailed at least 75 people for similar charges.

Judge Deanna O'Donnell of Parma Municipal Court said Thursday the court was unaware of the issue until contacted earlier this week by the ACLU. She said officials were examining the 45 cases in question.

"If there's an issue here, a problem, we're going to correct it," O'Donnell said.

Messages left for Norwalk and Sandusky municipal court officials Thursday weren't immediately returned. The ACLU also sent letters to officials at Bryan, Richland County and Hamilton County municipal courts and Springboro Mayor's Court.

ACLU spokesman Mike Brickner said the group believes the practice is widespread in Ohio.

The report is a follow-up to a national 2010 report that focused on Georgia, Louisiana, Michigan, Ohio and Washington.

That report determined that many courts are violating a 1983 U.S. Supreme Court decision that courts had to hold a hearing to determine why people are unable to pay before sentencing them to incarceration.

"The report shows how, day after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage," according to the 2010 report, 'In For a Penny: The Rise of America's New Debtors' Prisons.'

"In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them," the report said.

A similar 2010 report by New York University's Brennan Center for Justice looked at the growth of court fees in Florida. It concluded, in part, that the "current fee system creates a self-perpetuating cycle of debt for persons re-entering society after incarceration."

Courts are breaking the law by holding defendants in contempt of court for failing to pay fines without proper notice or allowing an attorney to be present, the report said. Courts are also issuing arrests warrants for people who fail to show up and pay their fines and jailing defendants who are too poor to pay, according to the report.

Court costs should be recovered through civil lawsuits, not jail time, the report said.

Opening Up, Students Transform a Vicious Circle

By Patricia Leigh Brown

The New York Times

Published: April 3, 2013

OAKLAND, Calif. - Jameelah Garry, 18, wiped tears from her eyes as she talked with Mr. Butler about the shooting death of her 16-year old brother, Charles.

"My daddy got arrested this morning," Mercedes Morgan, a distraught senior, told the students gathered there.

Mr. Butler's mission is to help defuse grenades of conflict at Ralph J. Bunche High School, the end of the line for students with a history of getting into trouble. He is the school's coordinator for restorative justice, a program increasingly offered in schools seeking an alternative to "zero tolerance" policies like suspension and expulsion.

The approach now taking root in 21 Oakland schools, and in Chicago, Denver and Portland, Ore., tries to nip problems and violence in the bud by forging closer, franker relationships among students, teachers and administrators. It encourages young people to come up with meaningful reparations for their wrongdoing while challenging them to develop empathy for one another through "talking circles" led by facilitators like Mr. Butler.

Even before her father's arrest on a charge of shooting at a car, Mercedes was prone to anger. "When I get angry, I blank out," she said. She listed some reasons on a white board — the names of friends and classmates who lost their lives to Oakland's escalating violence. Among them was Kiante Campbell, a senior shot and killed during a downtown arts festival in February. His photocopied image was plastered around Mr. Butler's room, along with white roses left from a restorative "grief circle."

Restorative justice adopts some techniques of the circle practice that is a way of life for indigenous cultures, fostering collaboration. Students speak without interruption, for example, to show mutual respect.

"A lot of these young people don't have adults to cry to," said Be-Naiah Williams, an after-school coordinator at Bunche whose 21-year-old brother was gunned down two years ago in a nightclub. "So whatever emotion they feel, they go do."

Oakland expanded the program after an initial success six years ago. Since then, the need for an alternative discipline has become more urgent: Last year, the district faced a Department of Education civil rights investigation into high suspension and expulsion rates, particularly among African-American boys.

A report by the Urban Strategies Council, a research and policy organization in Oakland, showed that African-American boys made up 17 percent of the district's enrollment but 42 percent of all suspensions, and were six times more likely to be suspended than their white male classmates. Many disciplinary actions were for "defiance" — nonviolent infractions like texting in class or using profanity with a teacher.

A body of research indicates that lost class time due to suspension and expulsion results in alienation and often early involvement with the juvenile justice system, said Nancy Riestenberg, of the Minnesota Department of Education, an early adopter of restorative justice. Being on "high alert" for violence is not conducive to learning, she added.

Many studies have concluded that zero-tolerance policies do not make schools safer.

"We're a terribly violent community," said Junious Williams, the chief executive of the Urban Strategies Council. "We have not done very much around teaching kids alternatives to conflict that escalates into violence."

Among the lost youngsters was Damon Smith, now an A student at Bunche, who said he had been suspended more than 15 times. "You start thinking it's cool," he said. "You think you're going to come back to school and catch up, but unless you're a genius you won't. It made me want to mess up even more."

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In one circle, students discussed racism. In another, a girl confided that she had been molested as a child. "Those boys who looked scary wrapped their arms around this girl," Mr. Butler said. "That's what's missing for our kids. It's harder to fight people you feel a closeness to."

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"If your kid was in this situation, what advice would you give her?" Mr. Butler asked gently.

Jameelah went silent, then said, "I got an anger problem, I'll be honest with you." She started to cry, tears welling up on glue-on eyelashes. "I lost my brother last year," she said. "Charles. He was shot in the head after an altercation in East Oakland."

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Betsye Steele, the principal, said that without the circle, and the trust it developed, the major source of Jameelah's bad behavior would not have been discovered and might have escalated.

Since the program started, the school reduced its overall suspension rate to 8 percent in 2012 from 12 percent in 2011.

But restorative justice is not a quick fix, teachers' union officials and legal experts warn. "You're changing a culture that has been in place for a long time," said Mary Louise Frampton, an adjunct law professor at the University of California, Berkeley. "It's a multiyear process."

It is also not a treatment for mental illness or ideal for situations with major power imbalances, like bullying, said Barbara McClung, the district's coordinator for behavior health initiatives. "Not every student will acknowledge they caused harm," she added.

Approaches to restorative justice vary nationwide. Some districts allow suspensions and expulsions but now require stricter justification. Others, under pressure to reduce suspensions, put students on "administrative leave" instead. Some schools focus on formal mediation and reparation while others, like Bunche, are more spontaneous.

A recent circle at Bunche for Jeffrey, who was on the verge of expulsion for habitual vandalism, included an Oakland police officer, and the conversation turned to the probability that Jeffrey would wind up incarcerated or on the streets. The student had told Mr. Butler that he was being pressured to join a gang.

"Cat, you got five people right now invested in your well-being," Mr. Butler told him. "This is a matter of life or death." Jeffrey agreed to go to Mr. Butler's classroom every day at third period to do his schoolwork.

Mr. Butler, who grew up in a vast segregated housing project in New Orleans, knows the urge for retribution: Two years ago, his sister was murdered by her boyfriend. "I wanted my quart of blood," he told students disturbed by Kiante Campbell's death.

Then the boyfriend's mother showed up, seeking forgiveness. "This brave little woman knocked on the door in her robe and flip-flops," he told his classroom. "The want for revenge in my stomach lifted."

Keeping students in school, focused on the future, is at the core of his work. So every Friday afternoon he tells them: "Y'all gotta come back Monday. Come back. I gotta see you."
"We're all we've got," he said. "And we need to start thinking that way."

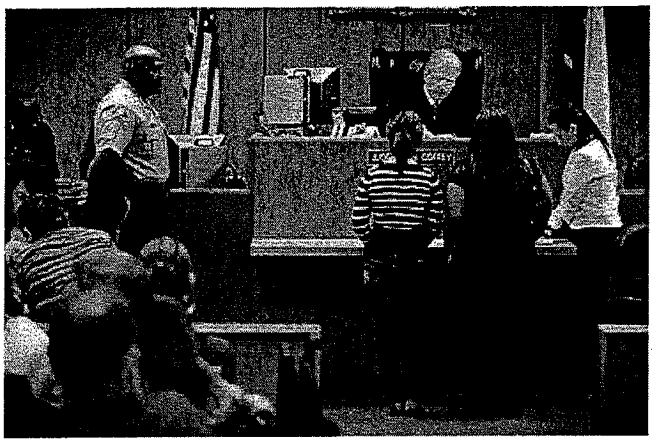
A version of this article appeared in print on April 4, 2013, on page A13 of the New York edition with the headline: Students Find Opening Up Transforms Vicious Circle.

The New York Times

April 12, 2013

With Police in Schools, More Children in Court

By ERIK ECKHOLM



Hundreds of thousands of students are arrested or given criminal citations at schools each year. Above, a court in Baytown, Texas.

HOUSTON — As school districts across the country consider placing more police officers in schools, youth advocates and judges are raising alarm about what they have seen in the schools where officers are already stationed: a surge in criminal charges against children for misbehavior that many believe is better handled in the principal's office.

Since the early 1990s, thousands of districts, often with federal subsidies, have paid local police agencies to provide armed "school resource officers" for high schools, middle schools and sometimes even elementary schools. Hundreds of additional districts, including those in Houston, Los Angeles and Philadelphia, have created police forces of their own, employing thousands of sworn officers.

Last week, in the wake of the Newtown, Conn., shootings, a task force of the National Rifle Association recommended placing police officers or other armed guards in every school. The White House has proposed an increase in police officers based in schools.

The effectiveness of using police officers in schools to deter crime or the remote threat of armed intruders is unclear. The new N.R.A. report cites the example of a Mississippi assistant principal who in 1997 got a gun from his truck and disarmed a student who had killed two classmates, and another in California in which a school resource officer in 2001 wounded and arrested a student who had opened fire with a shotgun.

Yet the most striking impact of school police officers so far, critics say, has been a surge in arrests or misdemeanor charges for essentially nonviolent behavior — including scuffles, truancy and cursing at teachers — that sends children into the criminal courts.

"There is no evidence that placing officers in the schools improves safety," said Denise C. Gottfredson, a criminologist at the University of Maryland who is an expert in school violence. "And it increases the number of minor behavior problems that are referred to the police, pushing kids into the criminal system."

Nationwide, hundreds of thousands of students are arrested or given criminal citations at schools each year. A large share are sent to court for relatively minor offenses, with black and Hispanic students and those with disabilities disproportionately affected, according to recent reports from civil rights groups, including the Advancement Project, in Washington, and the NAACP Legal Defense and Educational Fund, in New York.

Such criminal charges may be most prevalent in Texas, where police officers based in schools write more than 100,000 misdemeanor tickets each year, said Deborah Fowler, the deputy director of Texas Appleseed, a legal advocacy center in Austin. The students seldom get legal aid, she noted, and they may face hundreds of dollars in fines, community service and, in some cases, a lasting record that could affect applications for jobs or the military.

In February, Texas Appleseed and the Brazos County chapter of the N.A.A.C.P. filed a complaint with the federal Education Department's Office for Civil Rights. Black students in the school district in Bryan, they noted, receive criminal misdemeanor citations at four times the rate of white students.

Featured in the complaint is De'Angelo Rollins, who was 12 and had just started at a Bryan middle school in 2010 when he and another boy scuffled and were given citations. After repeated court appearances, De'Angelo pleaded no contest, paid a fine of $69 and was sentenced to 20 hours of community service and four months' probation.

"They said this will stay on his record unless we go back when he is 17 and get it expunged," said his mother, Marjorie Holmon.

Federal officials have not yet acted, but the district says it is revising guidelines for citations. "Allegations of inequitable treatment of students is something the district takes very seriously," said Sandra Farris, a spokeswoman for the Bryan schools.

While schools may bring in police officers to provide security, the officers often end up handling discipline and handing out charges of disorderly conduct or assault, said Michael Nash, the presiding judge of juvenile court in Los Angeles and the president of the National Council of Juvenile and Family Court Judges.

"You have to differentiate the security issue and the discipline issue," he said. "Once the kids get involved in the court system, it's a slippery slope downhill."

Mo Canady, the executive director of the National Association of School Resource Officers, defended placing police officers in schools, provided that they are properly trained. He said that the negative impacts had been exaggerated, and that when the right people were selected and schooled in adolescent psychology and mediation, both schools and communities benefited.

"The good officers recognize the difference between a scuffle and a true assault," Mr. Canady said.

But the line is not always clear. In New York, a lawsuit against the Police Department's School Safety Division describes several instances in which officers handcuffed and arrested children for noncriminal behavior.

Many districts are clamoring for police officers. "There's definitely a massive trend toward increasing school resource officers, so much so that departments are having trouble buying guns and supplies," said Michael Dorn, director of Safe Havens International, in Macon, Ga., a safety consultant to schools.

One district in Florida, Mr. Dorn said, is looking to add 130 officers, mainly to patrol its grade schools. McKinney, Tex., north of Dallas, recently placed officers in its five middle schools.

Many judges say school police officers are too quick to make arrests or write tickets.

"We are criminalizing our children for nonviolent offenses," Wallace B. Jefferson, the chief justice of the Supreme Court of Texas, said in a speech to the Legislature in March.

School officers in Texas are authorized to issue Class C misdemeanor citations, which require students to appear before a justice of the peace or in municipal court, with public records.

The process can leave a bitter taste. Joshua, a ninth grader who lives south of Houston, got into a brief fight on a school bus in November after another boy, a security video showed, hit him first. The principal called in the school's resident sheriff, who wrote them both up for disorderly conduct.

"I thought it was stupid," Joshua said of the ticket and his need to miss school for two court appearances. His guardian found a free lawyer from the Earl Carl Institute, a legal aid group at Texas Southern University, and the case was eventually dismissed.

Sarah R. Guidry, the executive director of the institute, said that when students appeared in court with a lawyer, charges for minor offenses were often dismissed. But she said the courts tended to be "plea mills," with students pleading guilty in the hope that, once they paid a fine and spent hours cleaning parks, the charges would be expunged. If students fail to show up and cases are unresolved, they may be named in arrest warrants when they turn 17.

In parts of Texas, the outcry from legal advocates is starting to make a difference. Jimmy L. Dotson, the chief of Houston's 186-member school district force, is one of several police leaders working to redefine the role of campus officers.

Perhaps the sharpest change has come to E. L. Furr High School, which serves mainly low-income Hispanic children on the city's east side. Bertie Simmons, 79, came out of retirement 11 years ago to try to turn around a school so blighted by gang violence that it dared not hold assemblies.

"The kids hated the school police," said Ms. Simmons, the principal. They arrested two or three students a day and issued tickets to many more.

Ms. Simmons searched for officers who would work with the students and build trust. She found them in Danny Avalos and Craig Davis, former municipal police officers who grew up in rough neighborhoods, and after years of effort, the campus is peaceful and arrests and tickets are rare. Discipline is usually enforced by a principal's court with student juries, not summonses to the criminal courts.

"Writing tickets is easy," Officer Avalos said. "We do it the hard way, talking with the kids and coaching them."

With new guidelines and training, ticketing within the Houston schools was reduced by 60 percent in one year. Citations for "disruption of classes," for example, fell to 124 between September and February, from 927 in the same period last year.

"Our role is not to be disciplinarians," Chief Dotson said in an interview. "Our purpose is to push these kids into college, not into the criminal justice system."

The New York Times

April 3, 2013

Opening Up, Students Transform a Vicious Circle

By PATRICIA LEIGH BROWN

OAKLAND, Calif. — There is little down time in Eric Butler's classroom.

"My daddy got arrested this morning," Mercedes Morgan, a distraught senior, told the students gathered there.

Mr. Butler's mission is to help defuse grenades of conflict at Ralph J. Bunche High School, the end of the line for students with a history of getting into trouble. He is the school's coordinator for restorative justice, a program increasingly offered in schools seeking an alternative to "zero tolerance" policies like suspension and expulsion.

The approach now taking root in 21 Oakland schools, and in Chicago, Denver and Portland, Ore., tries to nip problems and violence in the bud by forging closer, franker relationships among students, teachers and administrators. It encourages young people to come up with meaningful reparations for their wrongdoing while challenging them to develop empathy for one another through "talking circles" led by facilitators like Mr. Butler.

Even before her father's arrest on a charge of shooting at a car, Mercedes was prone to anger. "When I get angry, I blank out," she said. She listed some reasons on a white board — the names of friends and classmates who lost their lives to Oakland's escalating violence. Among them was Kiante Campbell, a senior shot and killed during a downtown arts festival in February. His photocopied image was plastered around Mr. Butler's room, along with white roses left from a restorative "grief circle."

Restorative justice adopts some techniques of the circle practice that is a way of life for indigenous cultures, fostering collaboration. Students speak without interruption, for example, to show mutual respect.

"A lot of these young people don't have adults to cry to," said Be-Naiah Williams, an after-school coordinator at Bunche whose 21-year-old brother was gunned down two years ago in a nightclub. "So whatever emotion they feel, they go do."

Oakland expanded the program after an initial success six years ago. Since then, the need for an alternative discipline has become more urgent: Last year, the district faced a Department of Education civil rights investigation into high suspension and expulsion rates, particularly among African-American boys.

A report by the Urban Strategies Council, a research and policy organization in Oakland, showed that African-American boys made up 17 percent of the district's enrollment but 42 percent of all suspensions, and were six times more likely to be

suspended than their white male classmates. Many disciplinary actions were for "defiance" — nonviolent infractions like texting in class or using profanity with a teacher.

A body of research indicates that lost class time due to suspension and expulsion results in alienation and often early involvement with the juvenile justice system, said Nancy Riestenberg, of the Minnesota Department of Education, an early adopter of restorative justice. Being on "high alert" for violence is not conducive to learning, she added.

Many studies have concluded that zero-tolerance policies do not make schools safer.

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Editorial: Business dealings no place for personal bias
The Spokesman-Review
April 11, 2013

The legal ramifications for active opponents of gay marriage were bound to arise at some point, so it shouldn't be surprising to see the state attorney general's office sue a Richland florist for refusing to sell flowers to a gay couple planning a wedding.

According to the state's lawsuit, Robert Ingersoll, a gay man who had been a customer of the shop for nine years, asked about buying flowers for his wedding. Baronelle Stutzman, who is the owner of the shop, refused to supply the flowers, citing her "relationship with Jesus Christ."

The couple posted information about this episode on Facebook, and when Attorney General Bob Ferguson learned of it, he decided he had to uphold state law.

The lawsuit, filed in Benton County Court, alleges violations of the Unfair Practices-Consumer Protection Act (RCW 19.86). Ferguson told The Spokesman-Review editorial board that his office chose that statute because human rights violations are typically handled by the state Human Rights Commission.

Whatever the statute, the fact that the couple were discriminated against based on sexual orientation is a critical factor. Ferguson put it succinctly in a press release: "If a business provides a product or service to opposite-sex couples for their weddings, then it must provide same-sex couples the same product or service."

The attorney general's office sent a letter to Stutzman informing her of the violation. It followed up with a phone call, giving her an opportunity to comply with the law and head off legal action. Instead, she hired a lawyer.

So this will be hashed about in Benton County Superior Court, and possibly the appellate courts. That's fine, because other business owners are probably tempted to take a similar stand, and they need to know how the law will be applied and the consequences of any violations. In this case, it's potentially $2,000 per violation. But this consumer protection lawsuit does not preclude the couple from filing their own lawsuit. The Human Rights Commission could take action, too.

In a state that's adopted gay marriage, along with laws barring discrimination based on sexual orientation, it ought to be clear: Attempts to refuse service based on religious or personal views are not acceptable.

Critics of this lawsuit will complain that Stutzman is being punished for her beliefs, but that isn't the case. She can still profess and maintain her beliefs and not violate any law. It's her decision to act on those beliefs by discriminating that is at issue. Her case is similar to those that arose after civil rights laws were adopted and business owners still refused to serve African-Americans.

The best course is to mind your own business when it comes to the race, religion, age and sexual orientation of your customers. If you just can't do that, you're in the wrong line of work.

ARTICLES

RACIAL CRITIQUES OF MASS INCARCERATION: BEYOND THE NEW JIM CROW

JAMES FORMAN, JR.*

In the last decade, a number of scholars have called the American criminal justice system a new form of Jim Crow. These writers have effectively drawn 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 consider 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.

 I would like to thank the following people for their comments: Michelle Alexander, the late Derrick Bell, Richard Banks, Rachel Barkow, Oscar Chase, David Cole, Alec Ewald, David Garland, Marty Guggenheim, Kristin Henning, Randy Hertz, Randall Kennedy, Greg Klass, Marc Mauer, Jean Koh Peters, Claire Priest, Constancia Romilly, Adam Samaha, Giovanna Shay, Loïc Wacquant, and the participants at faculty workshops at Georgetown University Law Center, NYU Law School, and Yale Law School. I would especially like to thank Arthur Evenchik, whose comments on multiple drafts have improved this Article immeasurably. I received invaluable research assistance from Greger Calhan, Mike Knobler, Kristin Lang, Katie Mesner-Hage, Emma Simson, Sarah Tallman, the staff of the Edward Bennett Williams Library at Georgetown University Law Center, and the staff of the Lillian Goldman Law Library at Yale Law School. This Article builds on James Forman, Jr., *Harm's Way: Understanding Race and Punishment*, BOSTON REVIEW, Jan.–Feb. 2011, at 55.

INTRODUCTION

In the five decades since African 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 jailer[3] and its 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, an emerging group of scholars and advocates has highlighted the issue with a provocative claim: They argue that our growing penal system, with its black tinge, constitutes nothing less than a new form of Jim Crow. This Article examines the 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 opportunities in life have been permanently diminished by the loss of citizenship rights and the stigma they suffer as convicted offenders. It highlights how ostensibly race-neutral criminal

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[1] 397 U.S. 483 (1954). 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 ET AL., 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 are 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/wppl-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).

[4] 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, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 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 modified 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).

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, by highlighting the role of politicians seeking to exploit racial fears while minimizing other social factors, oversimplifies the origins of mass incarceration.[6] Part IV demonstrates that the analogy has too little to say about black attitudes toward 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 that violence destroys so many lives in low-income black communities and 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 address a question that arose when I began presenting versions of this Article to readers familiar with my own opposition to our nation's overly punitive criminal justice system. As an academic, I have written extensively about the toll that mass incarceration has taken on the African American community, and especially on young people in that community.[7] I am also a former public

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[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 generally* James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 150, 151 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter Forman, Jr., *Racial Profiling*] (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) [hereinafter Forman, Jr., *Community Policing*] (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) [hereinafter Forman, Jr., *Exporting Harshness*] (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) [hereinafter Forman, Jr., *Mass Incarceration*] (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).

defender who co-founded a school that educates young people who have been involved with the juvenile justice system.[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 have drawn 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 recognize some of the signal contributions of the New Jim Crow writers, especially 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 single out Michelle Alexander's contribution to the literature because her elaboration of the argument is the most comprehensive and persuasive to date.[9]

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 more often than we disagree, the disagreements matter. I believe that the Jim Crow analogy neglects some important truths and must be criticized in the service of truth. I also believe that we who seek to counter mass incarceration will be hobbled in our efforts if we misunderstand its causes and consequences in the ways that the Jim Crow analogy invites us to do. In Part V, for example, I note that the New Jim Crow writers encourage us to view mass incarceration as exclusively (or overwhelmingly) 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.[10] 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. The idea that the Jim Crow analogy leads to a distorted view of mass incarceration—and therefore hampers our ability to challenge it effectively—is the central theme of this Article.

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[8] *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, 283–85 (Nancy E. Dowd ed., 2011) (discussing an effort to improve a school within a juvenile justice facility).

[9] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[10] SABOL ET AL., *supra* note 1, 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:

> 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.[11]

Buckman and Lamberth argued that racial profiling was a byproduct of the nation's strategy to combat drugs,[12] 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."[13] Graham Boyd, who led the ACLU's Drug Policy Litigation Unit, made a similar claim in 2002:

> 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 replicating the institutions and repressions of the plantation . . . .[14]

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 University Beasley School of Law hosted a symposium entitled, *U.S. Drug Laws: The New Jim Crow?*, which featured a series of lectures and articles supporting the analogy.[15]

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

[12] *See id.* ("Around the nation Jim Crow exists as a by-product of a 'War on Drugs' spun out of control.").

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

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

[15] *See generally* Symposium, *U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 303 (2001). During this same period, Berkeley sociologist Loïc Wacquant argued that the penal system was the latest form of racial subjugation in America—before it came slavery, Jim Crow, and the urban ghetto. 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." Loïc Wacquant, *Deadly Symbiosis: When Ghetto and*

The Jim Crow analogy has gained adherents in the past decade[16]—most prominently, Michelle Alexander in her recent book, *The New Jim 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

Prison Meet and Mesh, *in* MASS IMPRISONMENT, *supra* note 6, at 83 [hereinafter Wacquant, *Deadly Symbiosis*]. Wacquant's work is cited extensively by advocates of the New Jim Crow thesis. *See, e.g.*, ALEXANDER, *supra* note 9, at 22, 26, 94, 102 (citing Wacquant). However, Wacquant himself rejects the Jim Crow analogy. Loïc Wacquant, Not the New Jim Crow: Class, Race, and the Prison Boom After the Implosion of the Ghetto (Aug. 20–23, 2011) (unpublished manuscript) (on file with author).

[16] *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 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 . . . form of social exclusion . . . 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, *supra* note 6, at 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 reimplementation 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.").

ways, but it really doesn't help to make such an absurd comparison. People will just think you're crazy."[17] Over the years, however, she has come to believe that the flyer was right. "Quite belatedly, 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."[18]

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,[19] 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, as people with criminal records are permanently locked out of civil society.

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 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 a conviction's consequences. Depending on the state and the offense, a person convicted of a crime today might lose his right to vote[20] as well as the right to serve on a jury.[21] He might become ineligible

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17 ALEXANDER, *supra* note 9, at 3.

18 *Id.* at 4.

19 *See* 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). *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).

20 All states, except for Maine and Vermont, and the District of Columbia place some restrictions on felon voting rights. *See* VT. STAT. ANN. tit. 17, § 2121 (2002) (making no exception of voter 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

for health and welfare benefits,[22] food stamps,[23] public housing,[24] student

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 permanently deny the right to vote 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).

[21] 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 persons' 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) (West 1997) (excluding convicted felons from jury service until the 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 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).

[22] Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act, a welfare law enacted in 1996, 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 the ban 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 the distribution or manufacture of drugs 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).

[23] 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

loans,[25] and certain types of employment.[26]

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., *After Prison: Roadblocks to Reentry*, LAC.ORG, http://lac.org/roadblocks-to-reentry/main.php?view=law&subaction=7 (last visited Oct. 4, 2011). 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.* (listing state policies on banning food stamps to individuals convicted of drug felonies).

[24] 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(l)(6) (2006); *see also* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (holding that 42 U.S.C. § 1437d(l)(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).

[25] 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, § 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., *supra* note 23. 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).

These restrictions exact a terrible toll. Given that most offenders *already* come from backgrounds of tremendous disadvantage, 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[27] today becomes a member of a stigmatized caste, condemned to a lifetime of second-class citizenship.[28]

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[26] 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 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 a 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 (2007) (summarizing state licensing laws).

[27] In some cases the disabilities attach even without a conviction. As Alec Ewald explains, "several of the most serious collateral consequences—including deportation, eviction, temporary loss of custody of one's children, and job suspension—are routinely imposed not only on misdemeanants but also on people arrested or charged." Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 77, 81 (Austin Sarat et al. eds., 2011).

[28] *See* ALEXANDER, *supra* note 9, at 139–40 (describing the possible collateral consequences that await ex-offenders). 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

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.[29] Intense police surveillance of black youths becomes accepted practice.[30] Their misbehavior in school is reported to the police and leads to juvenile court.[31] Employers are reluctant to hire them.[32] Thus, even young, low-income 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

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 25 (describing the amendments to the HEA). In addition, since the Personal Responsibility and Work Opportunity Reconciliation Act was passed in 1996, thirty-nine states and the District of Columbia have either 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 22–23 and accompanying text (detailing state laws which modify the federal ban).

29 *See* Forman, Jr., *Community Policing*, *supra* note 7 at 22–25 (2004) (describing the misleading theme of inner city youth as "super-predators").

30 *Id.* at 20–21 (explaining that black youths are significantly more likely to be disrespected, illegally searched, and have force used against them when stopped by police); *see also* 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 of Hispanic and white men in the same age group), *available at* http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf; 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); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 338–39 (2004) (finding that suspects under thirty were subjected to a significantly greater number of unconstitutional searches); 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").

31 *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).

32 *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).

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,[33] 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.[34] 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.[35]

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? In stating my objections, I do not mean to suggest that mass incarceration is anything less than a profound social ill, or that racial disparity, racial indifference, and even outright racial animus in the criminal justice system are yesterday's concerns. Nor do I argue that the Jim Crow analogy fails because mass incarceration is not *exactly* the same as Jim Crow. After all, the best of the New Jim Crow writers—especially Alexander—acknowledge important differences between the two racial caste systems.[36]

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[33] *See generally* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004) (describing the 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 A. 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 impact of high levels of incarceration 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 the ways in which the mass incarceration of African Americans has damaged social networks, distorted social norms, and destroyed social citizenship).

[34] ALEXANDER, *supra* note 9, at 179–80.

[35] *E.g.*, Darryl Pinckney, *Invisible Black America*, N.Y. REV. 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."); *see also* 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), *available at* http://www.npr.org/templates/story/story.php?storyId=127368484; *Bill Moyers Journal, Bryan Stevenson and Michelle Alexander* (PBS television broadcast Apr. 2, 2010).

[36] *See* ALEXANDER, *supra* note 9, at 195–208 (discussing the limits of the analogy). For example, Alexander points out that while the old Jim Crow never purported to be colorblind, the

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 or ignore many important dissimilarities. As a result, the analogy generates 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 argue in the Parts that follow, the analogy directs our attention away from features of crime and punishment in America that 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 a historical claim, grounded in a theory of backlash.[37] The narrative is as follows: 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

New Jim Crow operates under the myth of colorblindness. *Id.* at 11–12 ("The 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 16, at 263 ("Unlike 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. KARA GOTSCH, THE SENTENCING PROJECT, BREAKTHROUGH IN U.S. DRUG SENTENCING REFORM: THE FAIR SENTENCING ACT AND THE UNFINISHED REFORM AGENDA 2–5 (2011), *available at* http://www.sentencingproject.org/doc/dp_WOLA_Article.pdf (discussing the effects of the Fair Sentencing Act on the 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. *Id.* at 4–5.

[37] 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 16, at 272. For similar accounts, see ALEXANDER, *supra* note 9, at 40–47, and 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).

the way of mobs in the street."[38] 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."[39] John Ehrlichman, another advisor, characterized Nixon's campaign strategy as follows: "We'll go after the racists."[40]

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.[41] Reported street crime quadrupled in the twelve years from 1959 to 1971.[42] Homicide rates doubled between 1963 and 1974, and robbery rates tripled.[43] 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.[44]

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."[45] But even

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38 ALEXANDER, *supra* note 9, at 41 (quoting Barry Goldwater, Peace Through Strength, *in* 30 VITAL SPEECHES OF THE DAY 744 (1964)).

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

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

41 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.").

42 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).

43 *Id.* at 21–22.

44 ALEXANDER, *supra* note 9, at 41.

45 *Id.*

accounting for problems with the FBI's crime statistics, there is no doubt that crime increased dramatically.[46]

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 minimum prison terms for muggers, pushers, [and first] degree murderers."[47] 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."[48]

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."[49]

IV

OBSCURING BLACK SUPPORT FOR PUNITIVE CRIME POLICY

The Harlem NAACP's push for tougher crime laws raises an important question: If many black citizens supported the policies that produced mass imprisonment, how can it be regarded as the New Jim Crow? 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

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46 *See* GARLAND, *supra* note 41, at 90 (noting the significant rise in crime rates from 1960 through the 1980s); LAFREE, *supra* note 42, at 20–22 (citing the quadrupling of street crime rates between 1959 and 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").

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

48 *Id.*

49 ALEXANDER, *supra* note 9, at 40.

schools and accommodations.[50] The Jim Crow analogy encourages us to 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.[51] But the question yet to be asked is: What sort of crime

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

[51] 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) [hereinafter NCSC SURVEY], *available at* http://www.ncsconline.org/d_research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf (noting the broad consensus among Americans that violent crimes should result in tougher sentences than non-violent crimes); Donald Braman et al., *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 variable[s]"); J.L. Miller et al., *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 LAW & SOC'Y REV. 313, 332–30 (1986) ("Compared to whites, in making their judgments blacks generally are less strongly influenced by crime seriousness . . . [and] 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 the strongest demographic correlate for sentencing attitudes); Philip E. Secret & James B. Johnson, *Racial Differences in Attitudes Toward Crime Control*, 17 J. CRIM. JUST. 361, 370–71 (1989) (finding that race is a less powerful predictor of attitudes toward crime control than are other demographic factors, such as income, political party, sex, and age); Carroll Seron et al., *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 24 ("Knowledge 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), and Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law*

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.[52] The District is 51% African American.[53] Since home rule was established in 1973, all six of its mayors have been black, and the D.C. Council has been majority-black for most of that time.[54] 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 the Metropolitan Police Department (MPD),[55] and the MPD has the highest percentage of black officers in supervisory positions of any large majority-black city in the country.[56] Because of its unique

Enforcement: Lessons for Federal Criminal Law, 1 BUFFALO CRIM. L. REV. 137 (1997). For additional 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).

52 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 (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).

53 *2010 Census: District of Columbia Profile*, U.S. CENSUS BUREAU 1, http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_District_of_Columbia.pdf (last modified Oct. 6, 2011).

54 The D.C. Council was majority black from 1975 until 1999, then majority white until 2009, when it went back to majority black. *See* Editorial, *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, *Schwartz Concedes to Michael Brown*, Comment to *D.C. Wire: News and Notes on District Politics*, 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 D.C. Council election). With Brown's election, seven of the Council's 13 seats were held by African Americans. *See also Previous Councils*, COUNCIL OF THE DISTRICT OF COLUMBIA, http://dcclimsl.dccouncil.us/previouscouncils (last visited Jan. 24, 2012) (listing all previous council members in each term).

55 BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 2000: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS 27 (2004), *available at* http://www.bjs.gov/content/pub/pdf/lemas00.pdf.

56 Ronald Weitzer et al., *Police-Community Relations in a Majority Black City*, 45 J. RES. CRIME & 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 one million dollars 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*

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. 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 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.[57]

I acknowledge that in a number of important ways, D.C. has less autonomy than a state. 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 Norton[58]), the White House ultimately makes judicial appointments.[59] In addition, although local officials prosecute juvenile offenses, the United States Attorney's Office prosecutes most crimes by adults.[60]

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 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. The D.C. Council has sometimes pushed for sentencing leniency. 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.[61] Twelve years later, in December 1994, the

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 verdict).

[57] *See* Fagan et al., *supra* note 30, 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)).

[58] *See Biography of Congresswoman Eleanor Holmes Norton*, UNITED STATES HOUSE OF REPRESENTATIVES, http://www.norton.house.gov/index.php?option=com_content&view=article&id=189&Itemid=94 (last visited Oct. 7, 2011) (discussing the Congresswoman's right to recommend federal judges when granted senatorial courtesy).

[59] D.C. CODE § 1-204.33 (2011).

[60] *See* D.C. CODE § 23-101(a)–(c) (2011) (detailing how local prosecutors prosecute municipal crimes where the penalty does not exceed a fine or one year of imprisonment, as well as crimes relating to disorderly conduct and lewd, indecent, or obscene behavior, while the U.S. Attorney prosecutes everything else, except as otherwise provided by law).

[61] *See* D.C. Law 4-166, §§ 9 & 10, 30 D.C. Reg. 1082 (Mar. 9, 1983), codified in D.C. CODE

D.C. Council voted to abolish mandatory minimums for nonviolent drug offenses.[62] Councilmembers defended the move as a recognition that mandatory minimums had "failed to deter drug use and drug sales."[63]

If the mayor and Council stray too far from what Congress deems appropriate, Congress retains the authority to overrule them.[64] However, Congress has generally respected D.C. autonomy in matters of criminal law.[65] When Congress has interfered, its interventions have typically related to hot-button issues such as medical marijuana and needle exchanges for drug addicts.[66] 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 Congresswoman Norton—to demand representation or to object to congressional proposals that threaten home rule.[67] Mayor Kelly and Councilmember Kevin Chavous were arrested in 1993 as part of a pro-statehood rally.[68] In 2011, Mayor Gray and five councilmembers were arrested on Capitol Hill while protesting riders to the federal spending bill restricting how D.C. may spend its tax dollars.[69]

In matters of criminal law, however, they have largely remained silent.

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§ 33-541(e) (1993) (repealed 1994) (describing the Act and giving referendum vote totals).

62 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).

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

64 *See* Wilkins, *supra* note 52, at 143.

65 *Id.*

66 *See* 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.

67 *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); 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); *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).

68 Tillman, *supra* note 67, at A6.

69 Ben Pershing, *Gray, Council Members at Protest of D.C. Riders in Spending Bill*, WASH. POST, Apr. 12, 2011, at A11.

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.[70] As Fenty argued, "[w]e are giving the police and the U.S. [A]ttorney more resources to put more people in jail."[71] The D.C. Council passed the law with few modifications.[72]

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?[73] They mirror the rates of other cities where 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.[74] Detroit, an overwhelmingly African American city in a majority-white state,[75] has a *smaller* proportion

[70] *Fenty Administration Introduces Anti-crime Bill*, WHAT'S NEW IN THE METROPOLITAN POLICE DEP'T (Oct. 10, 2008), http://newsroom.dc.gov/file.aspx/release/15141/wn_081010.pdf.

[71] *See* Hamil R. Harris, *Inmates Get Tools for Life Outside Jail*, WASH. POST, Feb. 12, 2009, at T3 (discussing the D.C. Council's passage of the law after a debate over a single amendment).

[72] 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.

[73] 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 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 JUSTICE: CRIME, PUNISHMENT, AND POLITICS IN COMPARITIVE PERSPECTIVE 1, 7–13 (Michael Tonry ed., 2007).

[74] *See* ERIC LOTKE & JASON ZIEDENBERG, JUSTICE POLICY INST., 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).

[75] KAREN R. HUMES ET AL., U.S. DEP'T OF COMMERCE, OVERVIEW OF RACE AND HISPANIC

of adults under criminal justice supervision than Washington, D.C. One in twenty-five Detroit[76] adults are in jail or prison, on probation, or on parole, compared to one in twenty-one adults in D.C.[77]

These data indicate the limits of the Jim Crow analogy, which attributes mass incarceration entirely to the animus[78] or indifference[79] of white voters and public officials toward black communities. While racial animus or indifference might explain the sky-high African American incarceration rates in Baltimore and Detroit, they do 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:[80] 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 disproportionate amount of both fatal and nonfatal violence.[81] In 2006, the homicide rate for young black men was nineteen times higher than the rate for young white men.[82] Most crime is intra-racial; more than 90% of black homicide victims are killed by blacks, and more than 75% of all crimes against black victims are committed by blacks.[83]

ORIGIN: 2010, at 18 (2011) (noting that Michigan is 77% non-Hispanic white).

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

77 *Id.* at 7, 42.

78 *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.").

79 *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.").

80 *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.").

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

82 *Id.*

83 JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE

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.[84]

Butler, writing before his conversion, speaks for people who care deeply about other blacks, and see tough-on-crime policies as pro-black.[85] 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 sustain mass incarceration, but are simply *complicit* 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."[86]

This answer compellingly demonstrates how choice is constrained for residents of the ghetto. But it is not a complete response to the black prosecutor phenomenon. 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

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

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

85 *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.").

86 ALEXANDER, *supra* note 9, at 205; *see also* López, *supra* note 37, 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.").

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 challenge. Admittedly, the District's mayor and 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 D.C. 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. Yet, PDS often fails to persuade the black-majority legislative body.[87]

V
IGNORING 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, whose only objective was to curtail the drug war.[88] It makes less sense for more recent proponents of the analogy, who attack the broader phenomenon of mass incarceration but restrict their attention to punishments for drug offenders.[89] Other crimes—especially violent

[87] 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 they were available*. *See supra* note 83 and accompanying text (describing the high incidence of black-on-black crime in D.C.). 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 this.

[88] 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 13, at 715.

[89] This theme in the discourse on mass incarceration not only exists among the New Jim

crimes—are rarely mentioned.[90]

The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow.[91] 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 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.[92] As with Jim Crow, the difference lies in government practice, not in 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.[93]

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

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 16, 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).

90 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 9, at 204 ("[B]lack men do have much higher rates of violent crime, and violent crime is concentrated in ghetto communities.").

91 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.

92 Tonry & Melewski, *supra* note 79, at 104–05.

93 *Id.* at 105–09.

white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate.[94] Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending.[95]

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 rates.[96] 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 it does, 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.[97] Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug

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94 RUTH & REITZ, *supra* note 46, 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.*

95 *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 748 & n.10 (1993) (citing a study showing, in robbery and aggravated assault cases, a strong correspondence between the race of the arrestee and the race of the offender as reported by the victim); LAFREE, *supra* note 42, 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.").

96 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 95, at 751–52.

97 WILLIAM J. SABOL ET AL., 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.

offenses, and 8% for public order offenses.[98] In jails, the split among the various categories was more equal, with roughly 25% of inmates being held for each of the four main crime categories (violent, drug, property, and public order).[99] 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.[100] 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.[101] 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.[102]

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.[103] An exclusive focus on the drug war misses this larger point about sentencing choices. This is

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98 SABOL ET AL., *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.*

99 DORIS J. JAMES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002, at 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.

100 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 ET AL., *supra* note 1, at 38 app. tbl.17.

101 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 ET AL., *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—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.

102 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/wppl-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.

103 *See* WESTERN, *supra* note 2, at 43–45 (cataloging the increase in the incarceration rate and average time served for violent, property, and drug crimes).

why it is not enough to dismiss talk of violent offenders by saying that "violent crime is not responsible for the prison boom."[104] It is true that the prison population in this country continued to grow even after violent crime began to decline dramatically. However, the *state's response* to violent crime—less diversion and longer sentences—has been a major cause of mass incarceration. Thus, changing how governments respond to *all* crime, not just drug crime, is critical to reducing the size of prison populations.[105]

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.[106] "As a society," Alexander writes, "our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep

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[104] ALEXANDER, *supra* note 9, at 99 (emphasis omitted); *see also* Kennedy, *supra* note 16, 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 37, 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.").

[105] In the preceding pages I have focused on the prison population, rather than the larger group of individuals that 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 supra* Part II (discussing the New Jim Crow writers' analysis of the stigmatizing and marginalizing effects of mass incarceration on low-income black communities). 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 justice 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, 26% 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 breakdown 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 breakdown for parolees, by most serious offense, was as follows: 27% violent, 23% property, 36% drug, 3% weapon, and 10% other).

[106] 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).

them locked up and locked out says far more about ourselves than it does about them."[107] Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid or change the subject.[108]

To see how reticent mass incarceration's critics can be regarding the subject of violence, consider how Alexander describes Jarvious Cotton, whose story opens *The New Jim Crow*:

> Cotton's great-great grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote. His grandfather was prevented from voting by Klan intimidation. His father was barred from voting by poll taxes and literacy tests. Today, Jarvious Cotton cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.[109]

Cotton is like his ancestors in that he cannot vote. But there is one salient difference between Cotton and his ancestors. They couldn't vote because they were black; Cotton lost his right to vote when he was convicted of murder.[110] But Alexander nowhere mentions Cotton's crime, and her passive construction—Cotton "has been labeled a felon"—suggests that he had no choice in the matter. Now, I agree with Alexander that *even though* Cotton was convicted of murder, his status as a felon should not carry with it a lifetime of disenfranchisement. But Alexander does not strengthen her case, or help us understand the problem of mass incarceration in all of its dimensions, by declining to acknowledge his violent offense.

Avoiding the topic of violence in this manner is a mistake, not least because it disserves the very people on whose behalf the New Jim Crow writers advocate.[111] After all, the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime.[112] And the two phenomena are mutually reinforcing.

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107 ALEXANDER, *supra* note 9, at 171.

108 *See supra* note 90 and accompanying text (discussing how New Jim Crow writers avoid discussion of violent crime when addressing mass incarceration).

109 ALEXANDER, *supra* note 9, at 1.

110 Joseph W. Queen, *Man Gets Life in Miss. Slaying*, NEWSDAY, Aug. 14, 1988.

111 *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). 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.

112 *See, e.g.*, Forman, Jr., *Community Policing supra* note 7, 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

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.[113] 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 good portion had been kicked out of school for fighting. They had been arrested for drug dealing, auto theft, 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.[114]

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 got 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

programs).

113 For a more detailed account, see James Forman, Jr. & David Domenici, *Circle of Trust: The Story of the See Forever School*, *in* STARTING UP: CRITICAL LESSONS FROM 10 NEW SCHOOLS (Lisa Arrastia & Marv Hoffman eds., forthcoming 2012).

114 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.* at 15–19.

not care about it? Not care about who I hurt, who I make feel my pain. Just don't even care, don't have no sympathy for nobody.[115]

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.[116] Instead it might lead us to ask: 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.[117] In what conditions? What might we have done to reduce the likelihood that Bobby would be attacked in the first place?[118] 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.[119] 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.

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115 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).

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

117 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, at 12–13 (2008).

118 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.

119 I have addressed these questions elsewhere. *See, e.g.*, Domenici & Forman, *supra* note 8 (describing efforts to improve educational programs for incarcerated youth in Washington, D.C.); Forman, Jr., *Mass Incarceration*, *supra* note 7, at 1006–09 (2010) (arguing that prisons that treat prisoners well and offer effective programs serve public safety). I return briefly to these themes in the Conclusion.

VI
OBSCURING CLASS

In the previous Part, 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 overlook violent crime by limiting their inquiry to the War on Drugs. 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 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.[120]

Analogizing mass incarceration to Jim Crow tends to suggest that something similar is at work today. This may explain why many—but not all[121]—of the New Jim Crow writers overlook the fact that mass

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120 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*), ATLANTIC MONTHLY, Aug. 1963, at 80.

121 Michelle Alexander appreciates this point. *See* ALEXANDER, *supra* note 9, at 232–34 (arguing that affirmative action has, to some extent, helped affluent African Americans while

incarceration does not impact middle- and upper-class educated African Americans in the same way that it impacts lower-income African Americans.[122] This is an unfortunate 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.[123] 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 a black man 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%).[124] 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.[125] Although we have too little reliable data about the class backgrounds of prisoners, what we do 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

serving as an inadequate substitute for the more radical changes to the economic and social structure needed to help poor African American communities).

122 *See, e.g.*, Nunn, *supra* note 89, 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); Black, *supra* note 16, 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 16, 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). 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 generally* 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) (discussing class distinctions between whites and blacks as a cause of interracial disparities in incarceration rates while overlooking class distinctions within the black community as a source of intraracial incarceration disparities).

123 Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74, 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.").

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

125 *Id.*

amount of college.[126]

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.[127] By contrast, college graduates comprised 22% of the population as a whole.[128] In Massachusetts—the only state that routinely reports the educational backgrounds of its prisoners—only 1% of state prisoners have college degrees.[129] Income data reveal a similar skew—the majority of prisoners in state facilities earned less than $10,000 in the year before entering prison.[130]

Class differences have always existed within the black community—but never on anything approaching today's scale.[131] Large segments of the black community are in extreme distress. Unemployment rates for young black men are high by any measure, even more so if we factor in incarceration rates.[132] 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)[133] they are much worse off. Yet the black middle class has expanded dramatically—and to be clear, I am 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 a crucial 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.[134] 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

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126 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%. *Id.*, at 26–28.

127 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.*

128 *Id.*

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

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

131 For an excellent account of this phenomenon, see generally EUGENE ROBINSON, DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA (2010).

132 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).

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

134 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, at 36–37 tbl.A-1 (2010).

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 do not 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 twenty five had a four-year college degree; today, 20% do.[135]

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.[136] Affirmative action's defenders often respond by pointing out the various ways in which even privileged blacks suffer racial discrimination.[137] 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."[138]

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 mass incarceration, any suggestion that blacks across classes are 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

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135 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.

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

137 *Id.* at 967–88 ("[T]he lingering effects of past discriminating suppress the economic performance of the black middle class.").

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

context of Jim Crow.[139] 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."[140] 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.[141] 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.[142]

For the most part, Alexander avoids this trap. In *The New Jim Crow*, she reminds us that the primary targets of mass incarceration are poor, uneducated blacks.[143] 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.[144] Yet, despite her 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."[145] 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."[146]

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[139] ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 327 (1992) (recounting a conversation in which Malcolm X asked a black associate professor, "Do you know what white racists call black Ph.D's? . . . *Nigger!*").

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

[141] *Id.* at 376 n.222.

[142] *See supra* note 122 and accompanying text (noting instances where other authors failed to acknowledge the importance of class when discussing mass incarceration).

[143] ALEXANDER, *supra* note 9, at 157 ("Practically from cradle to grave, black males in urban ghettos are treated like current or future criminals.").

[144] As Alexander puts it:

> 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.

Id., at 234.

[145] *Id.* at 192.

[146] *Id.*

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
OVERLOOKING 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 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.[147] Alexander mentions them only in passing; she says that mass imprisonment's true targets are blacks, and that incarcerated whites are "collateral damage."[148]

Many whites—most of them poor and uneducated—are now behind bars. One-third of our nation's prisoners are white,[149] and incarceration rates have risen steadily even in states where most inmates are white.[150] 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.[151] 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."[152] 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 men.[153] Prosecutions for sexually explicit

147 *See, e.g.*, Kennedy, *supra* note 16, at 505–06 (discussing the New Jim Crow analogy while ignoring whites); Roberts, *supra* note 16, at 263 (same); Tyson, *supra* note 16, at 348–49 (same); Black, *supra* note 16, at 178 (same).

148 ALEXANDER, *supra* note 9, at 202.

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

150 *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).

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

152 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).

153 JANIS WOLAK ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT, at viii (2003) (describing a

material offenses have risen by more than 400% since 1996.[154] 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.[155] Moreover, although whites remain relatively underrepresented as drug offenders, the percentage of drug offenders who are white has risen since 1999, while the percentage of drug offenders who are black has declined.[156]

Hispanic[157] prisoners also receive little attention from the New Jim

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.").

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

[155] U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING GUIDELINES, 29 tbl.13, 39 tbl.17; Rigsby, *supra* note 153, 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, 1302 (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).

[156] 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.

[157] 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.

Crow writers, even though they constitute 20% of American prisoners.[158] The fact that quality data on Hispanics in the prison systems is often lacking may be partly to blame for this omission.[159] 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.[160] And given what we do know about current Hispanic incarceration rates, 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.[161] 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.[162] Most Hispanic prisoners, like most blacks and whites, are serving time for violent offenses, and about 20% are in prison for drug offenses.[163]

Thus, the data on white and Hispanic prisoners reminds us that while African Americans are incarcerated in numbers grossly disproportionate to their percentage of the overall population, the fact remains that 60% of prisoners are not African American. As I will argue in the conclusion, anyone analyzing mass incarceration must keep that 60% squarely in mind.

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158 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 9, at 15–16.

159 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 subgroups).

160 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. Westminister 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, 273–74 (Rachel F. Moran & Devon W. Corbado eds., 2008) (discussing the role of *Hernandez v. Texas* as a civil rights ruling by the Warren Court, taking place before *Brown v. Board of Education*).

161 MAUER & KING, *supra* note 159, at 2.

162 *Id.* at 3, 12 n.14; Martinez, *supra* note 159, at 222 (suggesting that poorly collected data contribute to the undercounting of latinos).

163 Martinez, *supra* note 159, at 222, 224–25.

VIII
DIMINISHING 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 will argue that 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 Old Jim Crow and mass incarceration overlook (or underemphasize) important aspects of what made the Old Jim Crow so horrible.[164]

The New Jim Crow writers devote little attention to the Old Jim Crow.[165] 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.[166]

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

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164 *Cf.* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 172 (2011) ("Contending that the existence of blacks today can be analogized to people who were literally (not metaphorically) denied their freedom or to people who had their liberty . . . circumscribed by Jim Crow minimizes the suffering of individuals who endured the yoke of unrelenting racial oppression.").

165 Buckman and Lamberth, for example, invoke the term "Jim Crow" but do not define it. Buckman & Lamberth, *supra* note 11, 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 13, at 703 n.2. Alexander has the most to say about it, but even her treatment is brief—ten pages of a 208-page book. ALEXANDER, *supra* note 9, at 30–40. One important exception is ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

166 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 MPH in a 55 MPH-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."[167] 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.

We never discussed what happened that day. In my mind, though, I was sure I was right—sure that, in 1984, black people did not 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,[168] 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

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167 *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); THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE (Christopher Metress ed., 2002).

168 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.

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.[169]

The Old Jim Crow was the one that gave the U.S. Supreme Court cause to review convictions like those in *Brown v. Mississippi*.[170] In that case, the Mississippi Supreme Court had affirmed convictions despite the fact that the black suspects were

> made to strip and they were laid over chairs and their backs were cut to pieces 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.[171]

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

I conclude by briefly indicating a way forward. What follows is not intended as a set of policy prescriptions; instead, I offer four 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 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.

First, combating mass incarceration will require a multiracial movement. Some of the New Jim Crow writers understand this,[172] yet they

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

170 297 U.S. 278 (1936).

171 *Id.* at 282.

172 For example, Alexander writes:

> White drug "criminals" are collateral damage in the War on Drugs because they have

do not appreciate the extent to which the Jim Crow analogy pushes non-black prisoners to the margins. 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.[173] As Darren Hutchinson has argued, framing issues in terms of black and white discourages other racial minorities from engaging in coalition politics.[174] 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 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.[175]

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,[176] 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

> 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 9, at 202.

173 *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).

174 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.").

175 *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).

176 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.

indifference play a role as well. 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 also cutting crime.[177] 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 City reduced crime while also reducing the number of residents sent to prison.[178] 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.[179] Over the longer term, it requires human capital investments of the sort that both the New Jim Crow writers and I endorse.

Among the most important of such investments is 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 have attended college.[180] While correlation is not causation, these facts suggest that appropriate educational (and other social-service) interventions may be, in addition to their other benefits, crime-fighting measures.[181]

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177 *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 during the late 1990s and early 2000s).

178 *See* FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 3–14 (2012) (documenting New York City's crime decline between 1990 and 2009); *see also id.* at 75–77 (describing how New York City's incarceration rate declined between 1990 and 2008 while national incarceration rates increased during those same years); *id.* at 207–209 (discussing declining incarceration rates for minority males in New York City); *The Decline in Crime in New York City (1990–2010)*, VERA INST. OF JUST. (Oct. 29, 2010), http://www.vera.org/videos/franklin-zimring-decline-crime-new-york-city.

179 *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 et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 224 (2007) (discussing Chicago's Project Safe Neighborhoods, which reduced homicide rates by 35% in targeted neighborhoods).

180 *See supra* notes 124–26 and accompanying text (listing the differences in incarceration rates among African American men who are either college-educated or high school dropouts and whites who are college-educated or high school dropouts).

181 *See* KLEIMAN, *supra* note 179, at 188–89 (offering recommendations for effective social-service and other nonpunitive anti-crime measures).

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.[182] 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.[183] 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."[184] Justice Kennedy recognized that concern in his majority opinion, quoting then-Governor Schwarzenegger's acknowledgement that overcrowding "increases recidivism," as well as testimony from the acting secretary of the California prison system, who said that she "absolutely believe[s] that we make people worse, and that we are not meeting public safety by the way we treat people."[185] The record in *Plata* clearly illustrates that prison conditions are not only a prisoners' rights issue,[186] 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

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182 *See supra* notes 88–90 and accompanying text (describing the tendency among New Jim Crow writers to focus on drug crimes and ignore violent crimes when discussing mass incarceration).

183 Brown v. Plata, 131 S. Ct. 1910, 1922–23 (2011).

184 Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JIM P, 2009 WL 2430820, at *84 (E.D. Cal. Aug. 4, 2009). *Coleman* was combined with *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

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

186 *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).

of American prisoners will be released eventually.[187] 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.

Fourth, advocates for a more parsimonious use of punishment must take violence, and the fear of violence, seriously. There is nothing wrong (and a lot that is right) about emphasizing the profound racial disparities in incarceration rates for drug crimes. But there is everything wrong with accounts of crime policy that fail to mention the fear, disorder, and violence that accompanied city life in much of the 1970s, 1980s, and early 1990s.

Ta-Nehisi Coates compares life in Baltimore's black community during the 1980s with his father's urban experience a generation before:

> When crack hit Baltimore, civilization fell. Dad told me how it used to be. In his time, the beefs were petty and stemmed from casual crimes. . . . The bad end of a beef was loose teeth and stitches, rarely shock trauma and "Blessed Assurance" ringing the roof of the storefront funeral home.
>
> . . . But as time went on, we forgot ourselves and went cannibal—the next brother became a meal to feed our rep. At night, *Action News* unfurled the daily scroll, and always amid the rescued dogs, the lost toddlers, the scandalous bankers, there was us, buckled by the pop-pop of a .22, laid out on a sad stain of blood.
>
> I didn't fully get it then, but this was an inglorious turn. The world was filled with great causes—Mandela, Nicaragua, and the battle against Reagan. But we died for sneakers stitched by serfs, coats that gave props to teams we didn't own, hats embroidered with the names of Confederate states. I could feel the falling, all around. The flood of guns wrecked the natural order.[188]

And it wasn't just Baltimore. Bodies—mostly black, mostly young, and mostly poor—fell all across America.[189] In Washington, D.C., the

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[187] *See* TIMOTHY A. HUGHES & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2002), *available at* 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 sixty months in prison).

[188] TA-NEHISI COATES, THE BEAUTIFUL STRUGGLE: A FATHER, TWO SONS, AND AN UNLIKELY ROAD TO MANHOOD 29–30 (2008).

[189] ZIMRING, *supra* note 178, at 81 (noting that after 1985, "rates of life-threatening violence in the United States turned up again, led by very substantial increases in homicide by persons 15–29, primarily minority young persons in the nation's biggest cities."); RUTH & REITZ, *supra* note 46, at 17 (describing the rise in homicide rates and concluding that by the early 1990s "the United

number of homicides *tripled* in just seven years, as the violence associated with the crack trade ravaged the city.[190] Crime has declined since the era that Coates recounts. But there are neighborhoods where violence remains a daily fact of life. David Kennedy, in his recent book, *Don't Shoot: One Man, a Street Fellowship, and the End of Violence in Inner-City America*, explains:

> Everybody knows crime is down these days, it's a national success story. America's homicide rate hit almost 10 per 100,000 in the peak years; it's now about half that. But not for black men. Black men are dying, overwhelmingly by gunshot, at a horrendous pace. In 2005, black men aged eighteen to twenty-four were murdered at a rate of 102 per 100,000 (white men of the same age: 12.2 per 100,000). Recent data show that, even as homicide overall continues to decline, black men are dying *more*. Between 2000 and 2007, the gun homicide rate for black men aged fourteen to seventeen went up 40 percent; eighteen to twenty-four, up 18 percent; twenty-five and over, up almost 27 percent.[191]

Kennedy's response to this crisis consists of programs grounded in what he calls "focused deterrence." The strategy concentrates police resources on the offenders driving violent crime while also seeking sustained cooperation with the communities most affected by the violence. Police and community members work together to convey a single message to those who are causing the violence: Violent crime will not be tolerated.[192]

Kennedy's approach is not the only one;[193] Zimring, for example, drawing on the story of New York City's crime reductions, suggests other ways to reduce crime while shrinking prisons.[194] It is too early to tell whether any of these approaches are sustainable at scale. But this is a conversation that we must have, and that racial justice advocates must engage in, if we are to bring the disastrous era of mass incarceration to an end.

States was the most dangerous of first-world countries.").

190 *See* 1985 FBI UNIFORM CRIME REPORT FOR THE UNITED STATES 361 (reporting that 147 murders and non-negligent manslaughters occurred in Washington, D.C. in 1985); 1991 FBI UNIFORM CRIME REPORT FOR THE UNITED STATES 105 (reporting that 482 such homicides occurred in Washington, D.C. in 1991).

191 DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 12 (2011).

192 *Id.* at 44–75 (describing efforts to reduce gun violence in Boston); *id.* at 155–84 (describing an initiative to reduce violence associated with drug markets in High Point, North Carolina).

193 *See also* Papachristos et al., *supra* note 179, at 224 (evaluating a program with many similar "focused deterrence" elements).

194 ZIMRING, *supra* note 178, at 173–95; *see also supra* note 179 and accompanying text (outlining methods for crime reduction).