



2012

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Recommended Citation

FORMAN, JAMES, "RACIAL CRITIQUES OF MASS INCARCERATION: BEYOND THE NEW JIM CROW" (2012). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers*. Paper 110.
http://digitalcommons.law.yale.edu/yls_sela/110

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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. I argue 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.

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*, and their lifetime risk of incarceration has doubled. As the United States has become the world's largest jailer and its prison population has exploded, black men have been particularly affected. Today, black men are imprisoned at 6.5 times the rate of white men.

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

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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 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. 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. I am also a former public defender who co-founded a school that educates young people who have been involved with the juvenile justice system. 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.

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. 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.

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.

Buckman and Lamberth argued that racial profiling was a byproduct of the nation’s strategy to combat drugs, 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.”

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.¹

The Jim Crow analogy has gained adherents in the past decade—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 ways, but it really doesn’t help to make such an absurd comparison. People will just think you’re crazy.”² 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.”³

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

¹ See generally Symposium, *U.S. Drug Laws: The New Jim Crow?*, 10 TEMP. POL. & CIV. RTS. L. REV. 303 (2001).

² ALEXANDER, at 3.

³ *Id.* at 4.

the collateral consequences of criminal convictions, 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 as well as the right to serve on a jury. He might become ineligible for health and welfare benefits, food stamps, public housing, student loans, and certain types of employment.

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 today becomes a member of a stigmatized caste, condemned to a lifetime of second-

class citizenship.

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. Intense police surveillance of black youths becomes accepted practice. Their misbehavior in school is reported to the police and leads to juvenile court. Employers are reluctant to hire them. 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 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, 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. 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.

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.

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. 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 the way of mobs in the street.”⁴ 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.”⁵ John Ehrlichman, another advisor, characterized Nixon’s campaign strategy as follows: “We’ll go after the racists.”⁶

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. Reported street crime quadrupled in the twelve years from 1959 to 1971. Homicide rates doubled between 1963 and 1974, and robbery rates tripled. 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

⁴ ALEXANDER at 41 (quoting Barry Goldwater, *Peace Through Strength*, in 30 VITAL SPEECHES OF THE DAY 744 (1964)).

⁵ *Id.* at 43 (citing WILLARD M. OLIVER, *THE LAW & ORDER PRESIDENCY* 127–28 (2003)).

⁶ *Id.* at 44 (quoting JOHN EHRLICHMAN, *WITNESS TO POWER* 233 (1970)).

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.⁷

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."⁸ But even accounting for problems with the FBI's crime statistics, there is no doubt that crime increased dramatically.

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."⁹ 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."¹⁰

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

⁷ ALEXANDER, at 41.

⁸ *Id.*

⁹ VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 151 (2009).

¹⁰ *Id.*

system.”¹¹

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

Of course, one reason no one has asked this question is that, unlike during Reconstruction, there are no states today with black voting majorities. Still, one jurisdiction warrants scrutiny. Washington, D.C., is the nation’s only majority-black jurisdiction that controls sentencing policy. The District is 51% African American. Since home rule was established in

¹¹ ALEXANDER, at 40.

1973, all six of its mayors have been black, and the D.C. Council has been majority-black for most of that time. 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), and the MPD has the highest percentage of black officers in supervisory positions of any large majority-black city in the country. Because of its unique status, the city assumes both state and municipal functions in many aspects of the criminal process. Most important for purposes of this analysis, the D.C. 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.

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), the White House ultimately makes judicial appointments. In addition, although local officials prosecute juvenile offenses, the United States Attorney's Office prosecutes most crimes by adults.

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. Twelve years later, in December 1994, the D.C. Council voted to abolish mandatory minimums for nonviolent drug offenses. Councilmembers defended the move as a recognition that mandatory minimums had “failed to deter drug use and drug sales.”¹²

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? 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. Detroit, an overwhelmingly African American city in a majority-white state, has a *smaller* proportion of adults under criminal justice supervision than Washington, D.C. One in twenty-five Detroit adults are in jail or prison, on probation, or on parole, compared to one in twenty-one adults in D.C.

These data indicate the limits of the Jim Crow analogy, which attributes mass incarceration entirely to the animus or indifference 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.

¹² Matt Neufeld, *Minimum Terms' Demise Wins Praise: But Prosecutors Say Bad Message Sent*, WASH. TIMES, Nov. 3, 1994, at C5 (quoting Councilmember William Lightfoot).

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: 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. In 2006, the homicide rate for young black men was nineteen times higher than the rate for young white men. 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. 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.¹³

Butler, writing before his conversion, speaks for people who care deeply about other blacks, and see tough-on-crime policies as pro-black. 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.

¹³ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 24 (2009).

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.”¹⁴

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 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

¹⁴ ALEXANDER, at 205.

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.

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. 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. Other crimes—especially violent crimes—are rarely mentioned.

The choice to focus on drug crimes is a natural—even necessary—byproduct of framing mass incarceration as a new form of Jim Crow. 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. 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.

But violent crime is a different matter. While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses.

For example, the African American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate. Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending.

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. 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. Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug offenses, and 8% for public order offenses. 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). 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. 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. 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.

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. An exclusive focus on the drug war misses this larger point about sentencing choices. This is why it is not enough to dismiss talk of violent offenders by saying that “violent crime is not responsible for the prison boom.” 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.

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. “As a society,” Alexander writes, “our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep them locked up and locked out says far

more about ourselves than it does about them.”¹⁵ Since it is especially difficult to suspend moral judgment when the discussion turns to violent crime, progressives tend to avoid or change the subject.

To see how reticent mass incarceration’s critics can be regarding the subject of violence, consider how Alexander describes Jarvis 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, Jarvis Cotton cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.¹⁶

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. 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. After all, the same low-income young people of color who disproportionately enter prisons are disproportionately

¹⁵ ALEXANDER, *supra* note 9, at 171.

¹⁶ ALEXANDER, at 1.

victimized by crime. And the two phenomena are mutually reinforcing.

I had long known this as an intellectual matter, but it was driven home for me in 1997, when I helped to open an alternative school for teens from the juvenile court system.¹⁷ 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.

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?

¹⁷ 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).

What can't you get away with?

If people can do stuff like that and get away with it, and not be caught, not be arrested, not be locked up, not be killed, or suffer in no type of way, why can't I do that? Why can't I do that? If somebody can take my friend's life from me, somebody that I cared about, if they can take that from me, why can't I do that to about anybody else, to anybody else, and not care about it? Not care about who I hurt, who I make feel my pain. Just don't even care, don't have no sympathy for nobody.

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. 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. In what conditions? What might we have done to reduce the likelihood that Bobby would be attacked in the first place? 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. I raise them to highlight their importance and to suggest that, in focusing exclusively on the drug war, the New Jim Crow writers take themselves out of a

discussion to which they might make important contributions.

VI

OBSCURING CLASS

In the previous 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.

Analogizing mass incarceration to Jim Crow tends to suggest that something similar is at work today. This may explain why many of the New Jim Crow writers overlook the fact that

mass incarceration does not impact middle- and upper-class educated African Americans in the same way that it impacts lower-income African Americans. 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. 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%). 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.

Class differences have always existed within the black community—but never on anything approaching today's scale. 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. 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) 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. Going down the income scale from upper middle class to middle class, we also see robust growth. Since 1967, the percentage of black households earning more than \$75,000 a year has more than tripled, from 5% to 18% today. The percentage earning \$50,000 or more a year has doubled—from 17% in 1967 to 33% today. But the percentages alone 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.

Changes of this magnitude require us to modify how we discuss race. 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 context of Jim Crow.¹⁸ 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."¹⁹ 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. 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

¹⁸ 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!").

¹⁹ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 376 (1987).

still do not.

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

Many whites—most of them poor and uneducated—are now behind bars. One-third of our nation's prisoners are white, and incarceration rates have risen steadily even in states where most inmates are white. 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. 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."²⁰ 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. Prosecutions for sexually explicit material offenses have risen by more than 400% since 1996. 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

²⁰ Press Release, American Civil Liberties Union, ACLU Lawsuit Charges Idaho Prison Officials Promote Rampant Violence (Mar. 11, 2010).

almost 10 years in 2008. 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.

Hispanic²¹ prisoners also receive little attention from the New Jim Crow writers, even though they constitute 20% of American prisoners. The fact that quality data on Hispanics in the prison systems is often lacking may be partly to blame for this omission. 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.²² 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. 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. Most Hispanic prisoners, like most blacks and whites, are serving time for violent offenses, and about 20% are in prison for drug offenses.

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.

²¹ 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.

²² Some of the early important cases challenging segregation involved Hispanics. *See, e.g.,* Hernandez v. Texas, 347 U.S. 475 (1954) (striking down Jim Crow jury practices that excluded Mexican Americans from juries); Mendez v. Westminster Sch. Dist., 64 F. Supp. 544 (C.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947) (en banc) (striking down segregation of Mexican and Mexican-American students).

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.

The New Jim Crow writers devote little attention to the Old Jim Crow. 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.

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 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.” 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, but I still remember clearly the look on my dad's face when I returned to the car and got on the highway. He was terrified in a way that I had never seen. I cried myself to sleep that night, in a Howard Johnson's near downtown Jackson. I was overwhelmed with a boy's shame at watching his father laid low, and the double burden of knowing that I had helped bring it about.

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

Well John—This is a token of a great day we had in Dallas, March 3rd [1910], a negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole.²³

The Old Jim Crow was the one that gave the U.S. Supreme Court cause to review convictions like those in *Brown v. Mississippi*.²⁴ 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

²³ David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793, 794 (2005).

²⁴ 297 U.S. 278 (1936).

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.²⁵

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, yet they 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

²⁵ *Id.* at 282.

with their own. 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.

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, I have suggested that some of those who push for tough-on-crime laws, and many of those who support them, do so out of a real concern about safety. To be clear, I hardly think this is the only motivation: The New Jim Crow writers make a powerful case that racial animus and indifference play a role as well. 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.

Third, an effective response to mass incarceration requires increased attention to how we treat prisoners. 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. 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.

But 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.

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.²⁶ 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.”²⁷ 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.”²⁸ The record in *Plata* clearly illustrates that prison conditions are not only a prisoners’ rights issue, but are also a crime prevention issue. Most prisoners, after all, are serving time for violent offenses. And even with longer prison sentences, the vast majority of American prisoners will be released eventually. 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.

²⁶ *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011).

²⁷ *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).

²⁸ *Plata*, No. 09-1233, slip op. at 38 (U.S. May 23, 2011).

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.²⁹

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

And it wasn't just Baltimore. Bodies—mostly black, mostly young, and mostly poor—fell all across America. In Washington, D.C., the number of homicides *tripled* in just seven years, as the violence associated with the crack trade ravaged the city. 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.

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.

Kennedy's approach is not the only one; Frank Zimring, for example, drawing on the story of New York City's crime reductions, suggests other ways to reduce crime while shrinking prisons. 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.