

# The New Jim Crow<sup>1</sup>

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The subject that I intend to explore today is one that most Americans seem content to ignore. Conversations and debates about race—much less racial caste—are frequently dismissed as yesterday's news, not relevant to the current era. Media pundits and more than a few politicians insist that we, as a nation, have finally “moved beyond race.” We have entered into the era of “post-racialism,” it is said, the promised land of colorblindness. Not just in America, but around the world, President Obama's election has been touted as the final nail in the coffin of Jim Crow, the bookend placed on the history of racial caste in America.

This triumphant notion of post-racialism is, in my view, nothing more than fiction—a type of Orwellian doublespeak made no less sinister by virtue of the fact that the people saying it may actually believe it. Racial caste is not dead; it is alive and well in America. The mass incarceration of poor people of color in the United States amounts to a new caste system—one specifically tailored to the political, economic, and social challenges of our time. It is the moral equivalent of Jim Crow.

I am well aware that this kind of claim may be hard for many people to swallow. Particularly if you, yourself, have never spent time in prison or been labeled a felon, the claim may seem downright absurd. I, myself, rejected the notion that something akin to a racial caste system could be functioning in the United States more than a decade ago—something that I now deeply regret.

I first encountered the idea of a new racial caste system in the mid-1990s when I was rushing to catch the bus in Oakland, California and a bright orange poster caught my eye. It screamed in large bold print: THE DRUG WAR IS THE NEW JIM CROW. I recall pausing for a moment and skimming the text of the flyer. A radical group was holding a community meeting about police brutality, the new three-strikes law in California, the drug war, and the expansion of America's prison system. The meeting was being held at a small community church a few blocks away; it had seating capacity for no more than fifty people. I sighed and muttered to myself something like, “Yeah, the criminal justice system is racist in many ways, but it really doesn't help to make such absurd comparisons. People will just think you're crazy.” I then crossed the street and hopped on the

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bus. I was headed to my new job, director of the Racial Justice Project for the ACLU in Northern California.

When I began my work at the ACLU, I assumed the criminal justice system had problems of racial bias, much in the same way that all major institutions in our society are plagued to some degree with problems associated with conscious and unconscious bias. As a civil rights lawyer, I had litigated numerous class-action employment discrimination cases, and I understood well the many ways in which racial stereotyping can permeate subjective decision-making processes at all levels of an organization with devastating consequences. While at the ACLU, I shifted my focus from employment discrimination to criminal justice reform, and dedicated myself to the task of working with others to identify and eliminate racial bias whenever and wherever it reared its ugly head.

By the time I left the ACLU, I had come to suspect that I was wrong about the criminal justice system. It was not just another institution infected with racial bias, but rather a different beast entirely. The activists who posted the sign on the telephone pole were not crazy; nor were the smattering of lawyers and advocates around the country who were beginning to connect the dots between our current system of mass incarceration and earlier forms of social control. 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.

I state my basic thesis in the introduction to my book, *The New Jim Crow*:

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.<sup>2</sup>

I reached this conclusion reluctantly. Like many civil rights lawyers, I was inspired to attend law school by the civil rights victories of the 1950s and 1960s.

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<sup>2</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010).

Even in the face of growing social and political opposition to remedial policies such as affirmative action, I clung to the notion that the evils of Jim Crow are behind us and that, while we have a long way to go to fulfill the dream of an egalitarian, multiracial democracy, we have made real progress. I understood the problems plaguing poor communities of color, including problems associated with crime and rising incarceration rates, to be a function of poverty and lack of access to quality education—the continuing legacy of slavery and Jim Crow. I strenuously resisted the idea that a new caste system was operating in this country; I was nearly offended by the notion. But after years of working on issues of racial profiling, police brutality, drug law enforcement in poor communities of color, and attempting to assist people released from prison “re-enter” into a society that never seemed to have much use for them in the first place, I had a series of experiences that began what I call my “awakening.” I began to awaken to a racial reality that is so obvious to me now that what seems odd in retrospect is that I was blind to it for so long.

Here are some facts I uncovered in the course of my work and research that you probably have not heard on the evening news:

- \* More African American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began.<sup>3</sup>
- \* In 2007 more black men were disenfranchised than in 1870, the year the Fifteenth Amendment was ratified prohibiting laws that explicitly deny the right to vote on the basis of race.<sup>4</sup> During the Jim Crow era, African Americans continued to be denied access to the ballot through poll taxes and literacy tests. Those laws have been struck down, but today felon disenfranchisement laws accomplish what poll taxes and literacy tests ultimately could not.
- \* In many large urban areas in the United States, the majority of working-age African American men have criminal records. In fact, it was reported in 2002 that, in the Chicago area, if you take into account prisoners, the figure is nearly 80%.<sup>5</sup>

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<sup>3</sup> One in eleven black adults was under correctional supervision at year end 2007, or approximately 2.4 million people. PEW CTR. ON THE STATES, PEW CHARITABLE TRUSTS, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (Mar. 2009), available at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf). According to the 1850 Census, approximately 1.7 million adults (ages 15 and older) were slaves. U.S. CENSUS BUREAU, THE SEVENTH CENSUS OF THE UNITED STATES: 1850 9 (1853), available at <http://www2.census.gov/prod2/decennial/documents/1850a-01.pdf>; see also University of Virginia Library, *Historical Census Browser*, UNIVERSITY OF VIRGINIA LIBRARY, <http://mapserver.lib.virginia.edu/php/state.php> (last visited July 17, 2011).

<sup>4</sup> Contribution by Pamela S. Karlan, *Forum: Pamela S. Karlan*, in GLENN C. LOURY, RACE, INCARCERATION AND AMERICAN VALUES, 41, 42 (2008).

<sup>5</sup> PAUL STREET, CHICAGO URBAN LEAGUE, THE VICIOUS CIRCLE: RACE, PRISON, JOBS, AND COMMUNITY IN CHICAGO, ILLINOIS, AND THE NATION 4 (2002).

Those bearing criminal records and cycling in and out of our prisons today are part of a growing undercaste—not class, caste—a group of people, defined largely by race, who are relegated to a permanent second-class status by law. They can be denied the right to vote, automatically excluded from juries, and legally discriminated against in employment, housing, access to education, and public benefits, much as their grandparents and great-grandparents were during the Jim Crow era.

I find that when I tell people that mass incarceration amounts to a New Jim Crow, I am frequently met with shocked disbelief. The standard reply is: “How can you say that a racial caste system exists? Just look at Barack Obama! Just look at Oprah Winfrey! Just look at the black middle class!”

The reaction is understandable. But we ought to question our emotional reflexes. The mere fact that some African Americans have experienced great success in recent years does not mean that something akin to a caste system no longer exists. No caste system in the United States has ever governed all black people. There have always been “free blacks” and black success stories, even during slavery and Jim Crow. During slavery, there were some black slave owners—not many, but some. And during Jim Crow, there were some black lawyers and doctors—not many, but some. The unprecedented nature of black achievement in formerly white domains today certainly suggests that the old Jim Crow is dead, but it does not necessarily mean the end of racial caste. If history is any guide, it may have simply taken a different form.

Any honest observer of American racial history must acknowledge that racism is highly adaptable. The rules and reasons the legal system employs to enforce status relations of any kind evolve and change as they are challenged.<sup>6</sup> In the first chapter of the book, I describe the cyclical rebirths of racial caste in America. Since our nation’s founding, African Americans have been repeatedly controlled through institutions, such as slavery and Jim Crow, which appear to die, but then are reborn in new form—tailored to the needs and constraints of the time.

For example, following the collapse of slavery, the system of convict leasing was instituted—a system many historians believe was worse than slavery.<sup>7</sup> After the Civil War, black men were arrested by the thousands for minor crimes, such as loitering and vagrancy, and sent to prison. They were then leased to plantations. It was our nation’s first prison boom. The idea was that prisoners leased to plantations were supposed to earn their freedom. But the catch was they could never earn enough to pay back the plantation owner the cost of their food, clothing

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<sup>6</sup> See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing Action*, 49 STAN. L. REV. 1111, 1113, 1146 (1997) (dubbing the process by which white privilege is maintained, through the rules and rhetoric change, “preservation through transformation”).

<sup>7</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

and shelter to the owner's satisfaction, and thus they were effectively re-enslaved, sometimes for the rest of their lives. It was a system more brutal in many respects than slavery, because plantation owners had no economic incentive to keep convicts healthy or even alive. They could always get another one.<sup>8</sup>

Today, I believe the criminal justice system has been used once again in a manner that effectively re-creates caste in America. **Our criminal justice system functions more like a caste system than a system of crime control.**

For those who find that claim difficult to swallow, consider the facts. Our prison system has quintupled for reasons that have stunningly little to do with crime. In less than 30 years, the U.S. penal population exploded from around 300,000 to more than 2 million.<sup>9</sup> The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, including highly repressive regimes like China and Iran.<sup>10</sup>

In fact, if our nation were to return to the incarceration rates of the 1970s—a time, by the way, when civil rights activists thought that imprisonment rates were egregiously high—we would have to release four out of five people who are in prison today.<sup>11</sup> More than a million people employed by the criminal justice system could lose their jobs.<sup>12</sup> That is how enormous and deeply entrenched the new system has become in a very short period of time.

As staggering as those figures are, they actually obscure the severity of the crisis in poor communities of color. Professor Loïc Wacquant has argued that the term “mass incarceration” itself is a misnomer, since it implies that nearly

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<sup>8</sup> See *id.*

<sup>9</sup> *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUSTICE STATISTICS (updated Dec. 16, 2010), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>; JOHN IRWIN, ET AL., *AMERICA'S ONE MILLION NONVIOLENT PRISONERS*, THE JUSTICE POLICY INSTITUTE (1999), available at [http://www.hawaii.edu/hivandaids/America\\_s\\_One\\_Million\\_Nonviolent\\_Prisoners.pdf](http://www.hawaii.edu/hivandaids/America_s_One_Million_Nonviolent_Prisoners.pdf); Robert Longley, *U.S. Prison Population Tops 2 Million*, U.S. GOVERNMENT INFORMATION, <http://usgovinfo.about.com/cs/censusstatistic/a/aaprisonpop.htm>.

<sup>10</sup> PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (Feb. 2008), <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

<sup>11</sup> According to data provided by the Sentencing Project, in 1972, the total rate of incarceration (prison and jail) was approximately 160 per 100,000. See MAUER, *supra* note 9, at 17. Today, it is about 750 per 100,000. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 2 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf>. A reduction of 79% would be needed to get back to the 160 figure—itself a fairly high number when judged by international standards.

<sup>12</sup> According to a report released by the U.S. Department of Justice's Bureau of Statistics in 2006, the U.S. spent a record \$185 billion for police protection, detention, judicial, and legal activities in 2003. Adjusting for inflation, these figures reflect a tripling of justice expenditures since 1982. The justice system employed almost 2.4 million people in 2003—58% of them at the local level and 31% at the state level. If four out of five people were released from prisons, far more than a million people could lose their jobs. KRISTEN A. HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003*, at 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jeeus03.pdf>.

everyone has been subject to the new system of control.<sup>13</sup> But, of course that is not the case. The overwhelming majority of the increase in imprisonment has been poor people of color, with the most astonishing rates of incarceration found among black men. It was estimated several years ago that, in Washington, D.C.—our nation's capital—three out of four young black men (and nearly all those in the poorest neighborhoods) could expect to serve time in prison.<sup>14</sup> Rates of incarceration nearly as shocking can be found in other communities of color across America.<sup>15</sup>

So what accounts for this vast new system of control? Crime rates? That is the common answer. But no, crime rates have remarkably little to do with skyrocketing incarceration rates. Crime rates have fluctuated over the past thirty years, and are currently at historical lows, but incarceration rates have consistently soared.<sup>16</sup> Most criminologists and sociologists today acknowledge that crime rates and incarceration rates have, for the most part, moved independently of one another.<sup>17</sup> Rates of imprisonment—especially black imprisonment—have soared regardless of whether crime has been rising or falling in any given community or the nation as a whole.<sup>18</sup>

So what does explain this vast new system of control, if not crime rates? Ironically, the activists who posted the sign on that telephone pole were right: The War on Drugs. The War on Drugs and the “get tough” movement explain the explosion in incarceration in the United States and the emergence of a vast, new racial undercaste. In fact, drug convictions alone accounted for about two-thirds of the increase in the federal system, and more than half of the increase in the state prison population between 1985 and 2000.<sup>19</sup> Drug convictions have increased more than 1000% since the drug war began, an increase that bears no relationship to patterns of drug use or sales.<sup>20</sup>

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<sup>13</sup> See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74.

<sup>14</sup> DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 3 (2004) (citing D.C. Department of Corrections 2000).

<sup>15</sup> ERIC LOTKE & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, *TIPPING POINT: MARYLAND'S OVERUSE OF INCARCERATION AND THE IMPACT ON COMMUNITY SAFETY* 3 (2005) (reporting that in Baltimore the majority of young African American men are currently under correctional supervision). Nationwide, one in three black men will go to prison during their lifetime. See THOMAS P. BONCSZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

<sup>16</sup> BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 30 (2006) (Figure 2.1).

<sup>17</sup> See, e.g., MARC MAUER, *RACE TO INCARCERATE* 23–35, 92–112 (2d ed. 2006); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 14 (2004).

<sup>18</sup> See, e.g., WESTERN, *supra* note 16, at 35, 43.

<sup>19</sup> MAUER, *supra* note 17, at 33.

<sup>20</sup> MARC MAUER & RYAN S. KING, *A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY* 2, 4 (Sept. 2007), available at [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf).

People of all races use and sell drugs at remarkably similar rates, but the enemy in this war has been racially defined.<sup>21</sup> The drug war has been waged almost exclusively in poor communities of color, despite the fact that studies consistently indicate that people of all races use and sell drugs at remarkably similar rates.<sup>22</sup> This evidence defies our basic stereotype of a drug dealer, as a black kid standing on a street corner, with his pants hanging down.<sup>23</sup> Drug dealing happens in the ghetto, to be sure, but it happens everywhere else in America as well. Illegal drug markets, it turns out—like American society generally—are relatively segregated by race.<sup>24</sup> Blacks tend to sell to blacks, whites to whites, Latinos sell to each other. University students sell to each other. People of all races use and sell drugs. A kid in rural Kansas does not drive to the ‘hood to get his pot, or meth, or cocaine, he buys it from somebody down the road. In fact, the research suggests that where significant differences by race can be found, white youth are more likely to commit drug crimes than youth of color.<sup>25</sup>

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<sup>21</sup> The overwhelming majority of those arrested and incarcerated for drug crimes during the past few decades have been black and brown. When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans “skyrocketed, nearly quadrupling in three years, then increasing steadily until it reached in 2000 a level more than twenty-six times the level in 1983.” JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISON REENTRY* 28 (2002); see, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMINISTRATION, SUMMARY OF FINDINGS FROM THE 2000 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 21 (2001), available at <http://oas.samhsa.gov/NHSDA/2kNHSDA/chapter2.htm> (reporting that 6.4 percent of whites, 6.4 percent of blacks, and 5.3 percent of Hispanics were current illegal drug users in 2000); U.S. DEP’T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 16 (2003), available at <http://oas.samhsa.gov/nsduh/reports.htm#2k2> (revealing nearly identical rates of illegal drug use among whites and blacks, only a single percentage point between them); U.S. DEP’T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 25 (2003), available at <http://oas.samhsa.gov/nsduh/reports.htm#2k2> (showing essentially the same findings).

<sup>22</sup> See generally *supra*, note 21.

<sup>23</sup> A national survey conducted in 1995 illustrated the profound and pervasive racial stereotypes associated with drug crime. Survey respondents were asked: “Would you close your eyes for a second, envision a drug user, and describe that person to me?” 95% of respondents pictured a black drug user, while only 5% imagined all other racial groups combined. Betsy Watson Burston, Dionne Jones, and Pat Robinson-Saunders, *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC. 19, 20 (Winter 1995).

<sup>24</sup> Researchers have found that drug users are most likely to report using as a main source of drugs someone who is of their own racial or ethnic background. See, e.g., K. JACK RILEY, OFFICE OF NAT’L DRUG CONTROL POLICY, NAT’L INST. OF JUSTICE, CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 1 (1997); Patricia Davis & Pierre Thomas, *In Affluent Suburbs, Young Users and Sellers Abound*, WASH. POST, Dec. 14, 1997, at A20.

<sup>25</sup> The National Household Survey on Drug Abuse reported in 2000 that white youth aged 12-17 were more likely to have used and sold illegal drugs than African American youth. NEELUM ARYA & IAN AUGARTEN, CAMPAIGN FOR YOUTH JUSTICE, CRITICAL CONDITION: AFRICAN-AMERICAN YOUTH IN THE JUSTICE SYSTEM (2003), at table 5, p. 16 and p. 19, available at <http://www.campaignforyouthjustice.org/documents/AfricanAmericanBrief.pdf>. Another study

But that is not what you would guess when entering our nation's prisons and jails, overflowing as they are with black and brown drug offenders. In the United States, those who do time for drug crime are overwhelmingly black and brown.<sup>26</sup> In some states, African Americans constitute 80 to 90% of all drug offenders sent to prison.<sup>27</sup>

I find that many people are willing to concede these racial disparities once they see the data. Even so, they tend to insist that the drug war is motivated by concern over violent crime. They say: just look at our prisons. Nearly half of the people behind bars are violent offenders. Typically this is where the discussion ends.

The problem with this abbreviated analysis is that violent crime is not responsible for the prison boom. Violent offenders tend to get longer sentences than nonviolent offenders, which is why they comprise such a large share of the prison population. One study suggests that the entire increase in imprisonment can be explained by sentence length, not increases in crime.<sup>28</sup> To get a sense of how large a contribution the drug war has made to mass incarceration, consider this: there are more people in prison today just for drug offenses than were incarcerated

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published that year revealed that white students use cocaine and heroin at significantly higher rates than black students, while nearly identical percentages of black and white students report using marijuana. LLOYD D. JOHNSTON ET AL., NAT'L INST. ON DRUG ABUSE, MONITORING THE FUTURE, NATIONAL SURVEY RESULTS ON DRUG USE, 1975-1999, Vol. 1, SECONDARY SCHOOL UNITS 146, 197 (2000), available at [http://monitoringthefuture.org/pubs/monographs/mtf-vol1\\_1999.pdf](http://monitoringthefuture.org/pubs/monographs/mtf-vol1_1999.pdf). More recent studies continue to suggest higher rates of illegal drug use and sales by white youth. See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 81 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (reporting that white youth are more likely than black youth to engage in illegal drug sales); LLOYD D. JOHNSTON ET AL., NAT'L INST. ON DRUG ABUSE, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2006, VOLUME II: COLLEGE STUDENTS & ADULTS AGES 19-45, at 28 (2007), available at [http://www.monitoringthefuture.org/pubs/monographs/vol2\\_2006.pdf](http://www.monitoringthefuture.org/pubs/monographs/vol2_2006.pdf) (stating "African-American 12th graders have consistently shown lower usage rates than White 12th graders for most drugs, both licit and illicit").

<sup>26</sup> Although the majority of illegal drug users and dealers nationwide are white, roughly three-fourths of all people imprisoned for drug offenses since the War on Drugs began have been African American or Latino. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION 3 (Apr. 2004). In recent years, rates of black imprisonment for drug offenses have dipped somewhat—declining approximately 22% from their zenith in the mid-1990s—but it remains the case that African Americans are incarcerated at grossly disproportionate rates throughout the United States. MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 5 (2009), available at [http://www.sentencingproject.org/doc/dp\\_raceanddrugs.pdf](http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf).

<sup>27</sup> HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, Vol. 12, No. 2, at 19 (May 2000).

<sup>28</sup> According to this study, the entire increase in the prison population between 1980 and 2001 can be explained by sentencing policy changes, not increases in crime. MAUER, *supra* note 17, at 33, 36-38 (citing Warren Young & Mark Brown, *Cross-national Comparisons of Imprisonment*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH, Vol. 27, at 33, 1-49 (Michael Tonry, ed., 1993)).



in 1980 for all reasons.<sup>29</sup> The reality is that the overwhelming majority of people who are swept into this system are non-violent offenders.

In this regard, it is important to keep in mind that most people who are under correctional control are not in prison or jail. As of 2008, there were approximately 2.3 million people in prisons and jails, and a staggering 5.1 million people under “community correctional supervision”—i.e., on probation or parole.<sup>30</sup> Millions more have felony records and spend their lives cycling in and out of prison, unable to find work or shelter, unable to vote or to serve on juries. **This system depends on the prison label, not prison time. It does not matter whether you have actually spent time in prison; your second-class citizenship begins the moment you are branded a felon. It is this badge of inferiority—the criminal record—that ushers you into a parallel social universe in which discrimination is, once again, perfectly legal.**

How did this extraordinary system of control, unprecedented in world history, come to pass? Most people insist upon a benign motive. They seem to believe that the War on Drugs was launched in response to rising drug crime and the emergence of crack cocaine in inner city communities. For a long time, I believed that too. But that is not the case. Drug crime was actually declining, not rising, when President Ronald Reagan officially declared the drug war in 1982.<sup>31</sup> President Richard Nixon was the first to coin the term a “war on drugs,” but President Reagan turned the rhetorical war into a literal one. From the outset, the war had little to do with drug crime and much to do with racial politics.

The drug war was part of a grand and **highly successful Republican Party strategy—often known as the Southern Strategy—of using racially coded political appeals on issues of crime and welfare to attract poor and working class white voters who were resentful of, and threatened by, desegregation, busing, and affirmative action.**<sup>32</sup> Poor and working class whites had their world rocked by the

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<sup>29</sup> “Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?” *Hearing on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178 and H.R. 18 Before the H. Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary*, 111<sup>th</sup> Cong. 2 (2009) (testimony of Marc Mauer, Executive Director, Sentencing Project).”

<sup>30</sup> PEW CTR. ON THE STATES, *supra* note 3, at 4.

<sup>31</sup> President Richard Nixon was the first to coin the term a “war on drugs,” but the term proved largely rhetorical as he declared illegal drugs “public enemy number one” without proposing dramatic shifts in public policy. President Reagan converted the rhetorical war into a literal one, when he officially announced the War on Drugs in 1982. At the time, less than 2 percent of the American public viewed drugs as the most important issue facing the nation. *See* KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 62, 163 (1997); *see also* Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, in *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, Vol. 16, at 99, 129–37 (Michael Tonry ed., 1992).

<sup>32</sup> *See, e.g.,* BECKETT, *supra* note 31, at 31; Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. IN AM. POL. DEV.* 230, 233, 237 (Fall 2007). *See generally* ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE* (2010) (offering a compelling account of how the backlash against the Civil Rights Movement gave rise to mass incarceration in Texas, and, ultimately, the nation).

Civil Rights Movement. White elites could send their kids to private schools and give them all of the advantages wealth has to offer. But poor and working class whites were faced with a social demotion. It was their kids who might be bused across town, and forced to compete for the first time with a new group of people they had long believed to be inferior for decent jobs and educational opportunities.<sup>33</sup> Affirmative action, busing, and desegregation created an understandable feeling of vulnerability, fear, and anxiety among a group already struggling for survival.

Republican party strategists found that thinly veiled promises to “get tough” on “them”—the racially defined others—could be highly successful in persuading poor and working class whites to defect from the Democratic New Deal Coalition and join the Republican Party.<sup>34</sup> H.R. Haldeman, President Richard Nixon’s former Chief of Staff, reportedly summed up the strategy: “[T]he whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”<sup>35</sup>

A couple years after the drug war was announced, crack cocaine hit the streets of inner-city communities.<sup>36</sup> The Reagan administration seized on this development with glee, hiring staff who were responsible for publicizing inner-city crack babies, crack mothers, the so-called “crack whores,” and drug-related violence. The goal was to make inner-city crack abuse and violence a media sensation that, it was hoped, would bolster public support for the drug war and would lead Congress to devote millions of dollars in additional funding to it.<sup>37</sup>

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<sup>33</sup> During the 1950s, the majority of Southern whites were better off than Southern blacks, but they were not affluent or well educated by any means; they were semiliterate (with less than twelve years of schooling) and typically quite poor. Only a tiny minority of whites was affluent and well educated. They stood far apart from the rest of whites and virtually all blacks. C. Arnold Anderson, *Inequalities in Schooling in the South*, 60 AM. J. ON SOCIOLOGY 547, 553, 557 (May 1955); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AMER. HIST. 92, 103 (June 2004). What lower class whites did have was what W.E.B. Du Bois described as “the public and psychological wage” paid to white workers, who depended on their status and privileges as whites to compensate for their low pay and harsh working conditions. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA, AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLKS PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 700 (1935). Because the Southern white elite had succeeded in persuading all whites to think in racial rather than class terms, it is hardly surprising that poor and working class whites experienced desegregation as a net loss. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525 (1980).

<sup>34</sup> See ALEXANDER, *supra* note 2, at 43–49; see, e.g., PATRICK J. BUCHANAN, *THE NEW MAJORITY: PRESIDENT NIXON AT MID-PASSAGE* 60, 62 (1973); KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 467–68 (1969).

<sup>35</sup> WILLARD M. OLIVER, *THE LAW & ORDER PRESIDENCY* 126–27 (2003).

<sup>36</sup> See Craig Reinerman & Harry G. Levine, *The Crack Attack: America’s Latest Drug Scare, 1986-1992*, in *IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS* 152 (Joel Best ed., 1995).

<sup>37</sup> *Id.* at 170–71 (“Crack was a godsend to the Right . . . It could not have appeared at a more politically opportune moment”).

The plan worked like a charm. For more than a decade, black drug dealers and users became regulars in newspaper stories and saturated the evening TV news—forever changing our conception of who the drug users and dealers are.<sup>38</sup> Once the enemy in the war was racially defined, a wave of punitiveness took over. Congress and state legislatures nationwide devoted billions of dollars to the drug war and passed harsh mandatory minimum sentences for drug crimes—sentences longer than murderers receive in many countries. Many black politicians joined the “get tough” bandwagon, apparently oblivious to their complicity with the emergence of a system of social control that would, in less than two decades, become unprecedented in world history.<sup>39</sup>

Almost immediately, Democrats began competing with Republicans to prove that they could be even tougher on “them.”<sup>40</sup> In President Bill Clinton’s boastful words, “I can be nicked on a lot, but no one can say I’m soft on crime.”<sup>41</sup> The facts bear him out. Clinton’s “‘tough on crime’ policies resulted in the largest increases in federal and state prison inmates of any president in American history.”<sup>42</sup> But Clinton was not satisfied with exploding prison populations. **In an effort to appeal to the “white swing voters,” he and the so-called “new Democrats” championed legislation banning drug felons from public housing (no matter how minor the offense) and denying them basic public benefits, including food stamps,**

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<sup>38</sup> *Id.*; DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 88 (2007).

<sup>39</sup> PROVINE, *supra* note 38, at 117. Today the black community is divided in many respects about how best to understand and respond to mass incarceration, with some academics (and celebrities) arguing that poor education and cultural traits explain the millions of black men rotating in and out of correctional control, and others emphasizing the role of racial bias and structural inequality. *See, e.g.*, DEMICO BOOTHE, *WHY ARE SO MANY BLACK MEN IN PRISON?* (2007) (emphasizing the discriminatory nature of the prison system); BILL COSBY & ALVIN F. POUSSAINT, *COME ON PEOPLE: ON THE PATH FROM VICTIMS TO VICTORS* (2007) (arguing that poor education, as well as lack of personal responsibility and discipline, largely explain the status of black men today). The fact that many African Americans endorse aspects of the current caste system, and insist that the problems of the urban poor can be best explained by their behavior, culture, lack of education, and attitude, does not, in any meaningful way, distinguish mass incarceration from its predecessors. To the contrary, these attitudes and arguments have their roots in the struggles to end slavery and Jim Crow. As numerous scholars have observed, many black advocates during the Jim Crow era embraced a “politics of respectability” and an “uplift ideology” that led them to distance themselves from the urban poor, and to blame the least educated members of the urban poor for their own condition. *See, e.g.*, KAREN FERGUSON, *BLACK POLITICS IN NEW DEAL ATLANTA* 5–11 (2002). In fact, some of the most discriminatory federal programs of the New Deal era, including the slum clearance program, received strong support from African American bureaucrats and reformers. *Id.* at 13.

<sup>40</sup> ALEXANDER, *supra* note 2, at 55–56; BECKETT, *supra* note 31, at 61.

<sup>41</sup> Michael Kramer, *The Political Interest Frying Them Isn’t the Answer*, TIME, Mar. 14, 1994, at 32, available at <http://www.time.com/time/magazine/article/0,9171,980318,00.html>.

<sup>42</sup> Press Release, Justice Policy Institute, *Clinton Crime Agenda Ignores Proven Methods for Reducing Crime* (Apr. 14, 2008) (on file with the *Ohio State Journal of Criminal Law*).

for life.<sup>43</sup> Discrimination in virtually every aspect of political, economic, and social life is now perfectly legal, once you're labeled a felon.

All of this has been justified on the grounds that getting brutally tough on "them" is the only way to root out violent offenders or drug kingpins. The media images of violence in ghetto communities—particularly when crack first hit the street—led many to believe that the drug war was focused on the most serious offenders. Yet nothing could be further from the truth. Federal funding has flowed to those state and local law enforcement agencies that increase dramatically the volume of drug arrests, not the agencies most successful in bringing down the bosses. What has been rewarded in this war is sheer numbers—the sheer volume of drug arrests.<sup>44</sup> To make matters worse, federal drug forfeiture laws allow state and local law enforcement agencies to keep for their own use 80% of the cash, cars, and homes seized from drug suspects, thus granting law enforcement a direct monetary interest in the profitability of the drug market itself.<sup>45</sup>

The results are predictable. People of color have been rounded up en masse for relatively minor, non-violent drug offenses. In 2005, for example, four out of five drug arrests were for possession, only one out of five for sales.<sup>46</sup> Most people in state prison for drug offenses have no history of violence or even of significant selling activity.<sup>47</sup> In fact, during the 1990s—the period of the most dramatic expansion of the drug war—nearly 80% of the increase in drug arrests was for marijuana possession, a drug generally considered less harmful than alcohol or tobacco and at least as prevalent in middle-class white communities as in the inner city.<sup>48</sup>

In this way, a new racial undercaste has been created in an astonishingly short period of time. Millions of people of color are now saddled with criminal records and legally denied the very rights that were supposedly won in the Civil Rights Movement.

The U.S. Supreme Court, for its part, has mostly turned a blind eye to race discrimination in the criminal justice system. The Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process from stops and searches to plea bargaining and sentencing.<sup>49</sup> Law enforcement officials are largely free to discriminate on the basis of race today, so long as no one admits

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<sup>43</sup> See ALEXANDER, *supra* note 2, at 56.

<sup>44</sup> See *id.* at 71–73; see RADLEY BALKO, CATO INST., *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* 14–15 (2006).

<sup>45</sup> See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44–45, 51 (1998).

<sup>46</sup> MAUER & KING, *supra* note 20, at 3.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> ALEXANDER, *supra* note 2, at 59; RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s*, at 1 (2005).

<sup>49</sup> ALEXANDER, *supra* note 2, at 106–16.

it. That's the key. In *McCleskey v. Kemp* and *United States v. Armstrong*, the Supreme Court made clear that only evidence of conscious, intentional racial bias—the sort of bias that is nearly impossible to prove these days in the absence of an admission—is deemed sufficient.<sup>50</sup> No matter how impressive the statistical evidence, no matter how severe the racial disparities and racial impacts might be, the Supreme Court is not interested. The Court has, as a practical matter, closed the door to claims of racial bias in the criminal justice system. It has immunized the new caste system from judicial scrutiny for racial bias, much as it once rallied to legitimate and protect slavery and Jim Crow.

In my experience, those who have been incarcerated have little difficulty recognizing the parallels between mass incarceration and Jim Crow. Many former prisoners have told me, “It’s slavery on the inside; Jim Crow when you get out.” Prisoners are often forced to work for little or no pay. Once released, they are denied basic civil and human rights until they die. They are treated as though they possess an incurable defect, a shameful trait that can never be fully eradicated or redeemed. In the words of one woman who is currently incarcerated:

When I leave here it will be very difficult for me in the sense that I’m a felon. That I will always be a felon . . . it will affect my job, it will affect my education . . . custody [of my children], it can affect child support, it can affect everywhere—family, friends, housing. . . . People that are convicted of drug crimes can’t even get housing anymore. . . . Yes, I did my prison time. How long are you going to punish me as a result of it?<sup>51</sup>

Willie Johnson, a forty-three year old African American man recently released from prison in Ohio, explained it this way:

My felony conviction has been like a mental punishment, because of all the obstacles. . . . Every time I go to put in a [job] application—I have had three companies hire me and tell me to come to work the next day. But then the day before they will call me and tell me don’t come in—because you have a felony. And that is what is devastating because you think you are about to go to work and they call you and say because of your felony we can’t hire [you]. I have run into this at least a dozen times. Two times I got very depressed and sad because I couldn’t take care of myself as a man. It was like I wanted to give up—because in society nobody wants to give us a helping hand.<sup>52</sup>

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<sup>50</sup> See *United States v. Armstrong*, 517 U.S. 456 (1996); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>51</sup> JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 152 (2006).

<sup>52</sup> Interview by Guylando A. M. Moreno with Willie Thompson, in Cincinnati, Ohio (Mar. 2005). See also ALEXANDER, *supra* note 2, at 158–59.

Not surprisingly, for many trapped in the undercaste, the hurt and depression gives way to anger. A black minister in Waterloo, Mississippi put it this way:

'Felony' is the new N-word. They don't have to call you a nigger anymore. They just say you're a felon. In every ghetto you see alarming numbers of young men with felony convictions. Once you have that felony stamp, your hope of employment, for any kind of integration into society, it begins to fade out. Today's lynching is a felony charge. Today's lynching is incarceration. Today's lynch mobs are professionals. They have a badge; they have a law degree. A felony is a modern way of saying, 'I'm going to hang you up and burn you.' Once you get that *F*, you're on fire.<sup>53</sup>

What is painfully obvious to many trapped within the system, remains largely invisible to those of us who have decent jobs and zoom around on freeways, passing by the virtual and literal prisons in which members of the undercaste live.

None of this is to say, of course, that mass incarceration and Jim Crow are the "same." There are significant differences between mass incarceration and earlier forms of racial control, to be sure—many of which are described in some detail in my book. Just as there were vast differences between slavery and Jim Crow, there are important differences between Jim Crow and mass incarceration. Yet all three (slavery, Jim Crow, and mass incarceration) have operated as tightly networked systems of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race. When we step back and view the system of mass incarceration as a whole, there is a profound sense of *deja vu*. There is a familiar stigma and shame. There is an elaborate system of control, complete with political disenfranchisement and legalized discrimination in every major realm of economic and social life. And there is the production of racial meaning and racial boundaries. Just consider a few of the rules, laws, and policies that apply to people branded felons today and ask yourself if they remind you of a bygone era:

- \* Denial of the right to vote. Forty-eight states and the District of Columbia deny prisoners the right to vote.<sup>54</sup> That, of course, is just the tip of the iceberg. Even after the term of punishment expires, states are free to deny people who have been labeled felons the right to vote for a period of years or their entire lives. In a few states, one

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<sup>53</sup> SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE 140 (2006).

<sup>54</sup> AMERICAN CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (2006); THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2011).

in four black men have been permanently disenfranchised.<sup>55</sup> Nationwide, nearly one in seven black men are either temporarily or permanently disenfranchised as a result of felon disenfranchisement laws.<sup>56</sup>

- \* Exclusion from jury service. One hallmark of Jim Crow was the systematic exclusion of blacks from juries. Today, those labeled felons are automatically excluded from juries, and to make matters worse, people are routinely excluded from juries if they “have had negative experiences with law enforcement.”<sup>57</sup> Good luck finding a person of color in a ghetto community today who has not yet had a negative experience with law enforcement. The all-white jury is no longer a thing of the past in many regions of the country, in part, because so many African Americans have been labeled felons and excluded from juries.
- \* Employment discrimination. Employment discrimination against felons is deemed legal and absolutely routine.<sup>58</sup> Regardless of whether your felony occurred three months ago or thirty-five years ago, for the rest of your life you’re required to check that box on employment applications asking the dreaded question: “Have you ever been convicted of a felony?” In one survey, about 70% of employers said they would not hire a drug felon convicted for sales or possession.<sup>59</sup> Most states also deny a wide range of professional licenses to people labeled felons.<sup>60</sup> In some states, you can’t even get license to be a barber if you’re a felon.<sup>61</sup>

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<sup>55</sup> JAMIE FELLNER & MARC MAUER, *THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 1 (1998), available at [http://www.sentencingproject.org/doc/File/FVR/fd\\_losingthevote.pdf](http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf).

<sup>56</sup> *Id.* These figures may understate the impact of felony disenfranchisement, because they do not take into account the millions of formerly incarcerated people who cannot vote in states that require people convicted of felonies to pay fines or fees before their voting rights can be restored. As legal scholar Pam Karlan has observed, “felony disenfranchisement has decimated the potential black electorate.” LOURY, *supra* note 4, at 48.

<sup>57</sup> See ALEXANDER, *supra* note 2, at 116–20 (discussing the discriminatory use of preemptory strikes against African American jurors).

<sup>58</sup> See DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 33 (2007); see also LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* 10 (2004).

<sup>59</sup> EMPLOYERS GRP. RESEARCH SERVS., *EMPLOYMENT OF EX-OFFENDERS: A SURVEY OF EMPLOYERS’ POLICIES AND PRACTICES* 6 (2002); Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 205, 209 (Mary Pattillo et al., eds., 2004).

<sup>60</sup> LEGAL ACTION CTR., *supra* note 58, at 10.

<sup>61</sup> *Id.*; see OHIO REV. CODE ANN. § 4709.13 (West, Westlaw through 1991-1992 Legis. Sess.).

- \* Housing discrimination. Housing discrimination is perfectly legal. Public housing projects as well as private landlords are free to discriminate against criminals. In fact, those labeled felons may be barred from public housing for five years or more and legally discriminated against for the rest of their lives.<sup>62</sup> These laws make it difficult for former prisoners to find shelter, a basic human right.
- \* Public benefits. Discrimination is legal against those who have been labeled felons in public benefits. In fact, federal law renders drug offenders ineligible for food stamps for the rest of their lives.<sup>63</sup> Fortunately, some states have opted out of the federal ban, but it remains the case that thousands of people, including pregnant women and people with HIV/AIDS, are denied even food stamps, simply because they were once caught with drugs.<sup>64</sup>
- \* Fees and fines. What do we expect people convicted of drug felonies to do? Even if they manage to escape jail time and get nothing more than probation, they will be discriminated against in employment, denied public housing, locked out of the private housing market, and possibly denied even food stamps. Apparently what we expect them to do is to pay hundreds or thousands of dollars in fees, fines, court costs, and accumulated back child support—frequently as a condition of probation or parole.<sup>65</sup> And here's the kicker: Even if a former prisoner manages to get a job, up to 100% of their wages can be garnished to pay for the costs of their imprisonment, court processing fees, and back payments in child support.<sup>66</sup> Yes, 100% of their wages can be garnished.

What, realistically, do we expect these folks to do? What is this system designed to do? It seems designed to send them right back to prison, which is what in fact happens most of the time. About 70% of released prisoners are rearrested

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<sup>62</sup> See HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 33 (2004).

<sup>63</sup> See Temporary Assistance for Needy Family Program (TANF), 21 U.S.C. § 862a(a)(2) (2006). See generally Legal Action Center, *Opting out of Federal Ban on Food Stamps and TANF*, at <http://www.lac.org/toolkits/TANF/TANF.htm>; Patricia Allard, The Sentencing Project, *Life Sentences: Denying Welfare Benefits To Women Convicted Of Drug Offenses* (2002), available at [http://www.sentencingproject.org/doc/publications/women\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf)

<sup>64</sup> *Black Men's Jail Time Hits Entire Communities*, NPR TALK OF THE NATION (Aug. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=129379700>.

<sup>65</sup> RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 7–8 (2007).

<sup>66</sup> *Id.* at 22. See also *Out of Prison and Deep in Debt*, N.Y. TIMES, Oct. 6, 2007, at A18, available at <http://www.nytimes.com/2007/10/06/opinion/06sat1.html>. (“People caught in this impossible predicament are less likely to seek regular employment, making them even more susceptible to criminal relapse.”).



within three years, and the majority of those who return to prison do so within a matter of months, because the barriers to mere survival on the outside are so immense.<sup>67</sup>

Remarkably, as bad as all the formal barriers to political and economic inclusion are, many formerly incarcerated people tell me that is not the worst of it. The worst is the stigma that follows you for the rest of your life. It is not just the denial of the job, but the look that crosses an employer's face when he sees the "box" has been checked. It is not just the denial of public housing, but the shame of being a grown man having to ask your grandma to sleep in her basement at night. The shame associated with criminality can be so intense that people routinely try to "pass."

During the Jim Crow era, light-skinned blacks often tried to pass as white in order to avoid the stigma, shame, and discrimination associated with their race. Today, people labeled criminals lie not only to employers and housing officials, but also to their friends, acquaintances and family members. Children of prisoners lie to friends and relatives saying, "I don't know where my daddy is." Grown men who have been released from prison for years still glance down and look away when asked who they will vote for on election day, ashamed to admit they can't vote. They try to "pass" to avoid the stigma and discrimination associated with the new caste system.

An excellent ethnographic study conducted in Washington, D.C., found that even in neighborhoods hardest hit by mass incarceration—places where nearly every house has a family member behind bars or recently released from prison—people rarely "come out" fully about their own criminal history or that of their loved ones, even when speaking with relatives, friends and neighbors.<sup>68</sup> An eerie silence about this new system of control has befallen us, one rooted for some in shame, and for others in denial.

Yes, denial. There are two major reasons, I believe, that so many of us are in denial about the existence of racial caste in America. The first is traceable to a profound misunderstanding regarding how racial oppression actually works. If someone were to visit the United States from another country (or another planet) and ask: 'Is the U.S. criminal justice system some kind of tool of racial control?', most Americans would swiftly deny it. Numerous reasons would leap to mind why that could not possibly be the case. The visitor would be told that crime rates, black culture, or bad schools were to blame. "The system is not run by a bunch of racists," the apologist would explain. They would say, "It is run by people who are trying to fight crime." Because mass incarceration is officially colorblind, and because most people today do not think of themselves as racist, it seems inconceivable that the system could function much like a racial caste system.

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<sup>67</sup> See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 94 (2005).

<sup>68</sup> See BRAMAN, *supra* note 14, at 219–20.

But more than forty-five years ago, Martin Luther King Jr. warned of the danger of precisely this kind of thinking. He insisted that blindness and indifference to racial groups is actually more important than racial hostility to the creation and maintenance of systems of racial control. Those who supported slavery and Jim Crow, he argued, typically were not bad or evil people; they were just blind.<sup>69</sup> Many segregationists were kind to their black shoe shiners and maids and genuinely wished them well. Even the Justices who decided the infamous Dred Scott case, which ruled “that the Negro had no rights which the white man was bound to respect,” were not wicked men, he said.<sup>70</sup> **On the whole, they were decent and dedicated men.** But, he hastened to add, **“They were victims of spiritual and intellectual blindness. They knew not what they did.”** The whole system of slavery was largely perpetuated by sincere though spiritually ignorant persons.”<sup>71</sup>

The same is true today. People of good will—and bad—have been unwilling to see black and brown men, in their humanness, as entitled to the same care, compassion, and concern that would be extended to one’s friends, neighbors, or loved ones.

After all, who among us would want a loved one struggling with drug abuse to be put in a cage, labeled a felon, and then subjected to a lifetime of discrimination, scorn and social exclusion? Most Americans would not wish that fate on anyone they cared about. But whom do we care about? In America, the answer to that question is still linked to race. Dr. King recognized that it was this indifference to the plight of African Americans that supported the institutions of slavery and Jim Crow. And this callous racial indifference supports mass incarceration today.

Another reason that we remain in deep denial is that we, as a nation, have a false picture of our racial reality. Prisoners are literally erased from the nation’s economic picture. Unemployment and poverty statistics do not include people behind bars. In fact, standard reports underestimate the true jobless rates for less educated black men by as much as 24 percentage points.<sup>72</sup> During the much heralded economic boom of the 1990s—the Clinton years—African American men were the only group to experience a steep increase in real joblessness, a development directly traceable to the increase in the penal population.<sup>73</sup> During the 1990s—the best of times for the rest of America—the true jobless rates for non-college black men was a staggering 42%.<sup>74</sup>

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<sup>69</sup> MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 45 (Fortress Press 1981) (1963).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> WESTERN, *supra* note 16, at 91-92.

<sup>73</sup> See Robert W. Fairlie & William A. Sundstrom, *The Emergence, Persistence, and Recent Widening of the Racial Unemployment Gap*, 52 INDUS. & LAB. REL. REV. 252, 257 Tables 2-3; see also Bruce Western, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553, 557 Table 2.

<sup>74</sup> WESTERN, *supra* note 16, at 97.

Affirmative action, though, has put a happy face on this racial reality. Seeing black people graduate from Harvard and Yale and become CEOs or corporate lawyers—not to mention President of the United States—causes us all to marvel at what a long way we have come. As recent data shows, though, much of black progress is a myth.<sup>75</sup> In many respects, if you take into account prisoners, African Americans as a group are doing no better than they were when King was assassinated and uprisings swept inner cities across America. And that is with affirmative action!

When we pull back the curtain and take a look at what our so-called colorblind society creates without affirmative action, we see a familiar social, political and economic structure—the structure of racial caste. And the entry into this new caste system can be found at the prison gate.

So where do we go from here? What can be done to dismantle this new system of control? I spend the last chapter exploring this question in some depth. What is clear, I think, is that those of us in the civil rights community have allowed a human rights nightmare to occur on our watch. While many of us have been fighting for affirmative action or clinging to the perceived gains of the Civil Rights Movement, millions of people have been rounded up en masse, locked in cages, and then released into a parallel social universe in which they can be discriminated against for the rest of their lives—denied the very rights our parents and grandparents fought for and some died for. The clock has been turned back on racial progress in America, yet scarcely anyone seems to notice.

What is needed, I believe, is a broad based social movement, one that rivals in size, scope, depth, and courage the movement that was begun in the 1960s and left unfinished. It must be a multi-racial, multi-ethnic movement that includes poor and working class whites—a group that has consistently been pit against poor people of color, triggering the rise of successive new systems of control.

The drug war was born with black folks in mind, but it is a hungry beast; it has caused incalculable suffering in communities of all colors. A white youth given a prison sentence rather than the drug treatment he desperately needs is suffering because of a drug war born of racial anxieties and resentments raging long before he was born. In California and throughout the Southwest, Latinos are a primary target of the drug war. And now that Wall Street executives have found they can profit from prisons, private prison companies have lobbied for punitive laws aimed at suspected illegal immigrants, in the hopes of building new immigration detention centers—the newest market for caging human beings.<sup>76</sup> The impulse to exploit racial fears and biases for political and economic gain is leading to a prison-building boom aimed at immigrants. If we are going to succeed in

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<sup>75</sup> See THE EISENHOWER FOUNDATION, WHAT WE CAN DO TOGETHER: A FORTY YEAR UPDATE OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: PRELIMINARY FINDINGS (2008), available at <http://www.eisenhowerfoundation.org/docs/Kerner%2040%20Year%20Update,%20Executive%20Summary.pdf>.

<sup>76</sup> Laura Sullivan, *Prison Economics Help Drive Arizona Immigration Law*, NATIONAL PUBLIC RADIO (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741>.

bringing this brutal system to an end, we must map the linkages between the suffering of African Americans in the drug war to the experiences of other oppressed and marginalized groups. We must connect the dots. This movement must be multi-racial and multi-ethnic, and it must have a keen sense of the racial history and racial dynamics that brought us to this moment in time.

But before this movement can even get underway, a great awakening is required. We must awaken from our colorblind slumber to the realities of race in America. And we must be willing to embrace those labeled criminals—not necessarily their behavior, but them—their humanness. For it has been the refusal and failure to fully acknowledge the humanity and dignity of *all* persons that has formed the sturdy foundation of all caste systems.

It is our task, I firmly believe, to end not just mass incarceration, but the history and cycle of caste in America.