

III. THE PEOPLE

ONE HUNDRED YEARS OF RACE AND CRIME

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I. INTRODUCTION

This Article considers the evolution of thinking about criminal justice and racial justice over the last one hundred years.

If I were writing about race and crime in 1910, the year the *Journal of Criminal Law and Criminology* was founded,¹ the problem that I would have focused on would be lynchings, which were sometimes an extra-legal response to African-American criminal suspects (and sometimes just random mob violence). The National Association for the Advancement of Colored People (NAACP) was created the year before the *Journal*.² The NAACP began as a response to the domestic terrorism of rampant lynchings, which were mainly in the South but all over the country.³ Most of the victims were African-American but there were Latino, Jewish, and immigrant victims as well.⁴ Thus the main race and crime problem, as

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¹ Jennifer Devroye, *The Rise and Fall of the Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7 (2010). The Institute established the *Journal of Criminal Law and Criminology* the following year. *Id.* at 8.

² GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969* 11 (2005).

³ *Id.* at 111 ("During its first two decades . . . the NAACP's solitary political focus . . . was the campaign to outlaw lynching nationally.").

⁴ W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, 91, 100 (1993).

identified by the first significant civil rights organization, was black victimization by white criminals.

Other race and crime problems I would have focused on in 1910 include de jure discrimination against African Americans, including their exclusion from juries.⁵ I would have been concerned about wrongful convictions, especially in death penalty cases when there was a black suspect and a white victim.⁶ I probably would have mentioned the related concern of lack of effective assistance of counsel.⁷ I would have complained about the way that the police enforced vagrancy laws.⁸ If punishment came up outside of the death penalty context, there might be some discussion of chain-gangs or conditions in segregated "colored only" prisons.⁹ I would have been concerned about quasi-scientific responses to

⁵ As a result of the decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), de jure segregation was still considered constitutionally valid. Even de jure racial segregation in housing had been upheld by state courts until invalidated in *Buchanan v. Warley*, 245 U.S. 60 (1917). Of course, the doctrine of "separate but equal" was not struck down completely until *Brown v. Board of Education*, 347 U.S. 483 (1954). See also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 39-43 (2004) (explaining that, despite the holding in *Strauder v. West Virginia*, 100 U.S. 303 (1880), which prohibited de jure exclusion of African-American jurors, subsequent decisions that rejected challenges to disenfranchisement allowed jurisdictions to exclude African-American jurors by selecting jurors through voter lists, since few blacks were registered to vote).

⁶ See, e.g., EDWIN M. BORCHARD, CONVICTING THE INNOCENT; SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 22-27 (1932) (detailing the story of Payne Boyd, an African-American man who, as a result of mistaken identity, was wrongly arrested and convicted for a white man's murder, even though thirty-one witnesses testified that the defendant was not Cleveland Boyd, the black man whom both parties admitted did commit the crime); see also STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 137-43 (2002) (explaining that in some southern states, the death penalty could be used to punish some crimes such as arson, murder, and robbery, but only if the defendant was black, and, in the case of rape and kidnapping, only if the victim was white).

⁷ The Sixth Amendment, which today guarantees indigent defendants the right to effective counsel, had not yet been incorporated; thus, not only was effective assistance of counsel not constitutionally guaranteed, but, in state prosecutions, indigent defendants practically had no right to counsel whatsoever. See *Betts v. Brady*, 316 U.S. 455, 461-62 (1942).

⁸ See also William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13 (1960). See generally Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161 (1984).

⁹ See DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 57-62 (1996) (describing the use of incarcerated African Americans as cheap labor); Nancy A. Ozimek, Note, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT'L L.J. 753, 758-63 (1997) (describing the history of chain gangs and their disproportionate impact on African Americans).

criminality like eugenics and forced sterilization,¹⁰ and worried about their application to African Americans.¹¹

A few years down the road from 1910, as formal police departments spread about the country, I certainly would have written about the problem of police brutality, and the widespread antipathy that blacks and police—two very distinct groups—had for each other.¹²

If I had spoken to a conference of progressives, say the members of the NAACP, which from its inception included many whites,¹³ I would also have mentioned the need for more black police officers. The suggestion that there needed to be more African-American prosecutors and judges would have been seen as so pie-in-the-sky as to be almost silly. In 1910 my great-grandfather cleaned outhouses for a living and, about twenty years later, my grandfather had one of the best jobs a black man could have—he was a Pullman porter.

That was then, this is now. I am a law professor. The President of the United States is an African-American man. And there are almost one million African-American people in prison.¹⁴ The major race and crime problems of our time are the mass incarceration of African Americans and the extraordinary disparities between blacks and whites in the criminal justice system.

The fundamental paradox is that, in 2010, while evidence of racial progress is everywhere, racial disparities in criminal justice have never been greater. Nearly one in three young black men has a criminal case: he's either locked up, on probation or parole, or awaiting trial.¹⁵ If we look at black-white racial disparities in education,¹⁶ housing,¹⁷ health care,¹⁸

¹⁰ See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (upholding forced sterilization of Carrie Buck, an alleged "feeble minded" woman).

¹¹ EDWARD J. LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 165-69 (1995) (describing popularity of eugenics movements in the Deep South).

¹² MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 57-86 (2003) (describing race riots and police brutality in New York City's increasingly black "Tenderloin" district).

¹³ JONAS, *supra* note 2, at 11.

¹⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES* 19 tbl.16 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

¹⁵ MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 1-5 (1995), available at http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf.

¹⁶ In 2007, the dropout rate for white students was 6.1%; for African Americans, it was 11.5%. NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION 2009* 182 tbl.A-20-1 (2009), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009081>.

employment,¹⁹ the ratio is usually 2:1 or 3:1. So, for example, the black unemployment rate is often twice the white unemployment rate.²⁰ Those disparities have either remained constant over the last one hundred years, or have gotten better.²¹ Right now the black-white incarceration disparity is 7:1.²² Over the last several decades, as African Americans presumably have had more and more opportunities, have been freed of de jure discrimination, and as overt racial prejudice has become socially stigmatized, the black-white disparity in incarceration has risen.²³ How can this be explained?

¹⁷ Though African Americans constitute less than one-sixth of the total population, they make up one half of the homeless population. See Daniel White & Charles Crawford, *African American Males and Homelessness: Voices from the Shelter*, in 1 HOMELESSNESS IN AMERICA 189-92 (Robert Hartmann McNamara ed., 2008).

¹⁸ African Americans are more than twice as likely as white Americans to die of diabetes, and in their first year of life, 108.14% more African-American infants die than do white infants. See Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127, 140-43 (1993).

¹⁹ BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008 3-5 (2009), available at <http://www.bls.gov/cps/cpsrace2008.pdf>.

²⁰ In 2008, the unemployment rate for African Americans was 10.1%. The unemployment rate for whites was 5.2%. *Id.* at 5 tbl.1.

²¹ See, e.g., NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 16, at 183 tbl.A-20-2 (showing that the dropout rate for black students has dropped from 19.1% in 1980 to 8.4% in 2007).

²² In 2008, about 846,000 of the approximately 38 million African Americans were in jail or prison. In contrast, about 712,500 of the approximately 228 million white Americans were similarly incarcerated. That's one in forty-five blacks, and about one in three hundred and twenty whites. BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 17 tbl.16 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>; U.S. CENSUS BUREAU, 2008 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_1YR_G00_DP5.

²³ In 1950, the incarceration rate (number incarcerated per every 100,000 persons) was 86 for whites and 406 for blacks; blacks were almost five times more likely to be locked up than whites. See MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984 65 tbl.3-31 (1986); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1951 8 (1951), available at <http://www2.census.gov/prod/statcomp/documents/1951-02.pdf>. However, in 2008, the incarceration rate was 360 for whites and 2,461 for blacks; blacks are now almost seven times more likely to be locked up than whites; see HEATHER C. WEST, & WILLIAM J. SABOL, PRISON INMATES AT MIDYEAR 2008 - STATISTICAL TABLES, 17 (2009); U.S. CENSUS BUREAU, 2008 AMERICAN COMMUNITY SURVEY, tbl.B02001, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2008_3YR_G00_-mt_name=ACS_2008_3YR_G2000_B02001. Therefore, since 1950, the incarceration rate for whites has quadrupled, but the rate for blacks has more than sextupled.

II. THE NEW JIM CROW

There are two competing narratives about race and criminal justice over the last one hundred years (or, more accurately, the last one hundred and fifty years, since the end of slavery). One narrative is that mass incarceration is the "New Jim Crow."²⁴ Under this analysis, slavery, de jure segregation, and now mass incarceration serve many of the same functions and have many of the same effects.²⁵ There are more blacks in the criminal justice system now (incarcerated, on probation or parole, awaiting trial) than were slaves in 1850.²⁶ In 2006, one in nine young black men were in prison, and black men were eight times more likely to be in jail or prison than white men.²⁷ More black men are barred from voting than when the Fifteenth Amendment was ratified.²⁸

Michelle Alexander's book, *The New Jim Crow*, advances the theory that, in today's "colorblind[]" era, police, prosecutors, judges, and legislators use criminal history as a proxy for race, thereby establishing (or maintaining) a racial caste system.²⁹ During the Jim Crow era, blacks were discriminated against, disenfranchised, excluded from juries, prevented from bringing legal challenges, and denied other civil, political, and legal rights.³⁰ The same can be said today about felons, a disproportionate number of whom are African-American.³¹ Alexander asserts that in the era of mass incarceration, a newly freed felon has "scarcely more rights, and arguably less respect, than a freed slave or a black person living 'free' in Mississippi at the height of Jim Crow."³²

According to Alexander, the war on drugs is the primary tool in creating today's caste system. Since the war on drugs began approximately thirty years ago, the U.S. penal population has almost sextupled, growing from around 300,000 to two million; more than half of these incarcerations

²⁴ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

²⁵ *Id.* at 185-95; see also DEAD PREZ, *Behind Enemy Lines*, on LET'S GET FREE (Loud Records 2000) ("Behind enemy lines, my niggas is cellmates. / Most of the youth never escape the jail fate. / Super maximum camps will advance their game plan / to keep us in the hands of the man. Locked up.").

²⁶ ALEXANDER, *supra* note 24, at 271 n.7 (citing PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009); U.S. CENSUS BUREAU, *THE SEVENTH CENSUS OF THE UNITED STATES: 1850 ix tbl.1* (1853)).

²⁷ ALEXANDER, *supra* note 24, at 98.

²⁸ *Id.* at 175.

²⁹ *Id.* at 2.

³⁰ *Id.* at 185-95.

³¹ *Id.* at 97, 185-95.

³² *Id.* at 138.

were drug convictions.³³ Today, about half of a million people are in jail or prison for a drug offense; this is more than a ten-fold increase from 1980.³⁴ As a result, the United States has the highest incarceration rate in the world by far; we incarcerate 750 adults per 100,000, while Germany, for example, incarcerates 93 per 100,000.³⁵ The incarceration rate has skyrocketed despite the fact that the rate of violent crimes is historically low.³⁶

The discriminatory results of the drug war are clear. Three-fourths of those imprisoned for drug offenses are black or Latino.³⁷ In seven states, 80% to 90% of imprisoned drug offenders are black.³⁸ Such disparities cannot be explained by disproportionate use of drugs by African Americans; blacks don't use drugs more than any other group, and some studies have even found that they use them less.³⁹

Instead of a formally discriminatory legal regime under Jim Crow, the caste system of mass incarceration relies on the unchecked discretion of police officers and prosecutors. Though all races use illegal drugs at similar rates, law enforcement officers target inner-city minorities; one study in Seattle showed that officers more frequently surveilled open-air drug markets even though most citizen complaints regarded suspected drug use in residences, that officers targeted a downtown drug market even though the frequency of transactions was higher in an outdoor drug market in a white neighborhood, that officers arrested black dealers far more often than white dealers even though white dealers were plainly visible, and that officers overwhelmingly focused on crack cocaine, preferred by the African-American community, even though more overdose deaths were the result of heroin use.⁴⁰ The Supreme Court has contributed to this highly differential system. Between 1982 and 1991, 90% of Supreme Court decisions regarding the Fourth Amendment as applied to narcotics were reversals in favor of the government.⁴¹ Frustrated, Justice Thurgood

³³ *Id.* at 6.

³⁴ *Id.* at 59.

³⁵ *Id.* at 6.

³⁶ *Id.* at 99.

³⁷ *Id.* at 96-97.

³⁸ *Id.* at 96.

³⁹ *Id.* at 97 (citing NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERV., MONITORING THE FUTURE: 1 NATIONAL SURVEY RESULTS ON DRUG USE, 1975-1999: SECONDARY SCHOOL STUDENTS (2000)).

⁴⁰ *Id.* at 120-22, 124-25.

⁴¹ *Id.* at 61 (citing *California v. Acevedo*, 500 U.S. 565, 600 (1991) (Stevens, J. dissenting)).

Marshall had to remind his colleagues that there is "no drug exception" to the Bill of Rights.⁴²

Similar statistics reveal racial disparities in police officers use of traffic stops; on the New Jersey Turnpike, where 15% of drivers are black, 42% of stops, and 73% of arrests were of black motorists, even though whites were more likely to be found carrying illegal drugs in their vehicles.⁴³

Even though America's laws must be formally colorblind, the Supreme Court has approved the practice of using race as a factor to determine whether an individual is sufficiently suspicious to investigate, at least in the context of immigration.⁴⁴ Moreover, the Court has made it difficult to challenge discrimination other than in its extreme forms. For example, the Court refused to grant relief to a death row inmate convicted in Georgia, where prosecutors sought the death penalty in 70% of cases involving blacks accused of killing whites but only 19% of cases involving whites accused of killing blacks.⁴⁵ The Court held that an undeniable pattern of discrimination was not sufficient and that the Equal Protection Clause would be implicated only if a defendant could prove that the prosecutor, judge, or jury consciously discriminated against the defendant in his own particular case.⁴⁶ Relying on this precedent, a subsequent Georgia Supreme Court decision upheld a statute allowing a judge to impose life imprisonment for a second drug offense, even though Georgia's prosecutors requested that the policy be applied against blacks sixteen times more often than against whites; 98.4% of persons discretionarily sentenced under the law were black.⁴⁷ The Court has also made it practically impossible to ensure a fair jury of one's peers; though the Court requires prosecutors to have a non-racially discriminatory justification for using a peremptory challenge,⁴⁸ the Court has accepted clearly pretextual justifications, such as having "the longest hair of anybody on the panel by far," or having a "mustache and goatee type beard," which according to the prosecutor in question, "look[ed] suspicious" and made the person "appear[] not to be a good juror for that fact . . ."⁴⁹ The Court has even closed the door to a plaintiff's fact-finding. When the federal public

⁴² *Id.* at 60 (citing *Skinner v. Ry Labor Executive's Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting)).

⁴³ *Id.* at 131.

⁴⁴ *Id.* at 128-30 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

⁴⁵ *Id.* at 106-09 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 111-12 (referring to *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995)).

⁴⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁴⁹ *Id.* at 120 (quoting *Purkett v. Elm*, 514 U.S. 765, 789 (1995)).

defenders in Los Angeles noticed that all of their crack defendants in the previous year were either black or Hispanic, they alleged selective enforcement and sought to acquire information regarding the prosecutors' charging decisions; the Court refused to grant discovery, requiring the defenders to show solid proof of selective prosecution before being allowed to investigate for solid proof of selective prosecution.⁵⁰

Professor Alexander is not the first to compare the modern struggles of blacks to the Jim Crow era; similar rhetoric has consistently been used to criticize American criminal law, especially the war on drugs. In 1999, former executive director of the ACLU Ira Glasser compared the drug laws not only to Jim Crow but also to the internment of Japanese-Americans during World War II.⁵¹ Like Alexander, Glasser blamed the drug war for discriminatory police tactics, such as racial profiling in the use of traffic stops and *Terry* stop-and-frisks.⁵² In 2001, the Temple Political and Civil Rights Law Review hosted an entire symposium titled "U.S. Drug Laws: The New Jim Crow?"⁵³ In a 2002 article, Graham Boyd,⁵⁴ the founder of

⁵⁰ *Id.* at 113-15 (citing *United States v. Armstrong*, 517 U.S. 456 (1996)).

⁵¹ Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 703-04 (2000).

⁵² *Id.* at 709-11.

⁵³ Beverly Xaviera Watkins and Mindy Thompson Fullilove noted how, despite the recognition of the health dangers of the use of crack, particularly the spread of AIDS, the government failed to allocate resources or provide a sufficient government response. Beverly Xaviera Watkins & Mindy Thompson Fullilove, *The Crack Epidemic and the Failure of Epidemic Response*, 10 TEMP. POL. & CIV. RTS. L. REV. 371, 377-83 (2001). Professor Diana Gordon examined change to drug laws, concluding that today's war on drugs is just another example of "a rear-guard action against full equality for racial minorities." Diana R. Gordon, *Drug Policy and the Dangerous Classes: A Historical Overview*, 10 TEMP. POL. & CIV. RTS. L. REV. 315, 320 (2001). Professor Susan Frietsche examined policies highlighted in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), that required hospitals to perform a drug test on mothers of newborns; if the mother tested positive for drug use, they would be charged with distribution of drugs to a minor. Susan Frietsche, *Policing Drug Use During Pregnancy*, 10 TEMP. POL. & CIV. RTS. L. REV. 411 (2001). Amy Hirsch addressed how welfare reform strips poor, uneducated, and often homeless women of necessary welfare benefits. Amy E. Hirsch, *Bringing Back Shame: Women, Welfare Reform, and Criminal Justice*, 10 TEMP. POL. & CIV. RTS. L. REV. 417, 419-27 (2001). Eric E. Sterling, President of The Criminal Justice Policy Foundation, discussed the political background of the war on drugs, including politicians' exploitation of the death of college basketball sensation Len Bias to strengthen cocaine sentences. Eric E. Sterling, *Drug Laws and Thought Crime*, 10 TEMP. POL. & CIV. RTS. L. REV. 327, 329-31 (2001). William H. Buckman and John Lamberth explained how police departments' drug courier profiles enable racial profiling in traffic stops. William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 10 TEMP. POL. & CIV. RTS. L. REV. 387, 390-94 (2001). J. Whyatt Mondesire compared felon disenfranchisement to Jim Crow era poll taxes. J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435 (2001). Marc Mauer, Assistant Director of the Sentencing Project, highlighted the abuses in police and prosecutor

the ACLU's Drug Policy Litigation Project, voiced a number of the same concerns addressed in Alexander's book; he cites felon disenfranchisement,⁵⁵ disparities in enforcement,⁵⁶ prison labor,⁵⁷ revocation of government aid,⁵⁸ and child custody revocation proceedings for mothers who show signs of drug use⁵⁹ as signs that the drug war is the New Jim Crow.

In the New Jim Crow analogy, police and prosecutors are the modern overseers.⁶⁰ It is easy to caricature this narrative, and its exponents are quick to acknowledge that there are important differences between slaves, victims of legal segregation, and inmates.⁶¹ The "New Jim Crow" analysis, however, focuses on the striking similarities. Both slavery and imprisonment, the argument goes, are caste defining and integral in the production of race.⁶² Both are institutions that are inextricable from white supremacy.

III. THE CELEBRATORY TRADITION

The competing narrative about race and crime is more optimistic. The "celebratory tradition" was originally described by Professor Randall Kennedy as a form of racial apologetics.⁶³ Here, I use the term in a non-pejorative sense. It is a way of identifying the concept that racial justice has been advanced in the last millennium and that the law has played an

discretion. Marc Mauer, *Race, Drugs Laws, & Criminal Justice*, 10 TEMP. POL. & CIV. RTS. L. REV. 321, 321-23 (2001). Kurt Schmoke, former Mayor of Baltimore and current Dean of Howard Law School, discussed his strategy for ending the drug war and the crime problem at the same time: shifting publicly allocated funds from criminal justice to public health. Kurt Schmoke, *Forging a New Consensus in the War on Drugs: Is It Possible?*, 10 TEMP. POL. & CIV. RTS. L. REV. 351, 356 (2001).

⁵⁴ Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839 (2002).

⁵⁵ *Id.* at 843-45.

⁵⁶ *Id.* at 845-46.

⁵⁷ *Id.* at 848.

⁵⁸ *Id.* at 848-49.

⁵⁹ *Id.* at 847-48.

⁶⁰ KRS-ONE, *Sound of da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993) ("The overseer rode around the plantation; / the [police] officer is off patrolling all the nation. / The overseer could stop you what you're doing; / the officer will pull you over just when he's pursuing. / The overseer had the right to get ill, / and if you fought back, the overseer had the right to kill; / the officer has the right to arrest, / and if you fight back they put a hole in your chest."); IMMORTAL TECHNIQUE, *You Never Know*, on REVOLUTIONARY VOL. 2 (Viper Records 2003) ("[I] [e]nded up locked up like an animal for a year, / where the C.O.'s [correction officers] talk to you like they were the overseer.").

⁶¹ See ALEXANDER, *supra* note 24, at 195-208.

⁶² *Id.* at 182-95.

⁶³ Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1629 (1986).

important role in this advancement. Professor Kennedy was critical of some constitutional scholars who he believed justified or ignored the Supreme Court's failures in race cases.⁶⁴ This inclination, Kennedy claims, arises from the pressure on legal scholars to provide "nationalistic self-congratulation" in order to bestow upon the Court the appearance of legitimacy.⁶⁵ In critiquing the celebratory tradition, Kennedy targeted the constitutional scholarship of Professor Benno Schmidt, particularly his work addressing the Court's jurisprudence during the Progressive era.⁶⁶

Schmidt claimed, for example, that the Supreme Court's peonage decisions, which invalidated statutes forcing persons who breached employment contracts to become indentured servants,⁶⁷ effectively dismantled southern peonage and became "the most lasting of the White Court's contributions to justice for black people, and among its greatest achievements."⁶⁸ Kennedy accused Schmidt of a gross exaggeration; the Court's declarations plainly failed to end peonage, as many state officials defied the decisions and continued to apply the criminal law to acquire forced labor.⁶⁹ Therefore, Kennedy argues, the White Court, which Schmidt claims was distinctly more progressive than other Courts and other branches of government at the time, "did not challenge the prevailing ideology in the Age of Segregation, but fit quite readily within it"; the Court continually upheld segregation, and the few progressive decisions issued by the Court were quickly and easily evaded through legislative subterfuge.⁷⁰

⁶⁴ *Id.* at 1622-27.

⁶⁵ *Id.* at 1659.

⁶⁶ *Id.* at 1628. Kennedy's critique highlights a number of Schmidt's writings. See *id.* at 1268 n.26 (citing ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT: 1910-1921* (9 OLIVER WENDELL HOLMES DEVISE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1984)); Benno C. Schmidt, Jr., *A Postscript for Charles Black: The Supreme Court and Race in the Progressive Era*, 95 YALE L.J. 1681 (1986); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401 (1983); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982)).

⁶⁷ See *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911).

⁶⁸ BICKEL & SCHMIDT, *supra* note 66, at 820.

⁶⁹ Kennedy, *supra* note 64, at 1646-48.

⁷⁰ *Id.* at 1648-52.

Ironically, given his critique of Schmidt, Kennedy himself is the leading practitioner of the celebratory tradition in criminal law scholarship. His book, *Race, Crime, and the Law*, revels in the progress that he believes the United States has made on race and crime issues.⁷¹ In "(Color) Blind Faith: The Tragedy of *Race, Crime, and the Law*," a critique of Kennedy's book, I noted that the book minimizes the law's failures and exaggerates its achievements.⁷² Kennedy does not believe that racism remains a significant concern in American criminal justice.

A celebrant like Kennedy, revisiting the list of problems that I would have focused on in 1910, would note that many of those problems have, to a significant degree, been solved. Lynching is no longer a significant concern.⁷³ Formal legal impediments, like the exclusion of African Americans from juries, have been removed.⁷⁴ Thanks to the Supreme Court, accused people have many more rights, importantly including the right to a lawyer.⁷⁵ The Court has also declared unconstitutional some laws, like some anti-loitering statutes, that allowed police to abuse their discretion.⁷⁶ And in addition to being a law professor, I am a former prosecutor.⁷⁷ There are many minority actors in the criminal justice system, including police officers, prosecutors, defense attorneys, jurors, judges, and significantly, lawmakers.⁷⁸

⁷¹ RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

⁷² Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (book review).

⁷³ Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 840 (1994).

⁷⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986) (declaring unconstitutional a prosecutor's use of race-based peremptory challenges).

⁷⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (declaring that the Sixth Amendment requires states to provide counsel to indigent criminal defendants).

⁷⁶ *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (invalidating Chicago's gang loitering law that prohibited "remain[ing] in any one place with no apparent purpose"); *Kolender v. Lawson*, 461 U.S. 352, 353 n.1 (1983) (striking California's loitering statute requiring individuals who "wander[] . . . from place to place without apparent reason or business" to explain their presence to police); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating Florida's loitering law "because it encourages arbitrary and erratic arrests and convictions"); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (reversing defendant's conviction under a statute, literally interpreted by the trial judge, that prohibited "stand[ing] or loiter[ing] upon any street or sidewalk . . . after having been requested by any police officer to move on").

⁷⁷ See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 1 (2009).

⁷⁸ See Nathaniel R. Jones, *For Black Males and American Society - The Unbalanced Scales of Justice: A Costly Disconnect*, 23 CAP. U.L. REV. 1, 8-12 (1994) (describing progress in increased appointment of black judges and hiring of black police officers).

How does the celebratory tradition deal with the higher rate of incarceration of African Americans and with other racial disparities in criminal justice? Here, in an odd way, it remains celebratory.

The celebratory tradition identifies the principle race and crime problem as under-enforcement.⁷⁹ The victims who merited the attention of criminal justice in the bad old days were almost exclusively white. Police and prosecutors were largely unconcerned about black-on-black or white-on-black crime.⁸⁰ Thus, the fact that there are so many black people in prison is, strangely enough, good news; all this law enforcement focus on the African-American community is reparation for the days when crimes against blacks went unanswered. Randall Kennedy argues that "the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the law."⁸¹

Law enforcement, in this story, is a public good. For a group to complain about having too much of it would be like complaining it had too many schools or too many parks.

This narrative is also easy to caricature. In the academy, I've explored it in two contexts—first, in the aforementioned review of Randall Kennedy's *Race, Crime, and the Law*.⁸² More recently, in promoting my own book, *Let's Get Free*,⁸³ I've had a series of debates with elected prosecutors across the country.⁸⁴ We have discussed whether the work that prosecutors do is consistent with social and racial justice. The prosecutors I've debated, many of whom are African-American, all claimed that their work is in the best interest of black people, even when that work includes locking up many blacks. These prosecutors have identified a different main race problem than mass incarceration. They, like Kennedy, believe that the principle problem remains the under-protection of law and, specifically, the disproportionate number of victims of violent crime, especially homicide, who are African-American.⁸⁵

IV. SYMBOLIC VERSUS MATERIAL PROGRESS

My purpose here is to set out these competing narratives rather than to choose between them. We should note, however, that they seem impossible

⁷⁹ See KENNEDY, *supra* note 71, at 19.

⁸⁰ *Id.* at 60-75.

⁸¹ *Id.* at 19.

⁸² Butler, *supra* note 72.

⁸³ BUTLER, *supra* note 77.

⁸⁴ See, e.g., Butler and Barkow Discuss the Role of Prosecutors in Social and Racial Justice, NYU LAW (Nov. 2, 2009), http://www.law.nyu.edu/news/forum_paul_butler (discussion with Anthony Barkow, who was a federal prosecutor for twelve years).

⁸⁵ KENNEDY, *supra* note 79, at 19.

to reconcile. They cannot both be true. If the "New Jim Crow" theorists are correct, and the mass incarceration of blacks is simply the latest manifestation of racial subordination, conditions are worse than (or at least equally as bad as) they have ever been. The depressing statistics about the number of African Americans who are locked up and other extreme racial disparities seem to bear this out.

On the other hand, most people probably would say that an African American has a better chance of receiving a fair trial in 2010 than he or she would have had in 1910. It seems undeniable that the racial climate has improved over the last one hundred years.

Can racial justice in criminal law be better and worse at the same time? In her widely cited article, "Race, Reform, and Retrenchment," Professor Kimberlé Crenshaw provides a useful and nuanced way of thinking about two kinds of racial progress: symbolic and material.⁸⁶ Though Crenshaw wrote about constitutional law rather than criminal law, her analysis provides a helpful template for assessing the evolution of race, crime, and the law.

Crenshaw argues that the Supreme Court's civil rights cases benefit African Americans but, at the same, time make further material gains more difficult to obtain. She explains that during the Jim Crow era, blacks were faced with two types of oppression: "symbolic subordination" and "material subordination."⁸⁷ Symbolic subordination includes the states' respective efforts to reinforce a racist ideology of black inferiority by formally refusing to provide social and political equality to blacks.⁸⁸ Material subordination is the actual economic subordination created by discriminatory policies and by the hegemonic racial hierarchy supported by the status quo.⁸⁹ Crenshaw argues that the Supreme Court has been highly effective in ending symbolic subordination, but has had only limited success in ending material subordination.⁹⁰

With regard to race and crime, symbolic victories have been few and far between. This is not because the Supreme Court approves of race-based criminal laws but rather because most criminal statutes have been facially race-neutral for generations. Racial disparities have not been caused by discriminatory statutes; instead, such results have been achieved through the racialized exercise of discretion, including selective enforcement by

⁸⁶ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

⁸⁷ *Id.* at 1376-79.

⁸⁸ *Id.* at 1377.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1378-79.

police departments, selective prosecution, and selective sentencing by judges.

For example, the men convicted in *Moore v. Dempsey*,⁹¹ *Powell v. Alabama*,⁹² and *Brown v. Mississippi*⁹³—outrageous examples of Jim Crow justice—were all charged under racially neutral criminal laws. Likewise, the anti-loitering laws, which were abusively applied to African Americans as described in *Shuttlesworth v. City of Birmingham*, were facially race-neutral.⁹⁴

As I noted earlier, the Supreme Court has been reluctant to disturb this broad discretion, even when it is demonstrated to have racially skewed results. Black criminal defendants do obtain some of the normative benefits cited by Crenshaw. Minorities gained when the Court overturned those criminal laws that were facially discriminatory, such as the laws criminalizing anti-miscegenation invalidated in *McLaughlin v. Florida*⁹⁵ and *Loving v. Virginia*.⁹⁶ Moreover, African-American defendants have benefited from the stigma against racism that the Supreme Court's civil rights cases have helped to create.

Yet material progress—the reduction, say, of racial disparities—has not been the result. In a way, the success of the civil rights litigation in the Supreme Court may be partly to blame. Crenshaw notes that formal neutrality has hindered the civil rights movement's ability to make further advances.⁹⁷ The abolition of most facially discriminatory policies gives credence to the theory (more aspirational than actualized) that America is essentially a meritocratic society.⁹⁸

Because race matters less in the law, it is thought by many to matter less in everyday life. Thus, factors other than the law are looked for to explain sub-standard black achievement—factors like culture or even genetics. This narrative harms African-American suspects because it diminishes the significance of race and racism. Pointing to facially

⁹¹ 261 U.S. 86, 87 (1923) (involving black defendants charged with murder and convicted at the culmination of a lynch mob riot); see also Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 51-52 (2000) (explaining that the mob went on to kill up to 250 other African-Americans, and that "[s]eventy-nine blacks (and no whites) were prosecuted as a result of the riot").

⁹² 287 U.S. 45, 50, 53 (1932) (involving black defendants convicted of rape and sentenced to death after a trial, where counsel was not appointed until the morning of trial).

⁹³ 297 U.S. 278, 281-82 (1936) (involving black defendants convicted of murder after police coerced a confession from them by hanging and beating them).

⁹⁴ 382 U.S. 87, 88 (1965).

⁹⁵ 379 U.S. 184, 184 (1964).

⁹⁶ 388 U.S. 1, 2-3 (1967).

⁹⁷ Crenshaw, *supra* note 86, at 1378-84.

⁹⁸ *Id.* at 1380.

discriminatory policies was an effective way for blacks to prove that the system was inherently oppressive; now that the "Whites Only" signs have been taken down, it is more difficult for African Americans to explain their experience, therefore making claims of racial subordination less credible to people who accept these dominant narratives.

V. ACKNOWLEDGING THE CONTINUING SIGNIFICANCE OF RACE

In this Symposium, Professor Ronald Allen spoke about the political trend, during the 1970s, of running against the Court.⁹⁹ Now, the Court, rather than the politics, has changed. We have witnessed the decline of the optimism of the Great Society, and its criminal justice correlate, the rehabilitative ideal.

Thus, for the problem of mass incarceration, relief from the Supreme Court will come unexpectedly, like the results in *Booker*¹⁰⁰ and *Apprendi*,¹⁰¹ rather than as the product of public interest litigation designed to bring the Court around. Groups like the NAACP and ACLU came late to recognizing mass incarceration as a race problem and a human rights problem, and thus missed the days of a more receptive Supreme Court. I consult on litigation strategy with some civil rights organizations, and their basic strategy is not to bring litigation, especially in federal court. No one, for example, thinks this is a good time to ask the Court to declare racial profiling unconstitutional. Even if the composition of the Court becomes more liberal, the weight of the precedent of the Burger, Rehnquist, and Roberts Courts is so daunting that it is difficult to imagine a welcoming climate in the foreseeable future. One exception might be the death penalty, where the Court is arguably more receptive to concerns about fairness.¹⁰²

⁹⁹ See Ronald J. Allen, *Opening Remarks*, 100 J. CRIM. L. & CRIMINOLOGY 633 (2010).

¹⁰⁰ *United States v. Booker*, 543 U.S. 220 (2005); see also Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1395 (2005) (calling the *Booker* opinion "dramatic and surprising").

¹⁰¹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); see Linda Greenhouse, *The Supreme Court: Trial by Jury; New Jersey Hate Crime Law Struck Down*, N.Y. TIMES, June, 27, 2000, at A19 ("Rarely has any case had such an immediate and dramatic impact on the practice of law.").

¹⁰² See *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating Georgia's death penalty system, citing ethnic disparities and basic fairness concerns). But see *McCleskey v. Kemp*, 481 U.S. 279, 353 (1986) (upholding Georgia's death penalty program despite study showing that "[w]hite-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases"); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that imposing the death penalty is not inherently unconstitutional, approving Georgia's new capital sentencing scheme).

Charles Ogletree, among other scholars, has observed that the Warren Court, in its famed criminal procedure cases, was making advances in racial justice as much as criminal procedure.¹⁰³ Many of the litigants in these cases, including Mr. Miranda¹⁰⁴ and Mr. Terry,¹⁰⁵ were African-American or Latino. Significantly, however, the Court rarely discussed race in its criminal procedure opinions. Its racial justice work was covert and formally color-blind. Now even these "down low" kinds of interventions seem absent from the Court's criminal jurisprudence.

The central race and crime problem in the next one hundred years will be the efficacy of dealing with race and crime problems through color-blind law and policy. In the post-racial era, is it even possible to fix problems that are inextricably linked to racial subordination? The increase in racial disparities in incarceration can be attributed mainly to selective enforcement of the drug laws. Again, this enforcement is "discriminatory" in the sense that there is no evidence that African Americans disproportionately commit drug offenses.¹⁰⁶ The Court's equal protection jurisprudence, which requires a discriminatory intent, and its criminal procedure jurisprudence, which reifies law enforcement discretion, make this race and crime problem exceedingly difficult to address through civil rights litigation.

There are, in addition, some crimes that blacks do commit disproportionately.¹⁰⁷ For these crimes, the issue of whether race should be considered in assessing responsibility and punishment remains fraught. Blacks do not commit crimes because they are black. Their overrepresentation among some classes of offenders is attributable to social

¹⁰³ Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106 n. 4 (2005) (citing Professor Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990)).

¹⁰⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring exclusion of custodial interrogations by criminal defendants unless the defendant had been informed of his right to silence and right to counsel).

¹⁰⁵ *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing government officers to execute "pat and frisk" searches of suspects only if the officer has reasonable suspicion that the suspect is participating in illegal behavior).

¹⁰⁶ MARC MAUER, *THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* 4 (2009), available at http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf (noting that African Americans composed 12% of the total state prison population, but 45% of those incarcerated for a drug offense).

¹⁰⁷ See UNIFORM CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1993-2001 59-69 (2003), available at http://www.fbi.gov/ucr/adducr/age_race_specific.pdf.

and environmental conditions such as poverty,¹⁰⁸ miserable schools,¹⁰⁹ broken families,¹¹⁰ lack of access to health care,¹¹¹ and even lead poisoning.¹¹² All of these factors are in turn linked to racial subordination. If the law does not recognize this fundamental truth, if its remedies are all color-blind, then the symptoms are treated, but the disease remains. For a painful disease, a patient might be satisfied with treatment of symptoms; she might feel better, even if she has not been cured. Maybe this "improvement" is what the celebratory narrative celebrates.

Yet the disease remains. It metastasizes. This is the racial subordination that the "New Jim Crow" storytellers focus on. The disease cannot be cured unless it is diagnosed and treated. This would mean race-conscious remedies in criminal justice. We have such remedies in other areas of the law, for example employment and education, because we understand that color-blind solutions will perpetuate the status quo. Their legal status, however, is relentlessly contested, and they are politically unpopular. They do not seem to be the wave of the future. President Obama, criticized about the high rate of African-American unemployment, said, "I can't pass laws that say 'I'm just helping black folks.'"¹¹³ He asserted that his overall fixes to the economy would benefit all, including African Americans.¹¹⁴ The "rising tide will lift all boats" remedy also seems to be the prevailing view on race and crime: improved access to health care, more jobs, improved education, elimination of "mandatory minimum sentences," and other means of restoring discretion to judges—all these will make things better for people of color in the criminal justice system. If the "New Jim Crow" school is correct, however, race will continue to confound criminal justice for the next one hundred years, or however long it takes to achieve explicit racial justice interventions in criminal justice.

¹⁰⁸ Ching-Chi Hsieh & M. D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182, 198 (1993).

¹⁰⁹ Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AMER. ECON. REV. 155, 183 (2004).

¹¹⁰ Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 380-86 (2004).

¹¹¹ Rachel E. Barkow & David B. Edwards, *Commentary: How Health Care Can Reduce Crime*, FORBES.COM, June 22, 2010, <http://www.forbes.com/2010/06/22/health-care-crime-drugs-opinions-contributors-rachel-barkow-david-edwards.html>.

¹¹² Shankar Vedantam, *Research Links Lead Exposure, Criminal Activity*, WASH. POST, July 8, 2007, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/07/AR2007070701073.html>.

¹¹³ April D. Ryan, *Interview with President Barack Obama*, APRILDRYAN.COM, Dec. 21, 2009, <http://aprildryan.com/2009/12/21/interview-with-president-barack-obama/>.

¹¹⁴ *Id.*

On the bicentennial of the United States Constitution, Justice Thurgood Marshall reflected on the legal progress that the civil rights movement helped to achieve. Justice Marshall explained that, looking back, he saw victories, but looking forward, he saw more challenges:

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. . . . Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled."¹¹⁵

The experience of the last one hundred years teaches us that racial progress in criminal justice is not inevitable, but it is possible, at least in some limited sense. Whether racial justice can be accomplished in a legal and political climate that rebuffs race discourse may still be an open question at the *Journal's* bicentennial in 2110. In the meantime, in 2010, nearly one million African Americans languish in prison, and millions more under some other form of criminal supervision.

¹¹⁵ Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

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