

The New Jim Crow

Mass Incarceration in the
Age of Colorblindness

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and are now struggling to hold on to the gains of the past. I thought my job as a civil rights lawyer was to join with the allies of racial progress to resist attacks on affirmative action and to eliminate the vestiges of Jim Crow segregation, including our still separate and unequal system of education. 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. Never did I seriously consider the possibility that a new racial caste system was operating in this country. The new system had been developed and implemented swiftly, and it was largely invisible, even to people, like me, who spent most of their waking hours fighting for justice. I first encountered the idea of a new racial caste system more than a decade ago, when a bright orange poster caught my eye. I was rushing to catch the bus, and I noticed a sign started to a telephone pole that screamed in large bold print: THE DRUG WAR IS THE NEW JIM CROW. I paused for a moment and skimmed the text of the flyer. Some radical group was holding a community meeting about police brutality, the new three strikes law in California, 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 signed, 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 an absurd comparison. People will just think you're crazy." I then crossed the street and hopped on the bus. I was headed to my new job, director of the Racial Justice Project of the American Civil Liberties Union (ACLU) in Northern California. When I began my work at the ACLU, I assumed that the criminal justice system had problems of racial bias, much in the same way that all major institutions in our society are plagued with problems associated with conscious and unconscious bias. As a lawyer who had litigated numerous class-action employment-discrimination cases, 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. I was familiar with the challenges associated with reforming institutions in which racial stratification is thought to be normal—the natural consequence of differences in education, culture, motivation, and, some still believe, innate ability. 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.

In my experience, people who have been incarcerated rarely have difficulty identifying the parallels between these systems of social control. Once they are released, they are often denied the right to vote, excluded from juries, and relegated to a racially segregated and subordinated existence. Through a web of laws, regulations, and informal rules, all of which are powerfully reinforced by social stigma, they are confined to the margins of mainstream society and denied access to the mainstream economy. They are legally denied the ability to obtain employment, housing, and public benefits—much as African Americans were once forced into a segregated, second-class citizenship in the Jim Crow era.

Those of us who have viewed that world from a comfortable distance—yet sympathize with the plight of the so-called underclass—tend to interpret the experience of those caught up in the criminal justice system primarily through the lens of popularized social science, attributing the staggering increase in incarceration rates in communities of color to the predictable, though unfortunate, consequences of poverty, racial segregation, unequal educational opportunities, and the presumed realities of the drug market, including the mistaken belief that most drug dealers are black or brown. Occasionally, in the course of my work, someone would make a remark suggesting that perhaps the War on Drugs is a racist conspiracy to put blacks back in their place. This type of remark was invariably accompanied by nervous laughter, intended to convey the impression that although the idea had crossed their minds, it was not an idea a reasonable person would take seriously.

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→ Most people assume the War on Drugs was launched in response to the crisis caused by crack cocaine in inner-city neighborhoods. This view holds that the racial disparities in drug convictions and sentences, as

well as the rapid explosion of the prison population, reflect nothing more than the government's zealous—but benign—efforts to address rampant drug crime in poor, minority neighborhoods. This view, while understandable, given the sensational media coverage of crack in the 1980s and 1990s, is simply wrong. While it is true that the publicity surrounding crack cocaine led to a dramatic increase in funding for the drug war (as well as to sentencing policies that greatly exacerbated racial disparities in incarceration rates), there is no truth to the notion that the War on Drugs was launched in response to crack cocaine. President Ronald Reagan officially announced the current drug war in 1982, before crack became an issue in the media or a crisis in poor black neighborhoods. A few years after the drug war was declared, crack began to spread rapidly in the poor black neighborhoods of Los Angeles and later emerged in cities across the country.² The Reagan administration hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war.³ The media campaign was an extraordinary success. Almost overnight, the media was saturated with images of black “crack whores,” “crack dealers,” and “crack babies”—images that seemed to confirm the worst negative racial stereotypes about impoverished inner-city residents. The media bonanza surrounding the “new demon drug” helped to catapult the War on Drugs from an ambitious federal policy to an actual war. The timing of the crack crisis helped to fuel conspiracy theories and general speculation in poor black communities that the War on Drugs was part of a genocidal plan by the government to destroy black people in the United States. From the outset, stories circulated on the street that crack and other drugs were being brought into black neighborhoods by the CIA. Eventually, even the Urban League came to take the claims of genocide seriously. In its 1990 report “The State of Black America,” it stated: “There is at least one concept that must be recognized if one is to see the pervasive and insidious nature of the drug problem for the African American community. Though difficult to accept, that is the concept of genocide.”⁴ While the conspiracy theories were initially dismissed as far-fetched, if not downright loony, the word on the street turned out to be right, at least to a point. The CIA admitted in 1998 that guerilla armies it actively supported in Nicaragua were smuggling illegal drugs into the United States—drugs that were making their way onto the streets of inner-city black neighborhoods in the form of crack cocaine. The CIA also admitted that, in the midst of the War on Drugs, it blocked law enforcement efforts to investigate illegal drug networks that were helping to fund its covert war in Nicaragua.⁵ It bears emphasis that the CIA never admitted (nor has any evidence been revealed to support the claim) that it intentionally sought the destruction of the black community by allowing illegal drugs to be smuggled into the United States. Nonetheless, conspiracy theorists surely must be forgiven for their bold accusation of genocide, in light of the devastation wrought by crack cocaine and the drug war, and the odd coincidence that an illegal drug crisis suddenly appeared in the black community after—not before—a drug war had been declared. In fact, the War on Drugs began at a time when illegal drug use was on the decline.⁶ During this same time period, however, a war was declared, causing arrests and convictions for drug offenses to skyrocket, especially among people of color.

The impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase.⁷ The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in highly repressive regimes like Russia, China, and Iran. In Germany, 93 people are in prison for every 100,000 adults and children. In the United States, the rate is roughly eight times that, or 750 per 100,000.⁸

The racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid. In Washington, D.C., our nation's capitol, it is estimated that three out of four young black men (and nearly all those in the poorest neighborhoods) can expect to serve time in prison.⁹ Similar rates of incarceration can be found in black communities across America.

These stark racial disparities cannot be explained by rates of drug crime. Studies show that people of all colors *use and sell* illegal drugs at remarkably similar rates.¹⁰ If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color.¹¹ That is not what one would guess, however, when entering our nation's prisons and jails, which are overflowing with black and brown drug offenders. In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those

of white men.¹² And in major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.¹³ These young men are part of a growing undercaste, permanently locked up and locked out of mainstream society.

It may be surprising to some that drug crime was declining, not rising, when a drug war was declared. From a historical perspective, however, the lack of correlation between crime and punishment is nothing new. Sociologists have frequently observed that governments use punishment primarily as a tool of social control, and thus the extent or severity of punishment is often unrelated to actual crime patterns. Michael Tonry explains in *Thinking About Crime*: “Governments decide how much punishment they want, and these decisions are in no simple way related to crime rates.”¹⁴ This fact, he points out, can be seen most clearly by putting crime and punishment in comparative perspective. Although crime rates in the United States have not been markedly higher than those of other Western countries, the rate of incarceration has soared in the United States while it has remained stable or declined in other countries. Between 1960 and 1990, for example, official crime rates in Finland, Germany, and the United States were close to identical. Yet the U.S. incarceration rate quadrupled, the Finnish rate fell by 60 percent, and the German rate was stable in that period.¹⁵ Despite similar crime rates, each government chose to impose different levels of punishment.

Today, due to recent declines, U.S. crime rates have dipped below the international norm. Nevertheless, the United States now boasts an incarceration rate that is six to ten times greater than that of other industrialized nations¹⁶—a development directly traceable to the drug war. The only country in the world that even comes close to the American rate of incarceration is Russia, and no other country in the world incarcerates such an astonishing percentage of its racial or ethnic minorities.

The stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history. And while the size of the system alone might suggest that it would touch the lives of most Americans, the primary targets of its control can be defined largely by race. This is an astonishing development, especially given that as recently as the mid-1970s, the most well-respected criminologists were predicting that the prison system would soon fade away. Prison did not deter crime significantly, many experts concluded. Those who had meaningful economic and social opportunities were unlikely to commit crimes regardless of the penalty, while those who went to prison were far more likely to commit crimes again in the future. The growing consensus among experts was perhaps best reflected by the National Advisory Commission on Criminal Justice Standards and Goals, which issued a recommendation in 1973 that “no new institutions for adults should be built and existing institutions for juveniles should be closed.”¹⁷ This recommendation was based on their finding that “the prison, the reformatory and the jail have achieved only a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it.”¹⁸ These days, activists who advocate “a world without prisons” are often dismissed as quacks, but only a few decades ago, the notion that our society would be much better off without prisons—and that the end of prisons was more or less inevitable—not only dominated mainstream academic discourse in the field of criminology but also inspired a national campaign by reformers demanding a moratorium on prison construction. Marc Mauer, the executive director of the Sentencing Project, notes that what is most remarkable about the moratorium campaign in retrospect is the context of imprisonment at the time. In 1972, fewer than 350,000 people were being held in prisons and jails nationwide, compared with more than 2 million people today. The rate of incarceration in 1972 was at a level so low that it no longer seems in the realm of possibility, but for moratorium supporters, that magnitude of imprisonment was egregiously high. “Supporters of the moratorium effort can be forgiven for being so naïve,” Mauer suggests, “since the prison expansion that was about to take place was unprecedented in human history.”¹⁹ No one imagined that the prison population would more than quintuple in their lifetime. It seemed far more likely that prisons would fade away.

Far from fading away, it appears that prisons are here to stay. And despite the unprecedented levels of incarceration in the African American community, the civil rights community is oddly quiet. One in three

young African American men is currently under the control of the criminal justice system—in prison, in jail, on probation, or on parole—yet mass incarceration tends to be categorized as a criminal justice issue as opposed to a racial justice or civil rights issue (or crisis).

The attention of civil rights advocates has been largely devoted to other issues, such as affirmative action. During the past twenty years, virtually every progressive, national civil rights organization in the country has mobilized and rallied in defense of affirmative action. The struggle to preserve affirmative action in higher education, and thus maintain diversity in the nation's most elite colleges and universities, has consumed much of the attention and resources of the civil rights community and dominated racial justice discourse in the mainstream media, leading the general public to believe that affirmative action is the main battlefield in U.S. race relations—even as our prisons fill with black and brown men.

My own experience reflects this dynamic. When I first joined the ACLU, no one imagined that the Racial Justice Project would focus its attention on criminal justice reform. The ACLU was engaged in important criminal justice reform work, but no one suspected that work would eventually become central to the agenda of the Racial Justice Project. The assumption was that the project would concentrate its efforts on defending affirmative action. Shortly after leaving the ACLU, I joined the board of directors of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. Although the organization included racial justice among its core priorities, reform of the criminal justice system was not (and still is not) a major part of its racial justice work. The Lawyers' Committee is not alone.

In January 2008, the Leadership Conference on Civil Rights—an organization composed of the leadership of more than 180 civil rights organizations—sent a letter to its allies and supporters informing them of a major initiative to document the voting record of members of Congress. The letter explained that its forthcoming report would show “how each representative and senator cast his or her vote on some of the most important civil rights issues of 2007, including voting rights, affirmative action, immigration, nominations, education, hate crimes, employment, health, housing, and poverty.” Criminal justice issues did not make the list. That same broad-based coalition organized a major conference in October 2007, entitled *Why We Can't Wait: Reversing the Retreat on Civil Rights*, which included panels discussing school integration, employment discrimination, housing and lending discrimination, economic justice, environmental justice, disability rights, age discrimination, and immigrants' rights. Not a single panel was devoted to criminal justice reform.

The elected leaders of the African American community have a much broader mandate than civil rights groups, but they, too, frequently overlook criminal justice. In January 2009, for example, the Congressional Black Caucus sent a letter to hundreds of community and organization leaders who have worked with the caucus over the years, soliciting general information about them and requesting that they identify their priorities. More than thirty-five topics were listed as areas of potential special interest, including taxes, defense, immigration, agriculture, housing, banking, higher education, multimedia, transportation and infrastructure, women, seniors, nutrition, faith initiatives, civil rights, census, economic security, and emerging leaders. No mention was made of criminal justice. “Re-entry” was listed, but a community leader who was interested in criminal justice reform had to check the box labeled “other.”

This is not to say that important criminal justice reform work has not been done. Civil rights advocates have organized vigorous challenges to specific aspects of the new caste system. One notable example is the successful challenge led by the NAACP Legal Defense Fund to a racist drug sting operation in Tulia, Texas. The 1999 drug bust incarcerated almost 15 percent of the black population of the town, based on the uncorroborated false testimony of a single informant hired by the sheriff of Tulia. More recently, civil rights groups around the country have helped to launch legal attacks and vibrant grassroots campaigns against felon disenfranchisement laws and have strenuously opposed discriminatory crack sentencing laws and guidelines, as well as “zero tolerance” policies that effectively funnel youth of color from schools to jails. The national ACLU recently developed a racial justice program that includes criminal justice issues among its core priorities and has created a promising Drug Law Reform Project. And thanks to the aggressive advocacy of the ACLU, NAACP, and other civil rights organizations around the country, racial profiling is widely condemned, even by members of law enforcement who once openly embraced the practice.

Still, despite these significant developments, there seems to be a lack of appreciation for the enormity of the crisis at hand. There is no broad-based movement brewing to end mass incarceration and no

advocacy effort that approaches in scale the fight to preserve affirmative action. There also remains a persistent tendency in the civil rights community to treat the criminal justice system as just another institution infected with lingering racial bias. The NAACP's Web site offers one example. As recently as May 2008, one could find a brief introduction to the organization's criminal justice work in the section entitled Legal Department. The introduction explained that "despite the civil rights victories of our past, racial prejudice still pervades the criminal justice system." Visitors to the Web site were urged to join the NAACP in order to "protect the hard-earned civil rights gains of the past three decades." No one visiting the Web site would learn that the mass incarceration of African Americans had already eviscerated many of the hard-earned gains it urged its members to protect.

Imagine if civil rights organizations and African American leaders in the 1940s had not placed Jim Crow segregation at the forefront of their racial justice agenda. It would have seemed absurd, given that racial segregation was the primary vehicle of racialized social control in the United States during that period. This book argues that mass incarceration is, metaphorically, the New Jim Crow and that all those who care about social justice should fully commit themselves to dismantling this new racial caste system. Mass incarceration—not attacks on affirmative action or lax civil rights enforcement—is the most damaging manifestation of the backlash against the Civil Rights Movement. The popular narrative that emphasizes the death of slavery and Jim Crow and celebrates the nation's "triumph over race" with the election of Barack Obama, is dangerously misguided. The colorblind public consensus that prevails in America today—i.e., the widespread belief that race no longer matters—has blinded us to the realities of race in our society and facilitated the emergence of a new caste system.

Clearly, much has changed in my thinking about the criminal justice system since I passed that bright orange poster stapled to a telephone pole ten years ago. For me, the new caste system is now as obvious as my own face in the mirror. Like an optical illusion—one in which the embedded image is impossible to see until its outline is identified—the new caste system lurks invisibly within the maze of rationalizations we have developed for persistent racial inequality. It is possible—quite easy, in fact—never to see the embedded reality. Only after years of working on criminal justice reform did my own focus finally shift, and then the rigid caste system slowly came into view. Eventually it became obvious. Now it seems odd that I could not see it before.

Knowing as I do the difficulty of seeing what most everyone insists does not exist, I anticipate that this book will be met with skepticism or something worse. For some, the characterization of mass incarceration as a "racial caste system" may seem like a gross exaggeration, if not hyperbole. Yes, we may have "classes" in the United States—vaguely defined upper, middle, and lower classes—and we may even have an "underclass" (a group so estranged from mainstream society that it is no longer in reach of the mythical ladder of opportunity), but we do not, many will insist, have anything in this country that resembles a "caste."

The aim of this book is not to venture into the long-running, vigorous debate in the scholarly literature regarding what does and does not constitute a caste system. I use the term *racial caste* in this book the way it is used in common parlance to denote a stigmatized racial group locked into an inferior position by law and custom. Jim Crow and slavery were caste systems. So is our current system of mass incarceration. It may be helpful, in attempting to understand the basic nature of the new caste system, to think of the criminal justice system—the entire collection of institutions and practices that comprise it—not as an independent system but rather as a *gateway* into a much larger system of racial stigmatization and permanent marginalization. This larger system, referred to here as mass incarceration, is a system that locks people not only behind actual bars in actual prisons, but also behind virtual bars and virtual walls—walls that are invisible to the naked eye but function nearly as effectively as Jim Crow laws once did at locking people of color into a permanent second-class citizenship. The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of America's new undercaste.

The language of caste may well seem foreign or unfamiliar to some. Public discussions about racial caste in America are relatively rare. We avoid talking about caste in our society because we are ashamed of our