

**Mass Incarceration: The Nuances and Complexities Behind its Causes and the Gaps in the
New Jim Crow Analogy**

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A young person who drops out of high school today will inevitably find himself at a disadvantage in everything he tries to accomplish. Manual labor jobs in this country are fewer to come by than thirty years ago, and globalization has increased the supply of potential workers competing for fewer jobs.¹ With the odds already stacked against him for a lack of education, this young dropout will be more susceptible to being arrested.² Arrest carries with it a stigma in American society that many employers will not ever overlook, no matter how small the crime and no matter how much of a price the perpetrator pays for this crime.³ Now, if this young dropout happens to be black and male, he sadly finds himself in a precarious situation that could very well define and limit him for the remainder of his life. More black dropouts currently reside in prisons or jails than have paying jobs, and from a sampling of black male dropouts born between 1975 and 1979, 68% had served time in prison at some point by 2009, while 37% resided in prison in 2009.⁴ Black men today are more likely to go to prison than graduate with a four-year college degree or graduate or complete military service.⁵ These numbers are staggering and representative of a much larger epidemic in our country: that of mass incarceration.

¹ Edward Alden, "Behind the New View of Globalization," *New York Times*, 29 August, 2012.

² Sam Dillon, "Study Finds High Rate of Imprisonment Among Dropouts," *New York Times*, 8 October, 2009.

³ Harry J. Holzer, Steven Raphael, and Michael A. Stoll, "Will Employers Hire Ex-Offenders? Employer Preference, Background Checks, and Their Determinants," *Institute for Research on Poverty*, January, 2002.

⁴ Sam Roberts, "How Prisoners Make Us Look," *New York Times*, 27 October, 2012.

⁵ *Ibid.*

The effect that mass incarceration has had on blacks as a subset of the American population cannot be understated. According to David Garland, imprisonment (used synonymously with incarceration) “becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.”⁶ Garland then goes on to identify young black males in urban areas as the group in the U.S. suffering from this epidemic to the point that prison became normalized for this group, so much so that it has become a “regular, predictable part of experience, rather than a rare and infrequent event.”⁷ The epidemic of mass incarceration has had a crippling effect on black males, especially those who are poor and from urban areas. Rather than serve as a boon to solving the woes of the inner-city poor by reducing crime, it has marginalized them, keeping them from joining the mainstream economy. Mass incarceration, above all else, has created a population that Eugene Robinson calls the “abandoned,”⁸ a group so insulated not just from other races but from middle-class blacks as well, exacerbating the vicious cycle of poverty and recidivism.

While socialists, criminologists, historians and political scientists may disagree about the causes of mass incarceration, common ground exists among them that the United States has grown increasingly punitive since the late 1960s, and this punitiveness has been significantly biased in how it has been meted out, leading to a consensus among scholars that we do have a system of mass incarceration disproportionately affecting people of color, particularly black males. But what role does race play in crime policymaking? This work will examine this

⁶ David Garland, *Mass Imprisonment: Social Causes and Consequences* (London: Sage Publications, 2001), 1-2.

⁷ *Ibid.*, 2.

⁸ Eugene Robinson, *Disintegration: The Splintering of Black America* (New York: Random House, 2010), 112.

question and attempt to determine the role that policymaking played in creating the modern American carceral state.

In order to determine just how much of a role race played in crime policymaking that led to the current inequity in the prison population, this paper traces the development of crime policymaking that preceded the infamous Rockefeller Drug Laws. The draconian laws put in place by New York Governor Nelson Rockefeller in 1973 created extremely punitive prescriptions for dealing with people convicted of using or selling drugs. More importantly, the Rockefeller Drug Laws served as a precedent for the rest of the country as many states and finally the federal government followed suit in implementing similar drug laws to those in New York State.

This study examines leading scholarly frameworks used to explain mass incarceration and attempts to determine the value and accuracy in these frameworks by looking at developments in New York State in the years preceding the Rockefeller Drug Laws. First, I review the historiography around mass incarceration by analyzing a leading work, Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, and a rebuttal of that work, James Forman's "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow." As part of this review, I examine other secondary works that help explain the development of mass incarceration. Second, I trace the development of crime policymaking that developed in New York State from 1958 - 1973 by examining work done by several legislative committees within New York created to study crime, including the use and exchange of illicit drugs, and formulate suggestions based on those studies. In doing this, I pay particular attention to the committees' findings in regard to how they either confirm or refute the New Jim Crow

analogy. Finally, I conclude by discussing the results of my findings and offering suggestions for solutions to the problem of mass incarceration.

This review will focus on an issue increasingly associated with the development of mass incarceration, that of the War on Drugs. While it remains incontrovertible that the War on Drugs contributed to mass incarceration, ambivalence still exists among scholars about how much of a role the War on Drugs played. Some, like Michelle Alexander, contend that the War on Drugs is the primary reason for the systemic problem of mass incarceration. Others, like James Forman, concede that the War on Drugs proved detrimental to black communities, but that this remains as only one among a host of factors that have contributed to depleting whole communities of their valuable members. Alexander and Forman provide useful lenses through which to view the War on Drugs specifically, and mass incarceration generally, and as such I will be utilizing their stances to frame my own evaluation of secondary work.

The theories employed by Alexander and Forman are representative of the wide spectrum of the historiography around mass incarceration and as such provide a useful framework through which to compose this paper. Alexander represents the segment within the historiography that considers the War on Drugs directly responsible for the phenomenon of mass incarceration. Furthermore, her provocative account stands as the most successful effort to date as its reach extends beyond academia and into the public consciousness with its commercial success. Forman, on the other hand, provides the antitheses for Alexander's account in its comprehensiveness and breadth in explaining the current state of mass incarceration. Forman is not dismissive of the New Crow analogy put forth by Alexander, making his argument more compelling. He acknowledges and rebukes the War on Drugs for its damaging effects, yet he argues that the War on Drugs exists as just one of the nuances of mass incarceration. By

juxtaposing the two frameworks put forth by Alexander and Forman, one can gain valuable insight into mass incarceration.

Alexander vs. Forman: Lenses Through Which to Analyze

Michelle Alexander's recent bestselling book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, has been hailed by Cornel West as the "secular bible for a new social movement in early twenty-first-century America," specifically for the way it deals with revealing America's shame in its "massive use of state power to incarcerate hundreds of thousands of precious poor, black, male young people in the name of a bogus 'War on Drugs.'"⁹ Alexander aptly - as West asserts - traces the history of the War on Drugs and makes a case for it being the mechanism for social control of people of color in this country today on a level akin to the social control of blacks during Jim Crow. Alexander contends that in the age of colorblindness that proceeded the Civil Rights Movement it became unacceptable to promulgate policies that appeared, at least overtly, racist. As a reactionary measure, conservative politicians attempted to associate people of color with crime as a mechanism of holding onto the caste system that endured through Jim Crow. An impulse among conservative politicians developed to continue to target and control minorities in this new colorblind reality as a way for them to regain political power. Conservatives satisfied this impulse by equating blacks with criminality, for it is commonly accepted to despise, segregate, disenfranchise and hold back criminals.

Alexander argues that the disproportionate number of blacks tied up in America's correctional facilities is not a result of mere happenstance; rather, it is a direct result of substantiated efforts, initiated through political actors, supported by court decisions, and carried

⁹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New York Press, 2010), ix-x.

out by law enforcement officers, to target blacks as criminals and areas where blacks are concentrated as areas of crime. Alexander contends that the American public has come to conflate crime with people of color. After the Reagan Administration declared the War on Drugs in 1982, it used a media campaign to “publicize horror stories involving black crack users and crack dealers in ghetto communities,” effectively shifting the public’s image of drug use as a private matter to one that threatened the national order.¹⁰ This political push, coupled with media’s portrayal of blacks in general, led to a skewed image of blackness in this country. Research shows that television played a pivotal role in searing negative images of blackness into the public consciousness.¹¹ Kathryn Russell Brown concurs with Alexander’s assertion of the conflation of blackness and crime in this country: “The onslaught of criminal images of Black men, however, causes many of us to incorrectly conclude that most Black men are criminals,” leading to the “myth of the criminalblackman.”¹²

Alexander’s theoretical framework rests on the notion that the War on Drugs played the primary role in incarcerating black males at extremely high rates to an extent that decimated communities of color, taking away invaluable and vital contributors to those communities and putting them behind bars and making them members of a permanent underclass, a modern day caste system in many ways reminiscent of Jim Crow. While she touches on other factors that are often attributed to mass incarceration - such as poverty, poor education, lack of employment, violent crime, white flight, to name a few - she contends that the War on Drugs is mostly responsible for the caste system that exists today, in which so many people of color, particularly males, are denied basic rights as citizens. A reason this theory works, at least in part, is because

¹⁰ Alexander, 105.

¹¹ Kathryn Russell-Brown, *The Color of Crime* (New York: New York University Press, 1998),

3.

¹² Ibid.

the nature of illicit drug activity calls for a different type of law enforcement, one that must, in order to be successful, be proactive and intrusive. Alexander acutely notes that “when a violent crime or a robbery or a trespass occurs, someone usually calls the police. There is a clear victim and perpetrator. Someone is hurt or harmed in some way and wants the offender punished.” However, with a drug crime, “neither the purchaser of the drugs nor the seller has any incentive to contact law enforcement,” making it a “consensual activity.”¹³ The nature of this means, quite simply, that law enforcement needs to be strategic and, in many ways, arbitrary in the way it carries out its war on drugs, and that arbitrariness has led to a stark inequity in the rate at which black men are targeted, arrested and made part of the of the undercaste associated with having a felony on one’s record.

Statistics do support Alexander’s claims that the War on Drugs played a major role in mass incarceration and make it difficult to repudiate her argument. She points out that drug offenses alone count for more than two-thirds of the rise in federal prisoners and more than half of state prisoners between 1985 and 2000; about a half million people are in jail for drug offenses today, compared to 41,100 in 1980; and drug arrests have tripled since 1980.¹⁴ More to her point about the bias involved in this increase, at the beginning of the twenty-first century blacks are overwhelmingly responsible for this rise in drug charges: blacks make up 80 to 90 percent of all drug offenders sent to prison in seven states; in at least fifteen states blacks are admitted to prisons on drug charges at rates ranging from twenty to fifty-seven times greater than that of white men; and, most telling of all, while the majority of drug users and dealers nationwide are white, three quarters of all drug offenders are black or Latino.¹⁵ Using the

¹³ Alexander, 105.

¹⁴ Ibid., 60.

¹⁵ Ibid., 98.

abovementioned data, coupled with her painstaking analysis of court decisions, legislation and police practices, Alexander paints a picture of a War on Drugs that is solely responsible for mass incarceration.

One problem with Alexander's assertion is that it overwhelmingly adheres to a singular focus. Alexander sees the War on Drugs as not just a contributing cause of mass incarceration, but, somewhat myopically, as the cause that trumps all others. While her argument is convincing and there is much validity in the damaging effects that the War on Drugs has had on mass incarceration, there remains more to the picture. James Forman Jr., in his article "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," lays out a framework that, while acknowledging the major role that the War on Drugs has played in mass incarceration, paints a picture that is more inclusive and more nuanced. Forman does not dismiss the arguments put forth by the New Jim Crow writers – particularly Alexander – but rather lauds them for their contributions:

The New Jim Crow writers have drawn attention to a profound social crisis, and I applaud them for that. Low-income and undereducated African Americans are currently incarcerated at unprecedented levels. The damage is felt not just by those who are locked up, but by their children, families, neighbors, and the nation as a whole. I recognize some of the signal contributions of the New Jim Crow writers, especially their description of how our criminal justice system makes permanent outcasts of convicted criminals and stigmatizes other low-income blacks as threats to public safety. I also single out Michelle Alexander's contributions to the literature because her elaboration of the argument is the most comprehensive and persuasive to date.¹⁶

However, Forman goes on to point out that while he and the New Jim Crow writers agree more than they disagree, those disagreements are important.¹⁷ Forman notes that the "Jim Crow

¹⁶ James Forman Jr., "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," *New York University Law Review*, 87 (2012): 104.

¹⁷ *Ibid.*

analogy neglects some important truths and must be criticized in the service of truth” and that “we who seek to counter mass incarceration will be hobbled in our efforts if we misunderstand its causes and consequences in the ways that the Jim Crow analogy invites us to do so.”¹⁸ The central theme of Forman’s article, therefore, is that “the Jim Crow analogy leads to a distorted view of mass incarceration – and therefore hampers our ability to challenge it effectively.”¹⁹

Forman shows how one important shortcoming of the arguments put forth by the New Jim Crow writers exists in how they obscure the history of how mass incarceration started. These writers focus primarily on the backlash of the civil rights movement that materialized in the campaigning and policy agendas of Republican politicians, most notably Barry Goldwater and Richard Nixon, appealing to a white constituency uneasy over a newfound racial equality and a growing welfare state.²⁰ By focusing on crime, a seemingly race-neutral factor, these politicians could implicitly appeal to white voters along racial lines. While Forman acknowledges that this political propaganda existed as a very real phenomenon, other factors played a role as well. Particularly, crime actually did increase significantly prior to this push by conservative politicians to appeal to voters by claiming they would get tough on crime (and, consequently, tough on black criminals). Forman points out that, between 1959 and 1971, reported street crime quadrupled; and between 1963 and 1974 homicide rates doubled and robbery rates tripled.²¹ New Jim Crow writers often ignore or downplay this reality because it does not fit their narrative, and rather provides one that allows for the idea that Goldwater and Nixon had such receptive audiences, at least in part, because crime was an issue.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid., 113.

²¹ Ibid., 114.

Another shortcoming of the New Jim Crow writers that Forman points out is that they often obscure the black support behind more punitive crime policy. Blacks living in areas infested with high levels of violence and drug activity understandably want their neighborhoods safer, and one of the ways they believe this can be achieved is through more people going to jail (although this thought process is somewhat misguided as research shows, and Forman acknowledges, that mass incarceration does not help alleviate the problems that cause crime, and furthermore can even lead to more crime).²² This argument that Forman proposes rests largely on two main points of evidence: in the first, Forman looks specifically at Washington D.C. because of its unique status as the only majority-black jurisdiction that controls its own sentencing policy;²³ in the second, somewhat anecdotal in nature, Forman uses the example of black law scholars who, after graduating from prestigious law schools, decide that they can do the most good by working in high-crime areas and putting criminals away to make neighborhoods safer.

In the former Forman raises a valuable counter to the New Jim Crow writers: “The Jim Crow analogy encourages us to understand mass incarceration as another policy enacted by whites and helplessly suffered by blacks.”²⁴ Forman sheds light on a city that possesses a black majority, black mayors since the city received home rule in 1773, and a majority-black Council, not to mention a police force overrepresented by blacks.²⁵ This, according to the Jim Crow analogy, should lend itself to a situation in which the local government is more lenient on sentencing in general because more punitive approaches in these areas will contribute, unequivocally, to the phenomenon of mass incarceration. Quite contrarily, “there is little

²² *Ibid.*, 110

²³ *Ibid.*, 117.

²⁴ *Ibid.*, 116.

²⁵ *Ibid.*, 117.

evidence that D.C. officials have sought lenient criminal policies” and “local elected officials have recently pushed for tougher criminal penalties.”²⁶ This majority-black city mirrors other cities where blacks maintain substantially less control in terms of who goes to prison and for how long.²⁷ This raises the notion that blacks are not just helpless victims in the mass incarceration phenomenon, but are, due to a host of complex reasons, actors in it as well.

The other point Forman uses to show evidence of black support for tough-on-crime policy is through examples of successful black students who choose to improve, in their minds, black communities by cracking down on crime. Forman uses the example of Paul Butler, who graduated from a prestigious law school and chose to give back to the community by becoming a prosecutor. He believed that the most good he could do in black communities was through using his skill and knowledge to lock up black criminals, therefore making the rest of the community safer for it. According to Butler, he served by “helping people in the most immediate way – delivering the protection of the law to communities that needed it most, making the streets safer, and restoring to victims some measure of the dignity that a punk criminal had tried to steal.”²⁸ Forman points out that, while he does not agree with this line of thought, it is indeed justified: “If stark racial disparities within the prison system motivate mass incarceration’s critics, stark racial disparities among crime victims motivate tough-on-crime African Americans.”²⁹ These points that Forman raises about black ideology on tough-on-crime policy contends starkly with the New Jim Crow writers, who often assert that blacks are not really actors in the decision making that puts so many blacks behind bars and when they are part of that process they are just complicit in a system that already is set up to disproportionately put blacks in prison.

²⁶ Ibid., 120.

²⁷ Ibid., 120.

²⁸ Ibid., 122.

²⁹ Ibid., 121.

Perhaps the most convincing point that Forman raises about the shortcomings in the methodology employed by the New Jim Crow writers resides in the way in which they eschew the role that violence perpetrated by blacks plays in mass incarceration. The reason that the New Jim Crow writers make this intentional oversight is due largely to the fact that violence runs counter to the narrative that they are trying to tell – one where nonviolent drug offenses and arbitrary policing are overwhelmingly, if not solely, responsible for mass incarceration. The oversight that they do make, however, proves substantial as blacks disproportionately commit more violent crimes than whites: blacks are arrested for murder at rates seven to eight times greater than whites; and blacks are arrested about ten times more often for robbery than whites.³⁰ Further complicating the issue, these data are considered the most dependable when it comes to statistics on crime.³¹ Forman elucidates the precarious situation for progressives, for as they attempt to challenge the discriminatory nature of the criminal justice system they are constantly bombarded with statistics on violent crime. Forman duly notes that “the New Jim Crow writers are frustrated by decades of losing the crime debate to those who condemn violence while refusing to acknowledge or ameliorate the conditions that give rise to it.”³² So, instead of trying to tackle violence as part of the broad spectrum of mass incarceration, they minimize or ignore the issue in favor of focusing solely on the War on Drugs as a more effective means of criticizing mass incarceration. While this is understandable and in many ways justifiable, it also, as Forman points out, does a disservice to people ensconced in not just mass incarceration itself, but the neighborhoods that mass incarceration devastate:

Avoiding the topic of violence in this manner is a mistake, not least because it disserves the very people on whose behalf the New Jim Crow writers advocate. After all, the same

³⁰ Ibid., 125.

³¹ Ibid., 125.

³² Ibid., 127.

low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime. And the two phenomena are mutually reinforcing.³³

The New Jim Crow writers also obscure class in their excoriation of the inequity in mass incarceration, for they largely fail to acknowledge that mass incarceration encapsulates lower-class blacks to a far greater extent than it does middle-class or upper-class blacks. By doing this the New Jim Crow writers can continue to analogize mass incarceration with Jim Crow because, similarly to how Jim Crow affected blacks of all socioeconomic status, they are claiming that mass incarceration affects all blacks. As Forman assays, “one of the central motivations of Jim Crow was to render class distinctions within the black community irrelevant, at least as far as whites were concerned,” and due to this it was “essential to subject blacks of all classes to Jim Crow’s subordination and humiliation.”³⁴ The reality, however, is that class plays a much more determining factor with mass incarceration than it did with Jim Crow. About a quarter of all blacks today are trapped in abject poverty,³⁵ and it is precisely this segment of the black population that finds itself subject to the harsh practices of mass incarceration. Most of the rise in incarceration rates for blacks can be attributed to high school dropouts: a black man with a college degree has about a 5% chance of going to prison, in comparison to a black dropout, who has a 59% chance of going to prison.³⁶ Moreover, according to a 1991 federal survey, the majority of prisoners in state institutions earned less than \$10,000 the year before entering prison.³⁷ So, contrary to what the New Jim Crow writers argue, or at least contrary to what they omit, class plays a critically important role in mass incarceration. The people who possess the

³³ Ibid., 128.

³⁴ Ibid., 135.

³⁵ Robinson, 7.

³⁶ Forman, 132; based on a black man born in the late 1960s.

³⁷ Ibid., 133.

least amount of resources, those stricken by poverty, are the most defenseless against the trap of mass incarceration.

One more weakness according to Forman in the Jim Crow analogy is that the New Jim Crow writers, Alexander included, often overlook race in their explanation of mass incarceration. A common theme among them is that a small number of whites are swept up in mass incarceration as a price to pay for keeping a system going that must be, on its face, colorblind. Forman indicts Alexander for mentioning whites suffering from mass incarceration as merely “collateral damage.”³⁸ To simplify the extent of which whites become swept up in mass incarceration as being collateral damage is, at least to a certain degree, a façade. One-third of the country’s prisoners are white, and, more to the point, incarceration rates rose drastically over the past several decades even in states where the majority of prisoners are white.³⁹ Additionally, the New Jim Crow writers largely ignore Hispanic prisoners, even though they make up 20% of prisoners nationwide and one in six Hispanic males born today will eventually go to prison.⁴⁰ Mass incarceration affects blacks in unambiguously disproportionate measures in comparison to whites and Hispanics, yet brushing aside the fact that 60% of American prisoners are not black⁴¹ can be grossly myopic.

Alexander and Forman represent two contending sides on the issue of mass incarceration, both offering valuable insight into an epidemic that has increasingly imprisoned, stigmatized, criminalized, disenfranchised and subjugated a disproportionately large segment of African Americans in this country. Both show how mass incarceration decimates poor communities of

³⁸ Ibid., 136.

³⁹ Ibid., 136.

⁴⁰ Ibid., 138.

⁴¹ Ibid., 138.

color, reinforcing the strictures of poverty by debilitating invaluable members of those communities – its young males. Alexander uses the framework of the War on Drugs, making the case that this war is overwhelmingly the driving force behind mass incarceration. Part of the power of her work, and the reception it received, results from her ability to successfully analogize the War on Drugs in particular and mass incarceration in general as akin to Jim Crow. This analogy reverberates with people in the twenty-first century because people today do not overtly adhere to racist policies and most people remember (if they are old enough) Jim Crow or view (if they are younger) Jim Crow as a horrible injustice. Quite simply, Jim Crow, in hindsight, remains a dark stain on America's history and one that many are ashamed of. Whites and blacks today decry Jim Crow for its horrible treatment of blacks. In this light, for people to be made aware that something comparable to Jim Crow happens today covertly, even clandestinely, is on some levels both a shocking and enraging revelation. Alexander touches a nerve with her readers precisely because she so adeptly makes the connection between Jim Crow and mass incarceration and the War on Drugs. Forman, while acknowledging the devastation wrought by the War on Drugs and some ways in which it draws parallels to Jim Crow, uses a more complex and nuanced framework to explain mass incarceration and, in doing so, downplays the War on Drugs as an important but not central factor in mass incarceration. This alone limits the Jim Crow analogy, because the analogy depends on the War on Drugs for it to be successful. If the War on Drugs is not as responsible for mass incarceration as the New Jim Crow writers purport it to be, the analogy loses its effectiveness. Forman pulls more factors into his framework for explaining the causes of mass incarceration: a higher propensity for violence among blacks in comparison to whites, class, black support and initiative for tough-on-crime policy, and longer and more punitive sentencing for all crimes in general all play important roles

in this framework. Both frameworks are worthy of serious consideration and analysis, and much scholarly work is being done in this vein.

Much of the work that has been done around mass incarceration looks at the trajectory towards a more punitive system of law and order in a way that shows more of a concerted effort by those making crime policy (i.e. – politicians, police, judges, legislators), rather than as a reactionary measure to an increase in crime. As demonstrated earlier in this paper, the New Jim Crow writers often overlook crime, especially violent crime, because it does not align with their analogy. Similarly, functionalist theorists often muddle or downplay the statistics around crime in the time period leading up to mass incarceration. Heather Ann Thompson laments the current historiography around mass incarceration: “Overwhelmingly, attempts to grapple with the broad impact of the postwar rise of the carceral state have remained the preserve of journalists, legal scholars, criminologists and other social scientists”⁴² and proclaims that it is time for “historians to think critically about mass incarceration and begin to consider the reverberations of this never-before-seen phenomenon.”⁴³ Looking at this through the lens of a historian would allow one to “realize that the nation’s rightward shift had more to do with mass incarceration than we have yet appreciated and less to do with rising crime rates and the political savvy of the Republican party than we have long assumed.”⁴⁴ According to Thompson, this approach would reveal that increase in crime was not nearly significant enough to lead to mass incarceration and, in comparison to earlier time periods, not enough to explain the cause for the pending explosion in the prison population. While the murder rate in 1968 was 7.8 per 100,000 people, in 1921 it

⁴² Heather Ann Thompson, “Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History,” *Journal of American History*, 97, no. 3 (2010): 705.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

stood at 8.1 per 100,000, and was a rather staggering 9.7 per 100,000 in 1933.⁴⁵ Furthermore, while Americans were less likely to be murdered in the 1960s than in decades before, their chances of being murdered increased after the nation became focused on a more punitive law and order system.⁴⁶

This tactic employed by Thompson and New Jim Crow writers is telling, but it is incomplete. For example, the statistics that Thompson cites are aggregated national statistics, and therefore do not elucidate local concerns about crime and support for punishment. So while the murder rate may have been higher in 1933 in comparison to the 1960s on a national level, it cannot be derived from this that murder rates were lower in certain areas in the 1960s, which in part is what this argument purports to do. In contention, Michael Javen Fortner writes:

this perceived mismatch of crime trends and attitudes prompted others to spend more historical attention and analytic energy exploring the ways in which politics constructed individual perceptions of crime rather than carefully tracing how individual experiences with crime shaped politics and policy.⁴⁷

In addition to viewing aggregated statistics on crime in a way that is not representative of unique, local patterns,⁴⁸ aggregated statistics on crime do not necessarily reveal the relationship between race and crime. For example, Thompson's mention of aggregate crime statistics from the early twentieth century does not mention race, but a look at local crime statistics renders race important insofar as who is directly affected by it. Blacks living in New York City between 1960 and 1974, "despite being a minority, constituted a disproportionate share of deaths due to

⁴⁵ Ibid., 727.

⁴⁶ Ibid.

⁴⁷ Michael Javen Fortner, "The 'Silent Majority' in Black and White: Invisibility and Imprecision in the Historiography of Mass Incarceration," *Journal of Urban History*, Forthcoming.

⁴⁸ Ibid.

homicides, representing around 50% of all deaths.”⁴⁹ Thompson does point out the extremely negative effects of the increased carceral state in postwar industry and in this vein succeeds in showing the cyclical nature of mass incarceration and its destructive results in urban areas, yet this does not fully explain why mass incarceration came into existence. By either oversight or design she and other writers have built a theoretical framework that shapes the causes of mass incarceration that fits its current, clearly inequitable, state.

In “Frontlash: Race and the Development of Punitive Crime Policy,” Vesla Weaver attempts to explain the War on Drugs in a way that buttresses the framework used by Alexander by providing an explanation of what preceded the War on Drugs. Her article explains mass incarceration through a political framework in which people of political power used the changing landscape of the civil rights movement to institute policies of racial social control through mass incarceration. This differs from the more common framework used to describe the development of mass incarceration after the civil rights movement – backlash. Weaver defines backlash as the “politically and electorally expressed public resentment that arises from perceived racial advance, intervention, or excess.”⁵⁰ According to this traditional framework, the “silent majority” (a member of this group could be described as the typical American who quietly goes about his business behind the scenes, dutifully fulfilling his citizenship by working and paying taxes without fanfare) snapped back against the liberal excesses of the 1960s.⁵¹ The concept posits that backlash created from these liberal excesses led many Americans to align with the conservative political movement that resulted in the elections of Nixon and eventually Reagan (both figureheads in the War on Crime), victories due in large part to those voters who had

⁴⁹ Ibid.

⁵⁰ Vesla M. Weaver, “Frontlash: Race and the Development of Punitive Crime Policy,” *Studies in American Political Development*, 21, no.2 (2007): 237.

⁵¹ Ibid.

deserted the Democratic Party. Weaver acutely criticizes this theory as short on substance: “Despite the great common sense appeal and parsimony of the backlash account, it is more of a descriptive narrative and pseudo-theory for describing anti-black feeling expressed via election outcomes than a specified theory.”⁵²

To replace the backlash theory, Weaver uses her innovative *frontlash* theory, claiming a concerted effort by political elites to capitalize on the liberalization of America and tap into voters’ fears through proactive measures, as opposed to a populist backlash against black advances by the general population through voting practices. As such, she defines frontlash as “the process by which losers in a conflict become the architects of a new program, manipulating the issue space and altering the dimension of the conflict in an effort to regain their command on the agenda.”⁵³ According to Weaver’s concept, the end of Jim Crow brought about substantial change to the old paradigm in American society, and as such those who had power in that old paradigm found they had to change their strategy to retain their power. Two events – crime and riots – proved instrumental in this regard because they created a point of focus for the frontlash movement.⁵⁴ Crime and riots were not explicitly racial, so detesting them did not break with the new status quo of egalitarianism. However, due to the nature of the race riots and the fact that crime prevailed in urban areas, crime and riots became issues conflated with race and allowed political elites to campaign on agendas that espoused them.

This proved a successful mechanism and, despite nebulous statistics on crime that did not verify the veracity of the claim that crime was indeed on the rise, by 1965 it became accepted

⁵² Ibid.

⁵³ Ibid., 236.

⁵⁴ Ibid., 237.

that crime was an epidemic⁵⁵ plaguing the nation. As such, “elites leveraged these events to define a new issue, associate it with certain images and ultimately secure a monopoly on the issue undertaking.”⁵⁶ This in turn created a liberal dilemma in which liberals had to either argue for the justification of rioting as detestation of dreadful inner-city conditions – and potentially appearing to sanction crime⁵⁷ – or choose to disassociate riots from the civil rights movement.⁵⁸ Weaver elucidates that they chose the latter⁵⁹ and in doing so cemented the political monopolization around the war on crime.

While Weaver’s frontlash fills in some of the gaps left by the New Jim Crow writers, precisely in determining the agents responsible for the birth and rise of mass incarceration, it is somewhat singular and exclusive in its claims. Her framework allows for a broader scope in the sense that it is not limited to the War on Drugs, but rather uses riots in particular and crime in general to show how a war on crime developed in the United States following the end of Jim Crow. Still, it does not allow for the same complexities and nuances put forth by Forman, a conspicuous absence from her framework being initiative from black communities for tougher policing and policy making on crime. Furthermore, while she does note that much vagary existed around the statistics on crime in the 1960s, she does acknowledge that crime did increase but she is limiting in how she sees the connection between the rise in crime and the rise in punitive policies: “Crime might have been rising, but the primary catalyst was to be found elsewhere. Without the elite goals and shifts in power, crime and violence were merely objective

⁵⁵ Ibid., 247.

⁵⁶ Ibid.

⁵⁷ Ibid., 250.

⁵⁸ Ibid.

⁵⁹ Ibid.

conditions.”⁶⁰ By making this assertion, Weaver effectively dismisses non-elites. Members of the silent majority, both black and white, do not fit into this conceptual framework, but rather come across as pawns of the political elite and, according to Weaver’s framework, lack agency.

In “The ‘Silent Majority’ in Black and White: Invisibility and Imprecision in the Historiography of Mass Incarceration,” Michael Javen Fortner attempts to give agency to where it, as he asserts, remains lacking in other scholarly works on mass incarceration in their oversight of the silent majority, especially the black silent majority. Fortner criticizes the scholarly literature on mass incarceration for being “written in black and white, focusing on the politicization of white victimization or the construction of black criminality and imprisonment of black people.”⁶¹ This perspective essentially “minimize(s) the agency of African Americans” and creates a theory where they “exist as victims overwhelmed by the power of the racial order, neoliberalism, or reactionary Republican politics.”⁶² The problem with this framework lies in how it runs counter to the dominant history of the Civil Rights movement in which the black middle class played a pivotal role in affecting racial change.⁶³ Fortner fills in some of the gaps in the historiography by focusing on the black silent majority and elucidating examples at local levels of how blacks existed as more active agents in mass incarceration, as opposed to acquiescent bystanders.

Fortner’s work refutes the core frameworks existing within the mass incarceration lexicon of historiography: functionalism, which the New Jim Crow writers fall into it and which claims that the current carceral state developed as a method to stabilize a social order upset by

⁶⁰ Ibid., 235.

⁶¹ Michael Javen Fortner, “The ‘Silent Majority’ in Black and White,” Forthcoming.

⁶² Ibid.

⁶³ Ibid.

the Civil Rights movement;⁶⁴ neoliberalism, claiming that mass incarceration developed as a natural consequence of economic and social dislocations⁶⁵ that developed in post-war America; and political explanations, like that espoused by Weaver, which focus on the exploitation of evocative symbols by Republican political elites to tap into white prejudice and fears.⁶⁶ In doing so, Fortner “marshals a variety of materials in order to expose the analytic imprecision and explanatory weaknesses of the aforementioned approaches and to explain and defend the analytic potential of rendering the invisible black victim visible.”⁶⁷

Chief among these materials is the information culled from the disaggregation of crime statistics within New York City that Fortner treats as crucial to his argument: that aggregate statistics on crime are not revelatory of unique properties of particular crimes.⁶⁸ By looking at local crime statistics in New York City, it becomes evident that in certain neighborhoods the silent black majority played an instrumental role in affecting crime policy. A huge impetus for this was that in impoverished, nonwhite areas like the South Bronx, racial minorities experienced high rates of violent crime in comparison to predominantly white neighborhoods in New York City.⁶⁹ Furthermore, while blacks made up only 14% of New York City’s population in 1960 and 19% in 1970, during that time they accounted for 50% - 60% of all deaths due to drugs.⁷⁰ As such, it is safe to assert that the black community in New York City was being acutely hit by the drug epidemic prior to the draconian Rockefeller drug laws that came to fruition in 1973.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

To buttress his argument that the black silent majority did indeed endorse punitive drug measures, most prolifically at the local level, Fortner writes about early 1970's polling in New York City on the Rockefeller Drug Laws: "Individuals living in large cities reported the highest-level of support for the Rockefeller drug laws. Given this and New York City's acute drug problem, it is important to observe policy preferences of individuals living in the city. A poll taken in late 1973 revealed that blacks were the group most concerned about crime and drugs."⁷¹ This reality, that blacks in an urban area where drugs were prevalent favored punitive measures on par with their white counterparts, runs counter to the New Jim Crow narrative. The New Jim Crow writers tend to make generalizations based on national statistics and attitudinal studies, often rendering the silent black majority as being forced into a position of acquiescing to the meme of the white majority. Fortner carefully avoids that trap, offering that while his findings from New York City "directly contradicts the popular notion that whites support punitive policies more than blacks," it remains important to keep in mind that "this may just be an artifact of this particular historical moment and local social context."⁷² This hammers home the framework that Fortner uses to layout his argument, and it is "precisely the point: attitudes about crime and crime policy abstracted from specific settings cannot yield precise explanations about their social and political origins,"⁷³ a reach often employed by New Jim Crow writers and functionalist theorists alike.

To shed light on the black silent majority, and show how similarly they align with the white silent majority in many aspects, Fortner analyzes statements from the late 1960s and early 1970s culled from black newspapers and blacks ranging from professors to prominent members

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

of the NAACP. A common theme among them is that they too detested many of the counter-culture manifestations of the time and, in doing so, showed solidarity with the white silent majority. The “indigenous black working and middle-class,” in their reaction to social activists of the times, “was the same as working and middle-class white ethnics: the behavior of hippies and Yippies fundamentally challenged the norms and values they had come to believe were essential to success in the United States.”⁷⁴ This belief also surfaced in the black silent majority’s views on crime:

While some white ethnics prioritized student protestors as their top law and order concern, the black silent majority prioritized crime. Some African Americans, without explicitly appropriating the trope of the ‘silent majority,’ viewed inner-city crime through its lens. In 1970, a black medical school student in Chicago composed an op-ed about escaping a robbery committed by black males. After describing the events, he wrote: ‘I hope my telling this incident will arouse middle-class blacks who have in the past been unduly apathetic.’ He added: ‘There are some in both races who look to divide our city into opposing black and white factions, and thereby divert our attention from combating crime, which is colorless.’ He concluded by noting: ‘I am acutely aware of the shameful conditions which exist, but criminal actions by anyone cannot be condoned. The overwhelming majority of decent citizens must be protected while government takes swift action. . .to improve social conditions.’

Clearly many existed in the silent black majority who, while being cognizant of and detesting the social conditions that led to a higher prevalence of crime in urban areas, still condemned crime and condoned a punitive approach to stopping crime. They may have sympathized with the conditions that produced the criminal, but they by no means excused the criminal. The two feelings, sympathy for and condemnation of, criminals did not exist as mutually exclusive phenomena for blacks in the silent majority. New Jim Crow writers often lead their readers to believe that blacks cannot possibly be supportive of punitive policies that would punish their own, and their analogy “encourages us to understand mass incarceration as another policy

⁷⁴ Ibid.

enacted by whites and helplessly suffered by blacks.”⁷⁵ By shining a light on the black silent majority, Fortner supports Forman’s claim, counter to the New Jim Crow analogy, that “blacks are much more than subjects; they are actors in determining the policies that sustain mass incarceration.”⁷⁶

Another method that Fortner uses to show commonality between the white silent majority and the black silent majority, and by extension of this their similar views on crime, is through analysis of how they both view a provocative symbol: police. This illuminates a feeling among blacks that was not, as New Jim Crow writers assert, filled with hostility and anger. Contrarily, many blacks in the silent majority supported tough policing. An open letter from the *Amsterdam News* to the police supports Fortner’s point: “We want you to know that you are not alone when you walk your lonely post in the dark, and we would further like you to know that when it comes to the enforcement of the law, the overwhelming majority of the Black community is standing solidly behind you.”⁷⁷ This feeling was not exclusive to New York City, but rather indicative of black attitudes of the time in locales throughout the United States where blacks made up a sizable portion of the population, as revealed by polling: a *New York Times* poll revealed that 49% of blacks listed crime and criminals as their chief concern, compared to 16% for Civil Rights and 6% for white prejudice, and another New York City poll revealed that police brutality did not exist a major concern for blacks;⁷⁸ surveys of blacks in Watts, Harlem, Chicago and Baltimore showed that black respondents were more concerned with police protection than police brutality;⁷⁹ and in Los Angeles an LAPD survey found that 72% of blacks interacted

⁷⁵ Forman, 116.

⁷⁶ Ibid.

⁷⁷ Fortner, “The ‘Silent Majority’ in Black and White,” Forthcoming.

⁷⁸ Ibid.

⁷⁹ Ibid.

positively with the LAPD.⁸⁰ By looking at local attitudes of blacks in the time period directly preceding the prison boom, it becomes evident that blacks did not vehemently oppose a more salient police presence, but rather advocated and lobbied for a greater police presence.

Crime Policymaking in New York State, 1957 - 1973

To better understand the causes of mass incarceration and validate either of the opposing frameworks presented by Alexander and Fortner, one needs to analyze the thought process that went into instituting policies that preceded the War on Drugs in particular and the war on crime in general. Many scholars point to the 1973 Rockefeller Drug laws, draconian in their level of punitiveness and reach, as the crescendo that raised the bar and created a paradigm for unprecedented levels of incarceration for other states to follow. The Rockefeller Drugs Laws mandated long prison sentences for illicit drug use and this most commonly resulted in convictions for possession or sale of small amounts of drugs.⁸¹ The long-term effects of these new measures fit the New Jim Crow writers' premise that drug charges played a major role in mass incarceration and that they disproportionately affected people of color. In 2002, almost thirty years after the New York State legislature passed the Rockefeller Drug Laws, 19,164 of the 69,000 inmates in New York State prisons were serving time for drug offenses,⁸² and for the 21-44 age group (the age group most prone to drug-related convictions) of drug offenders serving time, blacks outnumbered whites at an astonishing ratio of 40:1.⁸³ However, these effects do not in themselves refute Forman's premise - which acknowledges the inequity inherent

⁸⁰ Ibid.

⁸¹ Ernest Drucker, "Population Impact of Mass Incarceration under New York's Rockefeller Drug Laws: an Analysis of Years of Life Lost," *Journal of Urban Health: Bulletin of the New York Academy of Medicine*, 79, no. 3 (2002): 1.

⁸² Ibid., 2.

⁸³ Ibid., 4.

in the War on Drugs and the devastation it wreaks on black communities – that there is much more to mass incarceration and that the War on Drugs, by itself, does not account for the problem of mass incarceration in general.

Due to the chief role that the Rockefeller Drug Laws played in the nascent stages of the War on Drugs, it is useful to analyze the decision making of the policymakers within New York State in the years preceding the Rockefeller Drug Laws. This will shed light on the thought processes that went into policies that helped drive mass incarceration, for mass incarceration connects in fundamental ways to sentencing policies associated with the War on Drugs,⁸⁴ and it will help give credence to the frameworks put forth by Forman and Alexander. As such, the Joint Legislative Committee on Narcotic Study proves extremely valuable as a primary source for understanding these thought processes. The committee, which commenced in 1957 and lasted through the passage of the Rockefeller drug laws, attempted to gauge the problems associated with drug use, the ways in which it plagued society and, ultimately, to find solutions.

Testimony given by Arch Sayler, a probation officer in New York City, resonates with the framework put forth by Forman because it describes a connection between drugs and crime, something that runs counter to the New Jim Crow writers’ attempt to divert focus away from violent crime.⁸⁵ Sayler pointed out to the committee that “persons on probation and parole who have used drugs in the past” tend to “require a great deal more attention and service than the non-users under supervision.”⁸⁶ One reason for the need for greater attention to drug users existed

⁸⁴ Fortner, “The Carceral State and the Crucible of Black Politics: An Urban History of the Rockefeller Drug Laws,” *Studies in American Political Development*, 27 (2013), 20.

⁸⁵ Forman, 103.

⁸⁶ Joint Legislative Committee on Narcotic Study, *Minutes of the Public Hearing of the Joint Legislative Committee on Narcotic Study* (New York: Joint Legislative Committee on Narcotic Study, 2 December 1957), 851.

because “they have a tendency to violate the conditions of probation and parole by relapsing to drugs and again turning to crime.”⁸⁷ To illuminate this point, Sayler pointed to statistics that exemplified the overwhelming rate at which drug users on probation or parole commit violations, in comparison to those not on drugs:

On November 27 [1957], we had 921 persons under supervision for civilian offenses of all kinds. Of these, 107 or 11.6 per cent had a history of drug use. . . We have found that this small group of drug users accounts for approximately 60 per cent of our probation and parole violations. In other words, 11.5 per cent of the people under supervision create 60 per cent of the violations, and 85.5 per cent, or the balance, make only 40 per cent of the violations.⁸⁸

So clearly, in the eyes of this probation officer from New York City, there existed a strong correlation between drugs and crime, well before the Rockefeller drug laws came into existence. If this testimony can be viewed as veracious, it would force New Jim Crow writers to acknowledge that, at least in some locales, a connection between drugs and crime existed and, therefore, a potential impetus for getting tough on drug users existed before the victory of the Civil Rights Movement (which would of course partly dispel the functionalist theory of backlash, which developed in response to the changes brought about by the Civil Rights Movement). These facts cannot simply be pushed aside because they do not fit the New Jim Crow narrative.

Further evidence of a connection between drugs and crime permeates the work done by the New York State Joint Legislative Committee on Crime, Its Causes and Effect on Society. The Assembly and Senate of New York State created a resolution to form this 12-member committee in 1966, and this committee would subsequently present annual reports from 1967 until the Rockefeller Drug Laws passed in 1973. In general the resolution directed the

⁸⁷ Ibid.

⁸⁸ Ibid, 851-852.

committee to “make a comprehensive study and investigation of all aspects and phases of crime and corruption and all questions in relation thereto.”⁸⁹ Specifically, one of the directives called on the committee to study and investigate “all phases of narcotics within the State, with the object in view of formulating and recommending remedial legislation as it may deem necessary to control the illegal use of narcotics and to provide for the care and treatment of addicts.”⁹⁰ As such, the committee played an integral role in affecting policy towards handling drug crimes in the years directly preceding the Rockefeller Drug Laws.

The committee’s first annual report, presented in 1967, showed an awareness of an increasing drug problem in New York State. The committee pointed out that the “seriousness of the narcotic problem in this state has reached a cost both in money and human suffering where it is fast becoming essential that the rising tide of narcotic addiction be stemmed.”⁹¹ In this first report by the committee, it showed support for recently passed legislation that called for rehabilitation of narcotic addicts. Particularly, it lauded the legislation for its stipulation that addicted drug sellers could be treated in a non-penal manner, whereas courts could more effectively, and punitively, handle non-addicted sellers.⁹² The report in general called for a more rehabilitative approach for addicts within the illicit drug trade.

The second annual report by the committee in 1968 devoted much more of its focus to the problems of narcotics. Particularly, the committee showed inextricable connections between narcotics and organized crime and presented it as a problem devastating New York City. The

⁸⁹ Joint Legislative Committee on Crime, *State of New York Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society* (New York: Joint Legislative Committee, 1967), 11.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

report noted that “the most vicious activity of organized crime in the ghetto is traffic in narcotics, specifically heroin” and that “New York City has an estimated 65,000 to 75,000 heroin addicts.”⁹³ The committee also mentioned the implications of race in the drug trade, elucidating how blacks comprised about 50% of the city’s addicts, whereas Puerto Ricans comprised 25% and an amalgam of other races comprised the other 25%.⁹⁴ The committee showed particular concern with the uptick in teenagers becoming addicted to heroin, and staggering death rates resulting from its use:

in 1968 almost 15% of the total deaths were of persons under 20 years old and unfortunately that figure too is on the upswing – out of the 850 addict deaths for 1969, slightly more than 25% or 220, were teenagers. Projections are that deaths attributable to heroin will reach over 1000 in 1970.⁹⁵

These staggering data on heroin use and its consequences drew much ire from the committee, and it saw a link between narcotics and crime that increasingly brought devastation to the rest of the city:

Certainly if 1000 or more deaths were recorded from any other poisonous substance or disease New York City would undoubtedly mobilize all its resources on an emergency basis to combat the epidemic. This burgeoning death rate due to narcotics coupled with the fact that addiction brings with it muggings, armed robberies, burglaries and other varieties of theft by which the addict pays for his drugs, effectively prevents anyone in the ghetto from leading a decent life. It explains why the rate of crime per 100,000 population in New York City is twice the national average, and the fact that approximately 50% of the street crimes are attributable to narcotics addiction.⁹⁶

The abovementioned work by the committee shows an unambiguous link between drugs and crime in New York City in the late 1960s.

⁹³ Joint Legislative Committee on Crime, *State of New York Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society* (New York: Joint Legislative Committee, 1968), 234.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid, 234-235.

The committee's 1967 report suggests a weakness in the New Jim Crow argument by showing an early correlation between race and drugs. The New Jim Crow writers' argument relies on the premise that whites and blacks use illicit drugs at roughly similar rates, yet despite this assertion blacks are arrested for drug use at far greater rates. Alexander assails the War on Drugs for targeting people of color at disproportionately high rates, even though "the majority of illegal drug users and dealers nationwide are white."⁹⁷ Furthermore, she notes that blacks do not make up the majority of dealers either: "People of all races use and sell illegal drugs at remarkably similar rates. 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 illegal drug dealing than people of color."⁹⁸ Research revealed by the Joint Legislative Committee on Crime, however, runs counter to Alexander's point and shows that generalizations about race and illicit drug use and dealing do not reveal specific situations that occur across space and time. As mentioned above, heroin addicts existed mostly in "ghetto" areas and blacks constituted about half of all heroin addicts at the time. This would explain why, at least in New York City, law enforcement developed an impetus to target blacks at greater rates than whites. The New Jim Crow theory asserts that law enforcement arbitrarily targets blacks in the War on Drugs (which often it does), but this theory does not allow for much room to acknowledge that a situation like that in New York City may have justifiably called for targeting people of color merely because in that locale they used and sold drugs at much higher rates than whites.

The committee also showed a real concern for people of color who, while trying to live their lives the right way, constantly found themselves exposed to the dangers of the drug trade. This reverberates with Fortner's argument that a black silent majority played a role in the

⁹⁷ Alexander, 98.

⁹⁸ Ibid., 99.

development of the drug war. The committee concluded that “no meaningful progress can be made in the anti-poverty effort, or in the general effort to improve conditions in the ghetto, unless the narcotics traffic is suppressed.”⁹⁹ This report shows that real concern for the people living within drug-ravaged communities partly drove the War on Drugs. And a large part of the concern came from innocent victims of the drug war, especially middle-class blacks. Fortner duly notes that “working and middle-class African Americans living in cities and enduring the negative consequences of urban change drew upon the moral content of indigenous class categories to understand these shifts,” and consequently “it is quite possible that working and middle-class African Americans in Baltimore, Los Angeles, Washington, D.C., Chicago, Atlanta and other urban areas in the throes of the urban crisis shifted the discursive terrain in their cities and states in favor of policy prescriptions that punished the irresponsible and separated them from good citizens.”¹⁰⁰ Just like the Joint Legislative Committee on Crime, blacks in New York City and other urban areas sought to clean up their neighborhoods by ridding them of drugs and their associated ills.

The New Jim Crow Writers make another charge that the War on Drugs developed as a top-down measure in which elites capitalized on a changing landscape – one in which, as a result of the Civil Rights Movement, there existed an unprecedented level of legal equality between whites and blacks and, consequently, fear developed among whites about the changing of the status quo which had previously behooved them – to reestablish a social caste system in which minorities remained under control at the bottom. This charge does not allow for much public agency as it implicates that the general public acquiesced to policies being carried out by

⁹⁹ Joint Legislative Committee, *State of New York Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society* (New York: Joint Legislative Committee, 1969), 238.

¹⁰⁰ Fortner, “The Carceral State,” 35.

political elites. In a way this argument presents the silent majority as pawns in a game being played out above their heads. These claims prove tempting to adhere to, especially considering the vigor with which political elites such as Barry Goldwater, Richard Nixon and later Ronald Regan pursued this agenda and the political success (at least for the latter two) that they achieved. However, this claim is somewhat shortsighted in that it does not take into account the reality that part of the political success experienced by Nixon and Regan, among others, resulted from a public that bought into their beliefs not because they were manipulated, but rather because they were receptive to their message out of a growing frustration that they had with drugs and crime.

Testifying before the Joint Legislative Committee on Narcotic Study in 1957, Chief Justice John Stanton of the Narcotics Bureau of the Police Department of the City of Buffalo, spoke of a growing drug problem in his city. This epidemic angered citizens of Buffalo, some of whom vehemently called for more punitive measures to be taken on drug addicts. After recommending tougher treatment of drug users, Stanton cited a discontent citizenry that called for a more punitive response to the addicts who were, at least in the public's eye, plaguing the city: "Our courts have been criticized by the public for not meeding [sic] out enough time to dope peddlers and drug addicts who are in violation of narcotic laws. I have done quite a bit of speaking before our public, and that seems to be the question uppermost in their minds, why don't the courts give these people more time."¹⁰¹ In defense of the courts, Stanton pointed out that they were "guided by punishment prescribed,"¹⁰² and therefore limited in the arbitrariness to hand out stricter and longer sentences. Stanton sympathized with the public sentiment, noting that he would recommend a minimum of five years and a maximum of fifteen years for those in

¹⁰¹ Joint Legislative Committee on Narcotic Study, 974.

¹⁰² Ibid.

violation of narcotic laws.¹⁰³ Of course Stanton's plea for minimum sentencing for drug offenders would eventually come to fruition, becoming one of the injustices of the War on Drugs that New Jim Crow writers castigate. So while the New Jim Crow writers have a valid claim that sentencing for drug offenders became too strict and limited the power of judges for leniency, it is important to keep in mind the origins of where this practice of long sentencing came from. To look at the whole picture one would have to admit that at least part of the move towards stricter sentencing came from a disgruntled public that had little sympathy for drug users and their ill effects on society.

Another revelation that early sessions of the Joint Legislative Committee on Narcotic Study offers resides in that some legislators already possessed an impulse to enact harsh punishment for drug dealers before the Civil Rights Movement, contradictory to the functionalist theory of backlash. Jacob Javits, a Junior Senator from New York, exemplifies this call for punitive measures in his testimony to the committee. Despite his admission that he understood drug addiction as a medical problem, one that "is like cancer in its lethal effect," he remained resolute in his conviction that he "always supported and continues to support the most condign punishment for the sellers, the pushers, the sellers to especially juveniles."¹⁰⁴ Despite this call for punitiveness, Javits championed a call to help the people directly affected by drug use: "I respectfully submit that the key to a solution is the treatment of narcotics addiction as a medical problem. That is the prevention and cure of narcotics addicts, who are sick people," and which remained "just as vital at the very least, if not more vital, than apprehension and punishment of dope smugglers and pushers who are criminals."¹⁰⁵ Despite seeing curing addiction as the key to

¹⁰³ Ibid.

¹⁰⁴ Ibid., 769.

¹⁰⁵ Ibid., 770.

solving the growing drug problem, even trumping pursuing punishment of those dealing drugs, Javits nevertheless declared a hard line when it came to those involved in the drug trade:

We have the recommendation from the Senate Committee to pose the most drastic penalty known to our law upon sellers to those who are under 18 years of age, and I leave that problem to the law enforcement officers and I say that I subscribe to the vigor and strength of their recommendations on seeking to cut off some of the bigger branches by punishment of those who deal in narcotics.¹⁰⁶

Javits's ambivalence toward the drug problem represents a reality that many who have tried to deal with the epidemic have faced – they at once feel sympathy for the addicts, but also feel empathy for the those in communities ravaged by the ills of the drug trade. The two feelings are not mutually exclusive and at times the New Jim Crow Writers present them as such.

New Jim Crow writers often criticize the War on Drugs for disproportionately targeting and punishing minor players in the drug trade, not those driving and controlling the drug trade. Michelle Alexander calls it a “myth” that the drug “war is aimed at ridding the nation of drug ‘kingpins’ or big-time dealers.”¹⁰⁷ Rather, “the vast majority of those arrested are not charged with serious offenses. In 2005, for example, four out of five drug arrests were for possession, and only one out of five was for sales. Moreover, most people in state prison for drug offenses have no history of violence or significant selling activity.”¹⁰⁸ These criticisms posited by Alexander and others prove valuable and meritorious; by largely failing to crackdown on the kingpins in the drug trade, it continues unabated. The New Jim Crow writers, while accurately pinpointing this major flaw in the War on Drugs, fail to use this to buttress their explanation for the causes of mass incarceration. They trace the War on Drugs and the subsequent prison boom from the post-Rockefeller drug laws (passed in 1973) and especially from the official declaration

¹⁰⁶ Ibid.

¹⁰⁷ Alexander, 60.

¹⁰⁸ Ibid.

of the War on Drugs by the Reagan Administration in 1982. As such, it would logically follow that the tendency to crackdown on minor drug offenders developed linearly with the War on Drugs. In other words, New Jim Crow writers lead their readers to believe that this tendency developed as one unique to the War on Drugs, serving the agenda of social control through mass incarceration by imprisoning vast numbers of people of color for merely committing minor drug offenses.

One major problem becomes evident with this framework: the tendency to crackdown on minor players in the illegal drug trade existed well before the War on Drugs as the New Jim Crow writers identify it. The Temporary Commission of Investigation of the State of New York, charged with conducting “investigations of current troublesome problems dealing with crime, racketeering and corruption,”¹⁰⁹ revealed that the tendency of law enforcement to go after the wrong people in the drug trade – i.e. minor offenders like pushers, addicts and small-time sellers – plagued attempts by government to curtail the drug problem before the War on Drugs commenced. The Temporary Commission’s 1972 report documented arrests by the New York City Police Department from 1968 – 1970. Their findings revealed that the NYPD arrested mostly minor offenders in the drug trade, therefore failing to stifle it.

¹⁰⁹ Temporary Commission of Investigation, *Fourteenth Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature of the State of New York* (New York: Temporary Commission of Investigation, 1972), 13.

Narcotics Arrests By New York City Police (1968 – 1970)

FELONY ARRESTS	1968	1969	1970
Possession	6,088	9,741	16,219
Sale	3,528	5,690	10,580
Total Felonies	9,626	15,431	26,799
MISDAMEANOR ARRESTS			
Possession	12,802	19,747	25,680
Drug Loitering	4,864	13,304	20,369
Total Misdemeanors	17,666	33,051	46,049
TOTALS	27,292	48,482	72,848

Source: Temporary Commission of Investigation, Fourteenth Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature of the State of New York (New York: Temporary Commission of Investigation, 1972), 13.

The report pointed out the flaws of the police department, noting that “these arrests clearly evidence how badly the city police have failed in their battle against the narcotics traffic.”¹¹⁰

Just how the New Jim Crow writers point out that the futility of the methods employed by law enforcement over the past three decades in fighting the War on Drugs by targeting minor offenders, the Temporary Commission on Crime similarly lambasted New York City law enforcement for failing to go after the real offenders in the drug trade:

¹¹⁰ Ibid., 41.

The significance of this fact is that any sale, regardless of the quantity of drugs involved, is a felony under state law. Therefore, an arrest of an addict ‘selling’ a \$5 bag of heroin to another addict is a felony arrest even though the amount of narcotics contained in that glassine envelope is infinitesimal. Indeed, as will be shown later, the Narcotics Division was doing exactly that, arresting addicts and charging them with the felony charge of sale of drugs even though the average such sale consisted of one glassine envelope containing one or perhaps two grains of the most highly adulterated heroin. The average purity of this heroin ranged from 4% to 12%, and when one further considers that there are 437 grains in one ounce, arrests for selling one grain of this type of heroin can hardly be expected to have any impact on the illicit narcotics trade.¹¹¹

This commonality between the New Jim Crow writers and the Temporary Commission of Investigation of the State of New York effectually weakens part of the New Jim Crow argument. The Commission’s findings reiterate the legitimacy of the points made by the New Jim Crow writers concerning the ineffectiveness of fighting the War on Drugs from the bottom-up, yet it also hinders the New Jim Crow argument because it shows that this bottom-up approach, although misguided and ineffective, preceded the War on Drugs.

In the 1970s the drug problem in New York City reached distressing levels and seemed to be spiraling out of control. The documents published by the New York State Committee on Crime, its Causes, Control and Effect on Society in 1972-1973 revealed a city frustrated with the ever-increasing drug epidemic. The committee noted how Governor Nelson Rockefeller claimed that “the very survival of our nation could be at stake,” and the committee agreed with him by determining that “we do indeed face a crisis in the narcotics situation which has profound implications for New York City and State.”¹¹² Research done by the committee revealed that at

¹¹¹ Ibid., 42.

¹¹² Joint Legislative Committee, *State of New York Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society* (New York: Joint Legislative Committee, 1972-73), 50.

the end of 1970, an estimated 150,000 to 300,000 heroin addicts lived in New York City.¹¹³ This staggering number created a daunting problem for the city that forced the committee to rethink how the problem should be dealt with: “The significance of a figure between 150,000 and 300,000 heroin addicts is that the problem has escalated beyond solution through treatment, rehabilitation or some yet to be discovered miracle drug.”¹¹⁴

The committee also reiterated its perception of a clear connection between drugs and crime. Consequently, they feared that a growing number of heroin addicts would lead to significant increases in crime. Members of the committee assayed the situation:

If the addict population ranges between 150,000 and 300,000 it also means a large fraction of the city’s population are probably committing crimes to support their narcotics habit. Studies of the addiction phenomenon have established the correlation between the growth of the addict population and the growth of crime in a neighborhood.¹¹⁵

Moreover, the committee pinpointed problems that occurred in particular areas of the city that experienced extremely high rates of drug use. Their report noted that “where the addict population is most concentrated, living conditions have become intolerable.”¹¹⁶ Harlem in particular experienced extremely high rates of addiction and crime, so much so that “some 90% of businesses in Central Harlem had similarly been burgled, robbed or pilfered in that year [1970],” and the “rising death rate among young people due to drug abuse has become a trite exercise.”¹¹⁷ Today the New Jim writers often shy away from acknowledging that urban areas that experience high rates of drug use and trafficking often experience high rates of crime. These two phenomena are not mutually exclusive as illicit drug activity leads to crime, often of the

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 51.

violent nature. So while the claim that Alexander and others make that blacks use drugs at roughly the same rate as whites holds weight on a national level, it does not necessarily stand up at the local level.

Many black leaders at local levels in New York City mobilized in support of harsher policies for those using and dealing in drugs. Harlem in particular was hit extremely hard by rising crime and drug addiction¹¹⁸ and as a result many blacks pushed for severe treatment of addicts and dealers in their community. In 1962 “African American civic and political leaders employed more aggressive tactics” in fighting the narcotics problem and consequently created a four-point plan, part of which urged President Kennedy to “mobilize all law-enforcement agencies to unleash their collective fangs on dope pushers and smugglers” and likewise called on Governor Rockefeller to “also push a similar crackdown.”¹¹⁹ New York City’s situation proved especially dire when it came to narcotics as the city served as a key player in organized crime around narcotics. The Temporary Commission of Investigation observed that “New York City plays a key role as a traffic center for hard drugs” and that “most of the heroin entering the United States finds its way to drug distribution centers here in New York City and for further distribution throughout the country.”¹²⁰ With the committee understandably focused on organized crime around narcotics, and not necessarily poor blacks using drugs, black leaders in Harlem proved pivotal in their role in pushing for measures that would eventually lead to a crackdown on all drug users and traffickers in the city on a large scale, many of them black. African Americans at the local level played a much greater role in the development of crime

¹¹⁸ Fortner, “The Carceral State,” 21.

¹¹⁹ *Ibid.*, 24.

¹²⁰ Temporary Commission of Investigation, *Fourteenth Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature of the State of New York* (New York: Temporary Commission of Investigation, 1972), 30.

policymaking in the years preceding the War on Drugs than the New Jim Crow writers ascribe to them.

CONCLUSION

The New Jim Crow writers should be lauded for much of their work. These writers, most notably Michelle Alexander, pushed the issue of mass incarceration to an unprecedented level of public consciousness by making the provocative claim that mass incarceration operates in ways tantamount to Jim Crow in how it creates a system of social control for people of color. Alexander and others demonstrate how the criminal justice system targets and imprisons people of color at far greater rates than whites. Perhaps most importantly, these writers show how the criminal justice system often entraps those caught up in the carceral state in numerous ways besides prison itself. Those with convictions on their records often cannot find gainful employment after prison and find themselves caught up in the vicious cycle of poverty and recidivism. The New Jim Crow writers effectively depict how people convicted of crimes live under systems of control, such as parole and probation, and many times cannot participate in basic freedoms, such as voting, that many citizens take for granted.

The New Jim Crow analogy, however, essentially falls short because it does not tell the whole story of mass incarceration. Alexander argues that the War on Drugs is solely responsible for the current state of mass incarceration. She and others claim that the War on Drugs developed as a form of social control after the Civil Rights movement, largely because it could be carried out in a colorblind society. These writers are correct that the War on Drugs targets people of color at disproportionately high rates and that this practice contributed greatly to the prison boom. Yet this is only part of the picture. Other factors came into play, including longer

sentencing in general, an increase in crime rates in the time period leading up to the prison boom, and a push by community members in urban areas, both black and white, for stricter law enforcement and less tolerance for criminals. All of these factors cannot be ignored, which the New Crow writers essentially do.

Most pointedly, the New Jim Crow argument falls short because it does not explain how the carceral state as it exists today came into existence. This is essential, because in order to fix the convoluted problem of mass incarceration, there needs to be a clear understanding of how mass incarceration came into existence. It did not come into play just because political elites saw an opportunity to tap into the fears of whites, nor did it come into existence just because it served as a new form of social control to replace the one left behind in the Jim Crow era. These factors doubtless played a role, but not the only role. As James Forman acutely depicted, the drug war served as one of a host of factors contributing to mass incarceration.

As this paper demonstrates through an analysis of work done by legislative committees in New York State in the years preceding the Rockefeller Drug laws, an increase in crime proved to be a very real problem affecting people living in urban areas like New York City. Drug use and drug-related crimes rose drastically in the 1960s, and people living in those neighborhoods found themselves being affected by those changes. The legislative committees expressed real concern for innocent people living in urban areas, and this concern drove much of the policymaking that led to a more punitive system of law enforcement. New York City did not stand alone as other urban areas, such as Chicago, Baltimore and Los Angeles, experienced increases in crime and illicit drugs. People living in these areas - including both the white and black silent majorities - demanded that their neighborhoods be safer and subsequently called for tougher law enforcement policies. This call for action materialized first in New York City with the Rockefeller Drug

Laws, and later took hold in locales throughout the United States. Urban areas increasingly became the hubs of mass incarceration as members of those communities disproportionately found themselves caught up in the criminal justice system. Forty years have passed since the call to action for a more punitive state, and the effects are staggering and unprecedented: whereas 326,000 Americans populated prisons in 1970, as of 2009 2.3 million Americans found themselves behind bars and America reins as the prison capital of the world, claiming 2.29 million of the world's 9.8 million prisoners.¹²¹

It is clear today that those calls for tougher law enforcement policies by legislative committees and citizens did not lead to decreases in crime or illicit drug use. Quite contrarily, more punitive law enforcement policies led to mass incarceration, which contributes to and reinforces the strictures of poverty and higher crime rates that come with poverty. Those with criminal records find themselves much more likely to remain in poverty because they can seldom find meaningful employment. With little else to turn to, former convicts often return to a criminal lifestyle out of necessity, not necessarily through choice. Furthermore, those on parole and probation often find themselves under the microscopic eye of the law, subject to going to prison for the slightest of infractions. Once a person falls under the aegis of America's criminal justice system, it proves very difficult for that person to unfetter himself from the strictures of this system and become a positive contributor to society.

To solve the problem of mass incarceration, people need to be aware of how damaging prison and the prison label can be. When people become aware that sending community members to prison en masse does not make their community safer, but rather more dangerous, they will be more likely to push for and support policies that call for rehabilitation rather than

¹²¹ Forman, 102.

punishment. When a vast majority of people become convinced that prison is not the answer, legislation will follow suit as politicians will cater to the desires of their constituencies.

As the New Jim Crow writers so adeptly point out, the War on Drugs is a factor in mass incarceration. To counter this problem, drug crimes should be treated with much more leniency. Drug users should not be treated as criminals, but rather as people with medical conditions who need to be treated through rehabilitation. Small-time drug dealers should not be given long-term prison sentences, but rather should be given a chance to change their ways before actually going to prison. When prison becomes a necessity in certain cases, the prison sentences should be shorter; young men cannot be expected to spend their 20s and 30s in prison and then reenter society in a successful manner. Law enforcement agencies should go after drug kingpins and focus their resources on this as opposed to going after small-time dealers who will merely be replaced by someone else as soon as they are taken away.

In this vein, calls from extreme progressives to legalize certain types of illicit drugs should not be ignored. A legalization of less severe drugs, such as marijuana, would immediately alleviate the stigmatization that goes along with those convicted of using or selling these less severe drugs. Marijuana users often use it as a social drug, similar to alcohol, and yet conviction of using or selling this drug carries with it a federal felony. Contrarily, a conviction of the much more dangerous practice of drinking and driving often carries with it a slap on the wrist in comparison to the sentencing meted out to recreational drug users. Those convicted of using or selling marijuana tend to be overwhelmingly people of color, despite voluminous research cited by Alexander and others that whites often use this type of drug at higher rates than blacks. Treating these recreational drug users, who are causing no physical harm to others, as hardened criminals will not lend to making them more productive members of society, but rather

limit them for life and make them less valuable contributors to communities that can least afford this loss.

People who live in urban areas where the dire effects of the illicit drug market are felt the most need to come to an understanding that locking up drug dealers will not necessarily make their communities more safe or productive in the long run. This may be the most difficult obstacle to overcoming mass incarceration, for the silent majority played a pivotal role in the development of mass incarceration and continue to play an important role in how criminal policy is carried out in urban areas. However, this does not mean that people in communities hit hard by drugs and crime can just be left to live in constant fear because of the dangers they encounter on a regular basis. In place of the system of mass incarceration that puts away so many valuable members of these communities, there needs to be alternative proactive measures that stress crime prevention, drug rehabilitation and job training. Young men who turn to selling drugs out of necessity need other viable options to be productive members of society, such as educational programs that provide specific skills that can be utilized in this era of ever decreasing blue-collar jobs that once bolstered many cities. Society as a whole needs to understand that sending these young men to prison benefits no one in the long run.

The number one precondition of crime is poverty. Children born into poverty experience a far greater chance of living a life of crime as research shows that “child poverty reduces later educational attainment, perpetuating deprivation.” This in turn leads to “reduced high-school graduation rates” that “lead to higher crime rates and increased incarceration costs.”¹²² As such, for mass incarceration to be combated it needs to occur at the root of the cycle that leads to it: poverty. It is well documented how poverty in America is often concentrated in urban areas.

¹²² Nancy Folbre, “The Great Deprivation,” *The New York Times*, 7 June 2010.

Factors that contributed to this concentration of poverty include the loss of factory jobs due to outsourcing and the technological revolution, the exodus of middle and upper-class whites and blacks from urban areas, inadequate education in urban areas and a lack of support systems for young people in these depressed areas.

Overall, it is imperative for people to know that mass incarceration has been an epic failure and that people often turn to crime because society has failed them in some way. Once this change in perspective occurs, people will no longer look at criminals as subhuman and therefore unworthy of the equalities and liberties given to free citizens in America. It will take work by everyone – politicians, employers, law enforcement members, members of the silent majority living in areas with higher rates of crime and drug use - to realize that it will behoove them to play their part in treating people convicted of crimes with dignity and respect. The more accepting society becomes of people convicted of crimes, the better off society will be. Unfortunately, becoming more understanding of and supportive of former criminals as a society will only serve as stopgap measure in the long run in terms of ameliorating the epidemic of mass incarceration. The root of the problem of mass incarceration lies in the ever increasing segments of society that live in abject poverty and the demarcation of these groups from the mainstream society and economy. To truly fight crime, and consequently mass incarceration, extreme poverty needs to be eradicated and people living in areas that contain high poverty rates need to not be insulated from everyone else. A more equitable American society will not have a need for its current system of mass incarceration.

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