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THE BLACK POOR, BLACK ELITES, AND AMERICA'S PRISONS

*James Forman, Jr.**

I. ARE WE POST-RACIAL?

For many of this symposium's panelists, the event's very title—*Acknowledging Race in a "Post-Racial" Era*—presented a challenge. Numerous panelists criticized the term "post-racial," arguing that race remains central to understanding how America operates.¹ By contrast, members of the criminal justice panel did not even feel the need to ask whether we are post-racial. Few people would assert that our criminal system is anywhere near the point that race no longer matters. This is not to say that racism infects our criminal system to the extent it once did. Our criminal system—like the rest of American society—has been profoundly transformed. Blacks accused of crimes are no longer lynched without trial² or worked to death on plantation-like settings;³ black victims are no longer systematically ignored by police and courts.⁴ Yet despite this progress there is no serious argument to be made that our criminal system is post-racial. Why not?

* Professor, Georgetown University Law Center. I am grateful to Arthur Evenchik for his comments and to Alex Berg, Greger Calhan, Alana Intieri, Mike Knobler, Jessica McCurdy, Bill Murray, and the staff of the Edward Bennett Williams Law Library for research assistance.

¹ See, e.g., Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011); Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011); Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833 (2011). For a discussion of post-racialism and its various meanings, see Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010).

² See generally David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793 (2005).

³ See generally ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* 83-131 (2010).

⁴ For discussions of the history of discriminatory treatment of black victims, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29-75 (1997); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004).

Principally—though not exclusively⁵—because of our nation’s penal system. We now have 2.3 million of our fellow citizens under lock and key—a number that is unprecedented for a democracy.⁶ Approximately one in one hundred adults is in prison or jail at any given time.⁷ The United States, with 5% of the world’s population, now has 25% of its prisoners.⁸ This is a relatively new experiment. America’s incarceration rate held roughly steady for much of the nation’s history.⁹ The prison explosion began in the early 1970s, with the number of people in America’s prisons and jails growing sevenfold since then.¹⁰ It is also a tremendously expensive experiment. Total state spending on corrections reached \$49 billion in 2007,¹¹ and the recent fiscal crisis has forced states to cut spending in areas such as higher education and health care in order to meet their corrections obligations.¹²

African Americans have borne the brunt of the prison explosion. Blacks constitute a larger percentage of the prison population today than they did at the time of *Brown v. Board of Education*.¹³ This trend is

⁵ There is a significant body of evidence documenting the role that race continues to play in all aspects of our criminal system. Three excellent sources are MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); and DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

⁶ *Key Facts at a Glance: Correctional Populations*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last updated Nov. 20, 2010) [hereinafter *Key Facts*].

⁷ PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf [hereinafter *ONE IN 100*].

⁸ Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

⁹ MARC MAUER, *RACE TO INCARCERATE* 18 (2d ed. 2006).

¹⁰ In 1970, there were 326,000 Americans behind bars: 196,000 in state and federal prisons and another 130,000 in local jails. MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-102529, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984*, at 35, 76 (1986), available at <http://www.ncjrs.gov/pdffiles1/pr/102529.pdf>. Today there are 2.3 million. *Key Facts*, *supra* note 6. Three main policy changes explain the growth in the number of prisoners: (1) more offenders today receive prison terms and fewer receive alternatives to incarceration (such as probation); (2) those who go to prison stay longer; and (3) we arrest and incarcerate many more drug offenders than we once did. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 43-48 (2006).

¹¹ *ONE IN 100*, *supra* note 7.

¹² PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS*, at 17 (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

¹³ Blacks made up 30% of the prison population in 1954. MAUER, *supra* note 9, at 121. In 2007, they comprised 38.4%. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISON INMATES AT MID-YEAR 2007*, at 7 (2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=840>. The black percentage of the overall population has increased slightly in those years, from 10% in 1950 to 12.3% in 2008. U.S. CENSUS BUREAU, *ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2006-2008*, http://factfinder.census.gov/home/saff/main.html?_lang=en (follow “Datasets” hyperlink; follow

especially shocking given America's racial progress over the past fifty years. The civil rights movement radically reshaped the nation, ushering in an era of increased opportunity for black Americans in virtually every domain of American society. At his inauguration, President Barack Obama stood as proof of this progress, and he used the occasion to remind us all of his utterly improbable journey. "[A] man whose father less than sixty years ago might not have been served in a local restaurant," he said, "can now stand before you to take a most sacred oath."¹⁴ Obama's election was not the only marker of change. A host of statistics indicate that a great many African Americans are substantially better off than they were before the civil rights movement.¹⁵

Yet a black man born in the 1960s, *after* the victories of the civil rights movement, is more than twice as likely to go to prison in his lifetime as was a man born during the Jim Crow era.¹⁶ One in nine black men between the ages of twenty and thirty-four are behind bars at any given time.¹⁷ There are few indicators of community health in which the black-white disparity is as great.¹⁸ Blacks are about eight times as likely to go to prison as whites, which dwarfs black-white disparities in, for example, unemployment rates (2-to-1 disparity), infant mortality (2-to-1 disparity), and out-of-wedlock births (3-to-1 disparity).¹⁹ Meanwhile, the number of African Americans under court

"American Community Survey" hyperlink; select "2006-2008 American Community Survey 3-Year Estimates," and click on "Data Profiles"; click on "Show Result"; click on "Demographic" under "2008 Data Profiles" in left column) (last visited Nov. 18, 2010); Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States* tbl.1 (U.S. Census Bureau, Working Paper Series No. 56), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html> (select Table 1: United States—Race and Hispanic Origin: 1790 to 1990).

¹⁴ Barack Hussein Obama, President of the United States, Inaugural Address (Jan. 20, 2009), available at <http://www.whitehouse.gov/blog/inaugural-address>.

¹⁵ For example, in 1957, just a few years after *Brown*, only 2.9% of the black population had completed four years of college; by 2009, 19.6% had. U.S. CENSUS BUREAU, CPS HISTORICAL TIME SERIES, TABLE A-2: PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2009 (2010), available at <http://www.census.gov/hhes/socdemo/education/data/cps/historical/tabA-2.xls>. In 1967, only two out of a hundred black households earned more than \$100,000; by 2009, almost one in ten black families earned that amount. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 36-37 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

¹⁶ WESTERN, *supra* note 10, at 25-26.

¹⁷ ONE IN 100, *supra* note 7, at 6.

¹⁸ GLENN C. LOURY WITH PAMELA S. KARLAN, TOMMIE SHELBY & LOIC WACQUANT, RACE, INCARCERATION, AND AMERICAN VALUES 22 (2008).

¹⁹ *Id.*

supervision, and the number of former prisoners struggling with re-entry, are also at historic highs.²⁰

These statistics remind us that our criminal justice system is not remotely post-racial. But recognizing this fact is only part of a response to the questions raised by this symposium. We were also invited to reflect on how race and the challenges associated with it have changed in recent years. So allow me to return to the issue of prisons, or more specifically prison-going. Here we should identify an important trend that will necessarily complicate how scholars think about race and criminal justice. The trend is this: The rise in African American incarceration rates has been concentrated almost entirely among lower-class, uneducated blacks.

Bruce Western's research reveals the enormous divide in the black community between high school dropouts and those who attended college. While an African American man born in the late 1960s who dropped out of high school is more than three times as likely to be incarcerated in his lifetime as was one born in the late 1940s, the same is not true for an African American man with some college education.²¹ For a black man who has attended college the lifetime chance of going to prison actually *decreased slightly* between 1979 and 1999 (from 5.9% to 4.9%).²² As a result of these diverging trend lines, the lifetime risk of incarceration for a black man born in the 1960s varies dramatically depending on whether he dropped out of high school (in which case he has a 58.9% chance of going to prison in his lifetime) or attended college (in which case he has a 4.9% chance).²³

What does this mean for how we think about race and the criminal justice system? One implication is suggested by what I have said already—namely, we must be specific about the fact that prison has become the province of the poor and uneducated, even within the black community. Therefore it no longer makes sense to talk about—without saying more—concepts such as “how the criminal justice system harms black people.” We must always identify which portions of the black community we are talking about, and in many cases the answer will be the poorest and least educated parts. This is not to say that other blacks are not also harmed, either directly (by, for example, racial profiling) or indirectly (by, for example, the stigma associated with being a member of a racial group that is disproportionately imprisoned). But it is to say

²⁰ ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008).

²¹ WESTERN, *supra* note 10, at 26-28. A black high school dropout born in the late 1940s has a 17% chance of being incarcerated in his lifetime, while a black high school dropout born in the late 1960s has a nearly 60% chance.

²² *Id.* at 27.

²³ *Id.*

that we will need to be precise, and more precise than was once required.²⁴

I discuss two additional implications in the Parts that follow. First I explore the question of “linked fate.” Specifically, I ask: If prison is reserved for less-privileged blacks, what implications does this have for the idea that blacks share a linked fate that binds them across socioeconomic classes? I then turn to discuss black elites and agenda setting. Picking up on Michelle Alexander’s provocative claim that the civil rights community has given insufficient attention to the challenge of mass incarceration, I explore how black elites’ limited exposure to America’s prison system may have contributed to the collective silence Alexander criticizes. I then turn to a particular part of the black elite—the legal academy—and focus on how legal academics discuss racial discrimination in the criminal justice system. Here I explore the extent to which relying on personal narrative may draw our attention to certain aspects of racial injustice but lead us to overlook others.

II. LINKED FATE

Many have argued that the black middle class and the black lower class see themselves as inextricably bound together in a “linked fate.”²⁵ As Mari Matsuda argues, in some contexts “[v]ictims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line; the educated Japanese still comes up against the assumption of Asian

²⁴ My analysis is in the spirit of Kimberlé Crenshaw, who argued that we must be careful not to elide or ignore intra-group differences. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); see also Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, in INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 124 (Emily Grabham et al. eds., 2009) (“[Intersectionality theory’s] core insight—that analysis of discrimination based on a single identity trait does not adequately account for intersecting aspects of identity, such as race or sex—has been widely embraced.” (citation omitted)). Others have adopted the term multidimensionality, which attempts to account for the complexity of multiple systems of oppression. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309 (2001) (examining “the relationships among racism, heterosexism, patriarchy, and class oppression utilizing a model I refer to as ‘multidimensionality’”).

²⁵ Political scientist Michael Dawson developed the concept of “linked fate” to describe a situation in which perceived racial group interest serves as a proxy for self-interest—i.e., “is what is good for black people good for you?” MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994). Tracey Meares expanded the concept of linked fate to include the extent to which African Americans empathize with others in their communities. Meares focused on linked fate *within* black poor communities, rather than across classes. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

inferiority.”²⁶ In support, Matsuda points out that Japanese Americans across classes all shared a similar fate in internment camps.²⁷ Arguments for linked fate are commonplace, as authors often seek to stress the ways in which wealthier minorities also suffer from discrimination. For example, in the racial profiling context (about which more later), David Harris argues that, “‘driving while black’ is not only an experience of the young black male, or those blacks at the bottom of the socio-economic ladder. All blacks confront the issue directly, regardless of age, dress, occupation or social station.”²⁸

Of course, linked fate sometimes exists. But linked fate is context specific; I am suggesting that it does not hold as firmly in the criminal context. In the criminal context we see what should be characterized as *qualified linked fate*.²⁹ To see why, contrast crime policy with another area in which linked fate is often asserted—affirmative action.

In the affirmative action context, black interests are aligned (or at least do not conflict) across the class spectrum. Even if privileged blacks disproportionately benefit from affirmative action in higher education, some less privileged blacks benefit as well.³⁰ Affirmative action policies in government employment also benefit both working and middle class blacks.³¹

In the criminal context, however, different portions of the black community have interests that are often in direct tension.³² We can see this in Mary Pattillo-McCoy’s study of an African American neighborhood in Chicago that straddled the lower end of the middle class. Some residents worried about the impact of drug addiction on

²⁶ Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 376 (1987).

²⁷ *Id.* at 376 n.222.

²⁸ David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 269 n.18 (1999).

²⁹ This term is Cathy Cohen’s, developed in the context of her examination of the black political response to the HIV and AIDS crisis. CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* (1999). According to Cohen, “not every black person in crisis is seen as equally essential to the survival of the community, as an equally representative proxy of our own individual interests, and thus as equally worthy of political support by other African Americans.” *Id.* at xi. Cohen makes another contribution useful for understanding crime policy. Cohen distinguishes between “consensus” and “cross-cutting” issues. *Id.* at 8-9. A consensus issue is one that is widely understood “as having an equal impact on all those sharing a primary identity based on race,” while a cross-cutting issue is “perceived as being contained to identifiable subgroups in black communities, especially those segments of the black community which are the least empowered.” *Id.* Cohen’s topic was AIDS, which she identified as a cross-cutting issue. *Id.* at 9. I argue that crime policy is also a cross-cutting issue, rather than a consensus issue.

³⁰ William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1714 (1986).

³¹ *Id.* at 1712-14.

³² For an excellent discussion of this issue, see Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769 (1992).

their property values.³³ A local reverend explains how one person's residence across the street from his church became a drug house:

What happened was the woman who owned the house, once she died it just went to pot. She died maybe a year ago. It was starting, I could see signs of it beginning when she was ill. And apparently she was like the matriarch and wouldn't take too much of that going on in the house. But now there is so much traffic coming in and out of that house all the time so I don't even know who lives there anymore, with the exception of the children. But there is a whole lot going on there.³⁴

Other neighbors were concerned about peer influences on their children. Pattillo-McCoy describes a mother's worries about her son, Derek, who was home from college for the summer:

For Derek, the possible dangers facing people in his age group include jail and death. These are the same fears that their parents and grandparents have for them Even Derek's friends who are working legal jobs continue to hang out with their neighborhood friends who have chosen the illegal route. Associating with such a diverse group can be dangerous even for someone like Derek, who seems committed to taking the legitimate road to success.³⁵

In a similar vein, sociologist Karyn Lacy describes what she calls the "boundary-work" among the black middle and upper middle classes, in which wealthier blacks attempt to shield their children from the influence of their less affluent peers.³⁶

In addition to these peer group concerns, criminal conduct by blacks directly jeopardizes the personal safety of other blacks. Blacks are overrepresented both as offenders and victims.³⁷ Thus, the black

³³ MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 51 (1999).

³⁴ *Id.* at 51-52.

³⁵ *Id.* at 66; *see also id.* at 6 ("The in-between position of the black middle class sets up certain crossroads for its youth. . . . The right and wrong paths are in easy reach of neighborhood youth. Working adults are models of success. . . . But at the same time the rebellious nature of adolescence inevitably makes the wrong path a strong temptation, and there is no shortage of showy drug dealers and cocky gang members who make dabbling in deviance look fun.").

³⁶ KARYN R. LACY, *BLUE CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS* 173-83 (2007).

³⁷ For example, blacks are six times more likely than whites to be homicide victims. JAMES ALAN FOX & MARIANNE W. ZAWITZ, *BUREAU JUST. STAT., U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES: 2000 UPDATE*, at 2 (2003), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=968>. Statistics regarding rates of offending are more complicated, because it is possible that blacks are more likely to be arrested or go to prison even if they are not more likely to commit crimes. After decades of study, some broad themes are now clear: for more serious crimes, black overrepresentation in the criminal justice system is predominately due to disproportionate offending. Blacks simply commit homicide, rapes, robberies and aggravated assaults at higher rates than whites. (Researchers have shown this by comparing data regarding arrests with victims' reports of offenders' race.) For example, blacks are approximately seven times more likely than whites to commit homicides. *Id.* On the other hand, for less serious offenses, discretion by the various actors in the criminal justice

citizen faces a dilemma in the criminal context that is not present in other issue areas. For the black community at large, a longer criminal sentence for burglary has both costs (higher incarceration rates) and benefits (the burglar will not break into *your* house as long as he is locked up). And because of the extreme concentration of uneducated blacks in the prison system, this dilemma often has a class component for the black middle-class citizen, because his or her own child is less likely to end up on the wrong side of a prison wall.

The tremendous growth of the crime control industry highlights another tension within the black community. Increasing numbers of African Americans have an economic stake in prisons, a point that has been largely overlooked. Many have shown the various ways the prison industry disadvantages blacks while benefiting rural, mostly white communities (which gain political power due to districting rules and economic power through jobs).³⁸

But more attention should also be paid to black beneficiaries of a larger prison system. Consider the prison workforce. Geoff Ward reports that in 2002, blacks constituted 28% of the nation's corrections officers (up from 24% in 1983).³⁹ Black women are especially well represented. While African American men constitute 20% of male corrections officers, African American women make up 40% of the nation's female corrections officers.⁴⁰ In jurisdictions with substantial black populations, of course, the representation is much greater. In New York City, for example, there are more black female prison guards than white male ones.⁴¹ We often hear about the large numbers of black *prisoners* coming from cities such as Washington, D.C., New York, Detroit, Oakland, and Atlanta. Less discussed is the fact that the prison industry provides substantial black *employment* in those cities as well.

system plays a greater role in explaining blacks' disproportionate rates of imprisonment. Drug offenses are the extreme example of this phenomenon. Blacks and whites use and sell drugs at roughly equivalent rates, but blacks are much more likely to go to prison and jail for both possession and sale. The final trend worth noting concerns violent offenses, because more recent data suggests that although blacks are still more likely to commit violent crimes than are whites, the degree of black overrepresentation is declining. For example, in the early 1980s, forty-nine percent of rape arrestees were black, but in 2002-2006, thirty-three percent were black. Robbery and aggravated assault saw declines almost as steep, and homicides also saw a decline, although less steep. The data in this paragraph is drawn principally from Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 14-31 (2008).

³⁸ For a discussion of the effects of redistricting on race and prisons, see Nathaniel Persily, *The Law of the Census: How to Count, What to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755 (2011).

³⁹ Geoff Ward, *Punishing for a Living: More on the Cementing of Prisons*, SOC. JUST., Spring-Summer 2004, at 35, 37.

⁴⁰ *Id.*

⁴¹ *Id.*

Corrections officers belong to unions, which sometimes play an important role in sustaining punitive crime and prison policies. At the federal level, for example, the Association of State Correctional Administrators seeks to water down the safety recommendations of the bipartisan National Prison Rape Elimination Commission.⁴² In New York, unions are fighting attempts to close some of the state's most notoriously abusive and dysfunctional juvenile facilities.⁴³ At the Tryon Residential Center in upstate New York, for example, 155 public employees remain on the payroll to guard six boys.⁴⁴ Why such inefficiency? Because, in an effort to protect its employees in the face of declining crime rates and shrinking prison rolls, the corrections union won the right to a year's notice before the state could close a facility.⁴⁵ During this year officials can remove juveniles, but they cannot touch those who guard them. In California, the union helped enact the state's "three strikes" legislation and defeat a pilot program for alternative sentencing for selected nonviolent offenders.⁴⁶ It also successfully opposed efforts to reduce prison overcrowding by releasing some prisoners.

What does any of this have to do with the black community? It turns out that majority-black unions have sometimes fought for harsher criminal penalties and against more rehabilitative facilities. And they have done so despite the fact that those who fill the prison beds are also predominately African American. Consider the case of Washington, D.C., a city in which the police, corrections officers and prisoners are all majority-black. The D.C. police union has supported tough law-and-order measures.⁴⁷ The city's corrections union has similarly opposed prison transparency and oversight measures, alleging excessive bureaucratic interference into prison conditions and a general over-

⁴² David Kaiser & Lovisa Stannow, *The Way to Stop Prison Rape*, N.Y. REV. BOOKS, Mar. 25, 2010, at 37, available at <http://www.nybooks.com/articles/archives/2010/mar/25/the-way-to-stop-prison-rape>.

⁴³ See, e.g., Editorial, *Two Words: Wasteful and Ineffective*, N.Y. TIMES, Oct. 11, 2010, at A22; Elizabeth Dwoskin, *Northern Disclosure: Shutting Upstate Jails for City Kids Has Made a Fiery Bronx Bureaucrat a Host of Enemies*, VILLAGE VOICE, Aug. 4-10, 2010, at 14, available at <http://www.villagevoice.com/2010-08-04/news/gladys-carrion-upstate-jails-for-city-kids-bronx>.

The New York Corrections union has also fought Governor David Patterson's proposal to close four minimum-security state prisons for adults. SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, *ECONOMIC IMPACTS OF PRISON GROWTH* 14 (2010).

⁴⁴ Jim Dwyer, *155 Workers, 6 Young Men, 1 Fiscal Mess*, N.Y. TIMES, June 9, 2010, at A17.

⁴⁵ *Id.*

⁴⁶ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 530-31 n.367 (2005).

⁴⁷ COUNCIL OF D.C., COMM. ON PUB. SAFETY & THE JUDICIARY, REP. ON BILL 18-151, "OMNIBUS PUBLIC SAFETY AND JUSTICE AMENDMENT ACT OF 2009," at 37 (2009). In testimony before the committee, D.C. police union chief Kristopher Baumann argued in favor of lengthening mandatory minimums. *Id.*

protectiveness of prisoners' rights.⁴⁸ In statements to the media, union leaders have also adopted tough-on-crime positions, fiercely criticizing prison reform efforts,⁴⁹ defending corrections officers accused of misconduct,⁵⁰ and arguing for greater use of force against misbehaving juvenile offenders.⁵¹ The stance of the D.C. unions raises an overlooked question—namely, what does it mean that an increasing number of African Americans depend on a system that harms other members of the same racial group?

In pointing out these fissures within the black community, I do not mean to suggest that the linked fate phenomenon is irrelevant. Family and other community networks do link blacks across classes—even privileged blacks often have a relative or friend who has spent time in prison. In addition, behaviors that appear punitive do not necessarily stem from animus; to the contrary, a sense of linked fate may actually drive some people towards harshness. A friend with children in the D.C. schools recounts a story of a black administrator disciplining black children for behavior that he routinely allowed white kids to get away with. While my friend did not condone the administrator's approach, she was sympathetic to his motives. In her view, the administrator was trying to teach black children that a racist world will not permit such behavior from them.

Along the same lines—if more extreme—is the case of the D.C. teachers who arranged for a tour of the D.C. jail for their misbehaving

⁴⁸ COUNCIL OF D.C., COMM. ON PUB. SAFETY & THE JUDICIARY, REP. ON BILL 18-404, "CORRECTIONS INFORMATION COUNCIL AMENDMENT ACT OF 2010," at 4 (2010). The union opposed a bill intended to enhance oversight of living conditions for the large number of District prisoners held in federal facilities outside of the D.C. area. In committee testimony, corrections union vice-chairman John Rosser criticized the measure as "another layer of supervision and inspection," and complained that the city executive "pays an inordinate amount of time protecting the rights . . . of the incarcerated." *Id.* at attach. 2.

⁴⁹ Nikita Stewart, *Juvenile Justice Chief in D.C. is Leaving Post; Schiraldi Will Lead New York City's Probation Department*, WASH. POST, Dec. 1, 2009, at B04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113003966.html>. D.C. police union chief Kristopher Baumann condemned a prominent D.C. prison reformer's purported "belief that juvenile offenders . . . needed to be coddled," adding that following the reformer's departure for New York, "D.C. is now safer, and New York is a little less safe." *Id.*

⁵⁰ See David Nakamura, *Union Criticizes 3 Firings After Inmate Mix-Up: Woman was Housed with Men*, WASH. POST, Aug. 21, 2007, at B04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/20/AR2007082001553.html>

(reporting that union official defending corrections officers fired for mistakenly housing female prisoner in male unit); Brendan Smith, *Failure to Report*, WASH. CITY PAPER, Apr. 11-17, 2008, at 29, available at <http://www.washingtoncitypaper.com/articles/34890/failure-to-report> (quoting union official dismissing criticism of corrections officers' handling of prison suicides, which he describes as "part of the [corrections] territory, the fleas that come with the dog").

⁵¹ Harry Jaffe, *Another Bad Ending at New Beginnings Reform School*, WASH. EXAMINER, June 22, 2010, at 7, available at <http://www.washingtonexaminer.com/local/Another-bad-ending-at-New-Beginnings-reform-school-96839074.html>. Following a staff/student altercation at a newly opened D.C. reform school, corrections union chair Tasha Williams expressed her opinion that physically coercive techniques "correct" students' behavior. *Id.*

students.⁵² The students had received in-school suspensions for misconduct and school officials wanted to show the students what might happen if they were arrested. At the jail, some of the students were forced to strip, bend over, and open their mouths as guards examined them. The students, teachers, and jail officers were all black. When news of the unauthorized tours leaked, some of the teachers expressed surprise at the media reaction, explaining that they were acting out of concern for the students.⁵³

In summary, while not all punitive actions result from animus, it would also be an overstatement to suggest that all such behavior reflects racial solidarity. Intra-racial tensions in the criminal context place immense pressure on perceptions of linked fate—pressures that do not exist in other areas such as affirmative action.

III. BLACK ELITES AND AGENDA SETTING

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander criticizes civil rights leaders, and racial justice advocates more generally, for failing to confront the issue of mass incarceration.⁵⁴ I find her criticism compelling, and build on it briefly here. In addition to the reasons Alexander advances to explain the failure of civil rights leaders to take on mass incarceration (at the top of her list is the historic reluctance of privileged blacks to associate themselves with criminals), I would add one more: For the reasons I have articulated, prison is an unfamiliar experience for privileged blacks.

⁵² Justin Blub & Yolanda Woodlee, *D.C. Schools Find More Strip-Search Victims; Seventh and Eighth Graders Tell of Humiliation, Threats on Jail Tour*, WASH. POST, May 25, 2001, at A1.

⁵³ As the in-school suspension coordinator explained, “I just wanted to keep them out of trouble—let them know this is where you’re going to wind up if you don’t behave.” Courtland Milloy, *Scare Tactics Miss True Causes of Kids’ Problems*, WASH. POST, May 27, 2001, at C1. She continued, “I wanted some of the kids to experience the jail—you know, the clink-clink, the bars.” *Id.*

⁵⁴ ALEXANDER, *supra* note 5, at 9 (“[D]espite the unprecedented levels of incarceration in the African American community, the civil rights community is oddly quiet.”).

Personal experience profoundly influences attitudes.⁵⁵ Consider what this might mean for criminal justice advocacy. Much more attention has been devoted to policing than to prisons, which remain largely hidden from view. Why might this be the case? In part, it is because while privileged blacks routinely fall victim to discriminatory policing, they rarely go to prison.⁵⁶ It is worth remembering how Barack Obama has said next to nothing about the almost one million blacks in jail and prison, yet lost his cool when asked about the mistreatment of a Harvard professor by the local police.

Glenn Loury provided the most trenchant critique of Obama's reaction to Henry Louis Gates' arrest:

It is depressing in the extreme that the president, when it came time for him to expend political capital on the issue of race and the police, did so on behalf of his "friend" rather than stressing policy reforms that might keep the poorly educated, infrequently employed, troubled but still human black men in America out of prison. This is to say that, if Mr. Obama were going to lose some working-class white votes to the charge of "elitism," I'd much rather it have been on countering the proliferation of "three strikes" laws, or ratcheting down the federal penalties for low-level drug trafficking, or

⁵⁵ There is substantial literature on how personal experience influences attitudes and behavior. For example, a personal relationship with a victim of a given misfortune increases charitable giving toward victims who suffer from the same misfortune, and the closer the relationship with the victim, the greater the sympathy generated. Deborah A. Small & Uri Simonsohn, *Friends of Victims: Personal Experience and Prosocial Behavior*, 35 J. CONSUMER RES. 532 (2008). In addition, victims of child abuse are more likely than non-victims to indicate that they would intervene if they saw a child being abused. Cathryn A. Christy & Harrison Voigt, *Bystander Responses to Public Episodes of Child Abuse*, 24 J. APPLIED SOC. PSYCHOL. 824 (1994). Similarly, rape victims who watched a video about a rape victim reported greater levels of empathy than did non-victims. Mark A. Barnett et al., *Similarity and Empathy: The Experience of Rape*, 126 J. SOC. PSYCHOL. 47 (1986). Intergroup Contact Theory—which asserts that interracial experiences reduce prejudice and that separation promotes it—is based on the same intuition. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (3d ed. 1979) (proposing theory); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006) (finding that, in almost all reported studies, personal contact with an out-group member increases positive feelings towards the group).

The parenting research is especially interesting. One study finds that male legislators with daughters vote more liberally on women's issues than do those with sons. Ebonya Washington, *Female Socialization: How Daughters Affect Their Legislator Fathers' Voting on Women's Issues*, 98 AM. ECON. REV. 311 (2008); see also Andrew J. Oswald & Nattavudh Powdthavee, *Daughters and Left-Wing Voting*, 92 REV. ECON. & STAT. 213 (2010) (noting that parents who raise daughters are more likely to vote for left-wing political parties); Rebecca L. Warner & Brent S. Steel, *Child Rearing as a Mechanism for Social Change: The Relationship of Child Gender to Parents' Commitment to Gender Equity*, 13 GENDER & SOC'Y 503 (1999) (noting that parents who raise only daughters are more likely to support policies that increase gender equity than those who raise only sons).

⁵⁶ My discussion here draws in part on James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1005 (2010) (reviewing PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009)).

inveighing against the racial disproportion in the administration of the death penalty.⁵⁷

While I share Loury's frustration with the President's silence on mass incarceration and its disproportionate racial impact, I believe Obama's reaction to Gates' arrest was—for the reasons I outline here—visceral and reflexive. Like other privileged blacks, Obama “gets” racial profiling; he could imagine himself in Gates' shoes more easily than he could imagine himself behind prison walls.

Being precise about the ways in which elite blacks experience discrimination in the criminal justice system raises particular considerations for legal academics of color. Many legal academics have used storytelling as a way to examine discrimination. I admire their work and have sometimes relied on personal narrative myself.⁵⁸

At the same time, I fear that relying on personal narrative may unwittingly restrict our view of the criminal justice system's flaws. As I have suggested, the personal experience of black elites in the criminal justice system is limited; the discrimination elites experience is almost exclusively at the hands of the police. To be clear, that discrimination is profoundly painful and largely ignored by the law. Moreover, it is not understood by those who have not lived it. This leads to an intense desire to tell these stories in the interest of challenging legal doctrine and changing police policy.

For these reasons, telling and hearing these stories is important. Racial profiling imposes severe harms on all its victims, including elites. It undermines a person's faith in her nation, reinforces the notion that the color line is inescapable, and requires parents of color to talk to their children about topics that most would rather avoid.⁵⁹ And the personal accounts by black elites have surely played a significant role in making the anti-profiling movement one of the few racial justice issues

⁵⁷ Glenn C. Loury, *Obama, Gates and the American Black Man*, N.Y. TIMES, July 26, 2009, at WK11.

⁵⁸ James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 526 (1991).

⁵⁹ It can also produce residential segregation, as I. Bennett Capers movingly describes:

A minority individual who is considering where to live may balance the benefits of a predominantly white neighborhood, such as better schools, less crime, better services, and greater access to social capital, against the costs associated with the risks of suspicion cast on him by the police. Will he be ordered to freeze and raise his hands as he attempts to enter his own house? Will officers, with either the best or worst intentions, casually stop him just to ask a few questions? Will they frisk him? Will any of this happen as his neighbors are watching from their windows? Or will it just be obvious that police cars slow down when they pass him on the street? Can he go for a run in the morning without drawing suspicion? What kind of police interaction can he expect his children to have, especially his son, who is or will one day be a black teenager? What will it mean to live in a neighborhood where the message that state actors convey, again and again, is one of not belonging here?

I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 71-72 (2009).

to gain widespread support from leaders of both political parties and a broad swath of the American public.⁶⁰

So what's to worry about? One concern is that narrative accounts by elites reinforce our obsession with innocence.⁶¹ Legal academics with profiling stories are innocent of any wrongdoing, and their accounts readily inspire sympathy and indignation. But profiling hurts guilty people as well. This is most obvious in the context of drug arrests, which have driven much of the prison growth over the past two decades. Instead of Henry Louis Gates, consider Alexander Leviner. Leviner, an African American man, was being sentenced for a gun crime. He faced significant sentencing enhancements because of prior offenses for traffic violations and marijuana possession. The district judge, citing evidence that "African American motorists are stopped and prosecuted for traffic stops, more than any other citizens," declined to take into consideration the prior traffic offenses when calculating Leviner's criminal history.⁶² Men and women like Alexander Leviner arrive for sentencing every day in American courtrooms. For drug crimes especially, where police concentrate their resources determines who goes to prison as much as who chooses to break the law. Yet the judge's choice to factor this into the sentencing decision was rare, and has been followed by few courts. And accounts like Alexander Leviner's, while common, receive little attention and do not enter the nation's collective conscience.

Worse yet, the Alexander Leviners are just a small portion of what is missed when we focus on the narrative accounts of innocent elites subjected to discriminatory policing. The legal academy generally pays almost no attention to what happens to individuals after sentencing, a bias that is reflected in the heavy tilt of law school course offerings towards the front end of the criminal justice system (especially policing) and away from the back end (especially prisons).⁶³ Black elite narratives reinforce this bias, and do so with an especially unfortunate twist. African American law professors tell their stories with an agenda—we want our colleagues of other races, our students, and (in our most hopeful moments) the broader world to understand what discrimination, hierarchy, and injustice look like. We attempt to

⁶⁰ For a thoughtful discussion of the development of the political movement against racial profiling, see Samuel R. Gross, *The Rhetoric of Racial Profiling*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES* 35, 57 (Richard L. Wiener et al. eds., 2007).

⁶¹ This point has been made well both by Richard Banks, *Beyond Profiling: Race, Policing and the Drug War*, 56 *STAN. L. REV.* 571 (2003), and Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 1030-43 (2002).

⁶² *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998).

⁶³ According to lists of course offerings available at the time of this Article's publication, most of the "top twenty" law schools do not offer a course or seminar on prison law.

provide a view, in Matsuda's words, "from the bottom." But I worry that the participants in this worthy endeavor sometimes fail to recognize the ways in which class privilege intersects with (and mitigates) racial subordination. We may not know what the bottom looks like, even as we suggest we are reporting from it.⁶⁴

For these reasons, I believe that privileged blacks must remain persistently self-reflective about the limits of our experience. This involves recognizing that while black skin may give an individual some opportunity to experience how the police treat disfavored groups, even that is sometimes mediated by class status.⁶⁵ More fundamentally, even on those occasions when class status does not save us from racist policing, it does protect us from the ravages of the rest of our punitive criminal justice system. (Gates, for example, was able to call his secretary as he was being arrested and tell her to "call Tree," referring to Charles Ogletree, one of the country's preeminent criminal defense attorneys and Gates' colleague on the Harvard faculty.⁶⁶) Against this backdrop, humility is in order, not unlike the sort black feminists once requested of their white female and black male allies.⁶⁷ Privileged

⁶⁴ Cf. Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 196 (2009) (seeking "to force the black middle class to confront the paradox of privilege in a racialized world").

⁶⁵ See, e.g., Ronald Weitzer, Steven A. Tuch & Wesley G. Skogan, *Police-Community Relations in a Majority-Black City*, 45 J. RES. CRIME & DELINQ. 398, 419 (2008) ("In Washington, DC, the lower one's social class position, the greater the perception that police wrongdoing is a problem in one's neighborhood—and this applies to Blacks and Whites alike."); Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819 (1999) (documenting differences between policing practices in black middle class and black lower-class neighborhoods in Washington, D.C.).

⁶⁶ Krissah Thompson, *Scholar Says Arrest Will Lead Him to Explore Race in Criminal Justice*, WASH. POST, July 22, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR2009072101771.html?sid=ST2009072301777>.

Gates, of course, is the extreme case, and is hardly representative of even the elite. But the anecdote highlights the issue of access to quality counsel, and a good lawyer is perhaps the most important protection money can buy. Middle and upper class African Americans who enter the criminal system are not forced to rely on low-quality court-appointed counsel. See, e.g., AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009) (documenting low quality of indigent defense representation and proposing reforms); NAT'L RIGHT TO COUNSEL COMM., *THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> (same).

⁶⁷ See generally ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hell, Patricia Bell Scott & Barbara Smith eds., 1982); BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 119-58 (1981); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 98 (Cherríe Moraga & Gloria Anzaldúa eds., 1983).

blacks must recognize the limits of our experience if we are to acknowledge the existence of stories that are not our own, and use our clout to make sure those stories are told.