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**Disparities in Justice:
The ‘Southern Strategy,’ 100-to-1 Sentencing,
and Persistent Political Immobility**

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Abstract

It has been well-documented that America holds a unique position amongst Western countries when it comes to its criminal justice system. Over the past half a century, the United States of America's penal population has skyrocketed in comparison with its Western peers from a statistically similar position to one of unprecedented magnitude. Even more unique than the sheer volume of Americans behind bars is the racial and socio-economic profile of those inmates: the majority of individuals under supervision by the criminal justice system (i.e. in jail or prison or on probation or parole) are young, poor black men. The question asked by this capstone, which takes the form of an extensive literature review, is if the racial (and socioeconomic) disparities in America's criminal justice system can be explained through an examination of American legal policies and practices. Furthermore, through this examination of policies and practices, can the question of whether race or class is the primary indicator of incarceration be answered? Every author this study examines agreed that the excesses and disparities within the American criminal justice system could be explained through an examination of some combination of American legal policies and practices as well as the sensibilities, fears, and sentiments of the American public (and, by extent, the pressures which these placed on legislators). Although, of course, the conclusions drawn by the many authors cited are by no means unanimous, most do point to some form of a racial sub-text behind the harsh policies and practices implemented by the federal and many state governments and jurisdictions. Concurring with these many authors, this study concludes that the only way America can turn the tide on the racial inequalities within its criminal justice system is through harsh self-reflection, uncompromising political resolve, and a willingness to undue, perhaps even retroactively, some of the worst damage done.

They target black men and poor black men. And they're taking all of these black men out of the community when we need them. I mean, they do some bad things, but the attention is biased and unbalanced in that the source of these drugs, the bigger people who are bringing the drugs into the neighborhood, aren't being prosecuted. Like I have cousins who are now in jail for forty years because of crack, whereas cocaine would never get you that much time. They target poor black men and the street-level sellers, and there is no equal time spent looking for and prosecuting the higher-ups. ~ Terri Jones¹

Introduction

For years, America's criminal justice system was simply a backdrop to American society. Not only did the percentages of Americans in prison remain relatively stable between 1925 and 1975, but criminal justice and penal policies were not a highly politicized topic amongst the American public or lawmakers. Of course, theories and ideologies and policy options were debated both by scholars and policy makers, but legislators were regularly able to come together and reach some form of consensus on policy options. Dissimilar to modern debates over abortion and gun control which tend to be seen as black-and-white, zero-sum arguments, punitive policy debates tended to remain out of the fray of highly polarized political debates.

This all changed, however, when crime control initiatives began to be viewed as important political tools for reaching specific aims. As politicians began to exploit the formally politically neutral topic of criminal justice policies, the entire American punitive landscape shifted: "By 2000...the U.S. incarceration rate was unparalleled in the economically developed democracies and unprecedented in U.S. history."² The overall U.S. prison population as well as the percentage of Americans behind bars rose exponentially from the mid-1970s to the present day.³ Furthermore, the U.S. incarceration rate has grown from a little over twice the size of most

¹ Pattillo-McCoy, Mary. *Black Picket Fences: Privilege and Peril Among the Black Middle Class*. Chicago: The University of Chicago Press, 2000. 194-195. Print.

² Western, Bruce. *Punishment and Inequality in America*. New York: Russell Sage, 2006. 12. Print.

³ Ibid 13.

comparable Western countries to nearly seven times the size of its closest Western competitor.⁴ One author notes, “to find close competitors to the American penal system we must look beyond the longstanding democracies of western Europe, to Russia...and South Africa.”⁵

Authors across the board agree that U.S. crime rates are not to blame for the enormous increase in America’s penal system. America is not vastly different in crime trends from other Western countries nor is any one American state very dissimilar from other states. Despite this, the criminal justice policies enacted in each country and state have varied drastically.⁶ It would seem that crime rates are influenced by some larger social phenomena other than individual crime control policies.

Another significant factor regarding America’s vast imprisonment system is the nature of those whom America imprisons: “Empirical evidence for large-scale incarceration justifies the term mass imprisonment—an incarceration so vast as to draw entire demographic groups into the web of the penal system.”⁷ The demographic group clearly targeted by America’s system of mass imprisonment is poor, undereducated African American males. Following are compelling statistics regarding the impact of America’s criminal justice system on this population:

The U.S. Department of Justice predicts that one in three black baby boys born in 2001 will spend part of his life as an inmate in a state or federal prison. At any time in the first decade of the twenty-first century one-third of young black men in their twenties were in jail or prison or on probation or parole. Imprisonment

⁴ Western 14.

⁵ Ibid 15.

⁶ Tonry, Michael. *Thinking about Crime: Sense and Sensibility in American Penal Culture*. New York: Oxford University Press, 2004. vii. Print.

⁷ Ibid 12.

rates for black men have for a quarter century been five to seven times higher than those for white men.⁸

Young, undereducated black men face the disproportionately high possibilities of facing the extraordinarily negative consequences of America's system of mass imprisonment.

The preceding statements are presumed accurate for the remainder of this paper. The point of this capstone is not to examine whether or not the criminal justice system has a disproportionately negative effect on the aforementioned class of individuals, but instead to question what the existing literature states regarding why this is true and how it came to be. A criminal justice system as vast and complex as the United States of America's did not come to be overnight nor was it created at the hands of one or even a handful of individual policy makers. Instead, America's system of mass imprisonment, and its accompanying negative effects on the entire black population, is deeply rooted in American history and was shaped over many years by both politicians, scholars, and the public.

⁸ Tonry, Michael. *Punishing Race: A Continuing American Dilemma*. New York: Oxford University Press, 2011. ix. Print.

Literature Review

This capstone was inspired significantly through a reading of Michelle Alexander's groundbreaking book, *The New Jim Crow*, whose central claim is that the racial disparities and downfalls in America's criminal justice system were originated as part of a calculating and devious plan by anti-civil rights white politicians and scholars following the downfall of the so-called "Jim Crow" laws. The current system of mass imprisonment, argues Alexander, exists to maintain the political and socioeconomic inferiority of blacks in American society. Put more bluntly, the criminal justice system serves as the enforcement arm of a new era of America's age-old racial caste system. And as the title of Michelle Alexander's book indicates, there is nothing subtle about the presentation of her argument and the harsh implications therein.

Alexander contends that each era of American history has contained some form of caste system perpetuated by the upper-class whites in order to keep blacks in a permanent sub-class in society. It began with the African slave trade which lasted up until the Civil War., then it took the form of Jim Crow laws which ended around the time of the Civil Rights Movement, and finally the death of the Jim Crow laws, alleges Alexander, influenced racist white politicians to construe a new, *prima facie* racially neutral system to maintain the position of blacks as a racial subclass:

Conservative whites began, once again, to search for a new racial order that would conform to the needs and constraints of the time. This process took place with the understanding that whatever the new order would be, it would have to be formally race-neutral—it could not involve explicit or clearly intentional racial discrimination....A new race-neutral language was developed for appealing to old racist sentiments, a language

accompanied by a political movement that succeeded in putting the vast majority of blacks back in their place.⁹

The mechanism created by these conservative politicians was the “law and order” political movement.¹⁰ Seeds for law and order as a racial caste system were planted in the 1950s and 1960s when anti-civil rights politicians labeled Dr. Martin Luther King’s acts of civil disobedience “a leading cause of crime.”¹¹ This fictitious association between civil disobedience and violence can be demonstrated through the words of then-Vic President Richard Nixon who declared that “the increasing crime rate ‘can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them.’”¹²

Following the death of Jim Crow laws, blacks left the South and moved into northern urban areas such as Harlem and Rochester at the same time as crime rates soared in these cities. In their own defense, blacks pointed to evidence of police brutality, but politicians such as former KKK member, West Virginian Senator Robert Byrd capriciously and dismissively declared, “‘If [blacks] conduct themselves in an orderly way, they will not have to worry about police brutality.’”¹³ As is evidenced through this statement by the late-Senator, the link between the law and order movement and a racist desire to keep blacks in a state of subjugation was obvious early on. Another clear example of this explicit linkage, according to Alexander, was when the conservatives blamed the Supreme Court for desegregating schools and public places at

⁹ Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press, 2010. 40. Print.

¹⁰ Alexander 40.

¹¹ Ibid 41.

¹² Ibid 41.

¹³ Ibid 41-42.

the same time as giving “favors” to criminals (i.e. granting defendant’s rights), while prominent segregationists tried to curb these rights.¹⁴

The “law and order” political movement became a mechanism for creating new party coalitions along racial lines. Following the Civil War, America’s major party coalitions were formed along strictly geographic lines: the South was exclusively Democratic and the North was exclusively Republican. However, with the inauguration of Franklin Delano Roosevelt and the economic upheaval caused by the Great Depression, these geographic party coalitions dissolved. In their place was formed an extremely strong Democratic coalition surrounding FDR’s New Deal legislation. Both inner-city blacks and Southern whites banded behind the Democrats as the New Deal gave these predominantly poor populations economic incentives. Therefore, for around thirty years American electoral politics were controlled by socioeconomic coalitions, not racial or geographic alliances.¹⁵

This all changed when the Republicans devised their “Southern Strategy”:

The success of law and order rhetoric among working-class whites and the intense resentment of racial reforms, particularly in the South, led conservative Republican analysts to believe that a “new majority” could be created by the Republican Party, one that included the traditional Republican base, the white South, and half the Catholic blue-collar vote of the big cities. Some conservative political strategists admitted that appealing to racial fears and antagonisms were central to this strategy, though it had to be done surreptitiously.¹⁶

¹⁴ Alexander 42.

¹⁵ Ibid 43.

¹⁶ Ibid 43.

Richard Nixon took on this plan of surreptitious racial rhetoric wholeheartedly in his 1968 Presidential campaign, according to two of his key advisors.¹⁷ One of these advisors, John Ehrlichman, special counsel to the president, acknowledged, ““subliminal appeal to the anti-black voter was always present in Nixon’s statements and speeches.””¹⁸

One example of this racially-charged rhetoric used by Nixon is the term “welfare cheat.”¹⁹ This term was used to emphasize a distinction between “deserving” and “undeserving” poor individuals:

Ultimately, the racialized nature of this imagery became a crucial resource for conservatives, who succeeded in using law and order rhetoric in their effort to mobilize the resentment of white working-class voters, many of whom felt threatened by the sudden progress of African Americans....This reality made it possible for conservatives to characterize the “liberal Democratic establishment” as being out of touch with ordinary working people—thus resolving one of the central problems facing conservatives: how to persuade poor and working-class voters to join in alliance with corporate interests and the conservative elite.²⁰

Eventually, it became taboo in American politics to even use these more overt, though still technically race-neutral images.

By the time Ronald Reagan began his presidential campaign, Alexander claims that the Republican candidate decided to still appeal to these same racist sentiments while expunging every overtly racist image from his political campaign. Instead, Reagan used a strategy of

¹⁷ Alexander 43-44.

¹⁸ Ibid 44.

¹⁹ Ibid 45.

²⁰ Ibid 45.

plausible deniability to evade claims of racist subtext in his campaign rhetoric.²¹ Reagan focused on crime, welfare, taxes, and states' rights, which Alexander claims were issues clearly linked in the American public's mind to racist desires to keep blacks in a perpetual subclass. For instance, Alexander claims that the term "welfare queen" that Reagan coined and used frequently throughout his political rhetoric was a code word for a "lazy, greedy, black ghetto mother."²²

At this point, Alexander's case is severely limited by her inability to provide evidence supporting her claim of a racial subtext to Reagan's campaign. While Alexander provides her racially-charged definition of the "welfare queen," she does not provide an example of a contemporary Reagan critic who successfully discovered a hidden racial meaning behind the term. In fact, Alexander readily admits that contemporary critics of Reagan questioned his motives behind the issues he supported, and Reagan promptly denied any racial motivation behind his chosen issues. Alexander fails to provide new evidence to support the same claim that Reagan's contemporaries leveled at him, so why should Alexander's arguments be viewed any more plausibly now than they were back then?

Nonetheless, Alexander's argument regains strength and precisions when she turns to Reagan's time as president and his cornerstone "War on Drugs." Alexander contends that Reagan began his "War on Drugs" as a *de facto* war on African Americans: "the drug war from the outset had little to do with public concern about drugs and much to do with public concern about race."²³ This is evidenced by the fact that budgets for law enforcement agencies soared while drug treatment and prevention programs were drastically slashed.²⁴ One must ask, if

²¹ Alexander 47-48.

²² Ibid 48.

²³ Ibid 49.

²⁴ Ibid 49.

Reagan truly wanted to fight drugs, why not at least attempt to address the addiction aspect of the equation, even while enforcing harsh criminal sanctions?

As Reagan declared his War on Drugs, black male employment rates were abysmal due to the economic upheaval caused by globalization. So when crack cocaine hit the streets en masse a few years *after* Reagan's drug war was launched, unemployed black males had huge incentives to begin selling the new drug. This influx of crack cocaine in inner-cities caused a major spike in violence as the drug markets attempted to regain equilibrium.²⁵ Taken together, all of these factors (black male unemployment, the influx of crack cocaine and its associated violence) led inner city black males to become a readily available and vulnerable target for Reagan's War on Drugs.

Reagan used the aforementioned combination of factors as an opportunity to build mass support for his War on Drugs. The media flooded the public with images of black "crack whores," "crack babies," and "gangbangers" as well as false and misleading claims about crack cocaine.²⁶ After a media frenzy surrounding the death by crack cocaine overdose of two well-known African Americans (Len Bias and Don Rogers), the U.S. Congress passed unprecedentedly harsh legislation regarding crack cocaine, from enacting the death penalty for certain drug-related crimes to enacting the now infamous 100-1 crack cocaine legislation in which crack (a dangerous and addictive substance used primarily by African Americans) was punished one hundred times more severely than an equitable amount of cocaine (an equally dangerous and addictive substance used primarily by whites).

After Reagan declared his War on Drugs, the Supreme Court and Congress took away every meaningful constraint on its enforcement. In his dissent to the 1991 case, *California v.*

²⁵ Alexander 50.

²⁶ Ibid 51.

Acevedo, Associate Supreme Court Justice commented upon the Court's decision to back Reagan's drug war: "No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."²⁷ Time and again, the Supreme Court confirmed and expanded law enforcement's ability to search and seize without a warrant. When it comes to the War on Drugs, it would seem that the Fourth Amendment had little to no place.

Furthermore, the Court upheld the police's ability to use racial profiling in drug searches. Associate Supreme Court Justice Thurgood Marshall, the first African American member of the Court, decried this practice in his dissent to *Florida v. Bostick*, writing that "the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable."²⁸ Based upon the Supreme Court's decision in this case, David Cole makes the bold assertion that "our criminal justice system affirmatively depends on inequality. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do."²⁹ Through this method of racially-targeted "consent" searches, "the privacy of the privileged is guaranteed, but the police still get their evidence, and society does not have to pay the cost in increased crime of extending to everyone the right to privacy that the privileged enjoy."³⁰ Alexander argues that the Supreme Court's entire body of jurisprudence surrounding Fourth Amendment protections (or lack thereof) on drug searches,

²⁷ Alexander 61.

²⁸ Ibid 65.

²⁹ Cole, David. "No Equal Justice." *Connecticut Public Interest Law Journal* 1.1 (2001). Georgetown University Law Center. 24. Online.

³⁰ Ibid 26.

ending in *Ohio v. Robinette*, “made clear to all lower courts that, from now on, the Fourth Amendment should place no meaningful constraints on the police in the War on Drugs.”³¹

And thus it seems that Reagan’s strategy of plausible deniability worked to its desired effect: according to public opinion polling, racial sentiments proved to be a greater predictor of support for law and order legislation than crime rates or likelihood of victimization. According to Alexander, “the War on Drugs, cloaked in race-neutral language, offered whites opposed to racial reform a unique opportunity to express their hostility towards blacks and black progress, without being exposed to the charge of racism.”³²

Moreover the federal government poured money into state coffers to advance the War on Drugs. The federal government provided a major incentive for state and local governments agencies to focus their attention on fighting a drug war: the local agencies were allowed to keep the money seized during the drug war for their own use: “This dramatic change in policy gave state and local police an enormous stake in the War on Drugs—not in its success but in its perpetual existence.”³³ Therefore, despite the political rhetoric, state and local governments had no actual incentive or desire to stop drugs from being trafficked, sold, or purchased. Instead, they simply had incentive and desire to keep the money coming. So they seized assets and property from low-level dealers and users while, according to Alexander, purposefully avoiding taking down drug kingpins and stopping the drug market as a whole.³⁴

Alexander also brings forward the idea that plea bargaining became yet another tool for the War on Drugs. Indigent defendants are granted counsel with overworked public defenders

³¹ Alexander 67.

³² Ibid 53.

³³ Ibid 77.

³⁴ This argument by Alexander coincides well with the statement made by Terri Jones, a young, middle-class African American girl discussing her neighborhood, quoted at the beginning of this paper.

who pressure them into pleading out. Furthermore, prosecutors overcharge defendants in order to influence them to accept plea bargains.³⁵ Alexander contends:

Never before in our history, though, have such an extraordinary number of people felt compelled to plead guilty, even if they are innocent, simply because the punishment for the minor, nonviolent offense with which they have been charged is so unbelievably severe. When prosecutors offer “only” three years in prison when the penalties defendants could receive if they took their case to trial would be five, ten, or twenty years—or life imprisonment—only extremely courageous (or foolish) defendants turn the offer down.³⁶

This new system of mass-plea bargaining inevitably leads to mass-incarceration.

Next, according to Alexander, once convicted, a convict is doomed for life to the underclass known as “felons.”³⁷ Alexander explains that, “once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits.”³⁸

Furthermore, once an individual has a felony conviction on their record, they are not allowed in any public and most private housing facilities, ineligible for most aid from the state, and forced to continuously disclose their felonious records with ever new job application, which often serves as a *de facto* disbarment from application, and explicitly barred from many professional career paths. All of this kicks in the moment someone has a drug addiction or has a

³⁵ Alexander 86-87.

³⁶ Ibid 86.

³⁷ Ibid 92.

³⁸ Ibid 92.

small drug possession charge. They “find themselves locked out of the mainstream society and economy—permanently.”³⁹

According to Alexander, this War on Drugs is focused primarily on black people. The majority of drug users and dealers are white, but the vast majority (75 percent) of those incarcerated for drug offenses are people of color⁴⁰:

There is, of course, an official explanation for all of this: crime rates. This explanation has tremendous appeal—before you know the facts—for it is consistent with, and reinforces, dominant racial narratives about crime and criminality dating back to slavery. The truth, however, is that rates and patterns of drug crime do not explain the glaring racial disparities in our criminal justice system. 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.⁴¹

African Americans are targeted in drug arrests because the police want to target them. They focus on areas that African American sell and rely upon legislation that gives the harshest sentences to those trafficking and using the drugs that are nearly exclusive to African-Americans.

Furthermore, contrary to the popular (and extremely simplified) belief, violent crime is not responsible for the prison boom; in fact, violent crime rates have fluctuated while the prison population has just grown exponentially. Alexander explains, “the uncomfortable reality is that convictions for drug offenses—not violent crime—are the single most important cause of the

³⁹ Alexander 92.

⁴⁰ Ibid 96-97.

⁴¹ Ibid 97.

prison boom in the United States, and people of color are convicted of drug offenses at rates out of all proportion to their drug crimes.”⁴²

This War on Drugs, started by Nixon and perpetuated by Reagan, was passed on to Reagan’s Republican successor also. Moreover, he used racist sentiments to gain admission to the presidency. George H.W. Bush specifically appealed to voters’ desires to keep blacks in a perpetual subclass, though at times much less covertly than Reagan:

Bush’s most famous racial appeal, the Willie Horton ad, featured a dark-skinned black man, a convicted murderer who escaped while on a work furlough and then raped and murdered a white woman in her home. The ad blamed Bush’s opponent, Massachusetts governor Michael Dukakis, for the death of the white woman, because he approved the furlough program. For months, the ad played repeatedly on network news stations and was the subject of incessant political commentary. Though controversial, the ad was stunningly effective; it destroyed Dukakis’s chances of ever becoming president.⁴³

Bush Sr.’s successful presidential campaign, won on the back of a “law and order” campaign imbued with racial subtext, caused a sea-change in American politics. No longer would there be a campaign from the political left to try and moderate the Republican’s “law and order” message. Instead, in an effort to regain poor white voters in his presidential campaign, Bill Clinton joined and extremely escalated the Republican’s efforts to create a racial undercaste.⁴⁴

Alexander explains that Clinton’s years as president ensured that the new caste system fully emerged. Additionally, it had taken a new and harsh form: mass incarceration. Clinton’s presidency “resulted in the largest increases in federal and state prison inmates of any president

⁴² Alexander 99.

⁴³ Ibid 53.

⁴⁴ Ibid 55-56.

in American history.”⁴⁵ According to Alexander, in his effort to never be caught to the left of Republicans on crime policies, Bill Clinton did “more than any other president” to put blacks in a permanent racial undercaste.⁴⁶ Alexander points to Clinton’s demolition of welfare and harsh public housing policies as putting blacks out on the streets and without money, thus extremely vulnerable to be caught up in an illegal activity such as peddling drugs. Any drug conviction, under Clinton’s expanded drug policies, could lead to years behind bars.

After summing up all of the individual policies and practices that she believes were put in place to create this new caste system, many of which have been listed here, Alexander argues, “What is painfully obvious when one steps back from individual cases and specific policies is that the system of mass incarceration operates with stunning efficiency to sweep people of color off the streets, lock them in cages, and then release them into an inferior second-class status.”⁴⁷

Alexander sums up the “New Jim Crow” as established by Nixon and strengthened with each subsequent presidency until it was solidified under Clinton as follows:

Once again, in response to a major disruption in the prevailing social order—this time the civil rights gains of the 1960s—a new system of racialized social control was created by exploiting the vulnerabilities and racial sentiments of poor and working-class whites. More than 2 million people found themselves behind bars at the turn of the twenty-first century, and millions more were relegated to the margins of mainstream society, banished to a political and social space not unlike Jim Crow, where discrimination in employment, housing, and access to education was perfectly legal, and where they could be denied the right to vote....the mass

⁴⁵ Alexander 55.

⁴⁶ Ibid 56.

⁴⁷ Ibid 100.

incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate.⁴⁸

According to Michelle Alexander, this new racial caste system remains to this day, perpetuated by America's massive penal system which places an unprecedented number of American citizens behind bars each and every day.

This paper thus far contains a significant number of direct quotes from Michelle Alexander's book in large part to illustrate the inflamed rhetoric with which her work is riddled. Alexander begins the introduction to her book with the claim that she came to her overall conclusion "reluctantly."⁴⁹ And while this may be true, her conclusions are obviously now strongly held and ardently articulated. To a non-skeptical audience, this impassioned rhetoric could seem incredibly persuasive. One could easily become a passionate advocate for Alexander's cause of ridding this world of the "New Jim Crow." However, taking a step back, either in the interest of academic objectivity or due to any form of allegiance to the "law and order" political ideology, Alexander's book contains several large holes in logic.

Alexander makes numerous compelling arguments and lines of reasoning, but many of them are not fully explained. For instance, Alexander continually creates lines of association between conservative criminal justice policies and the negative effects that they have had on young, poorly educated, and indigent black men. Yet Alexander expects the reader to immediately accept her line of reasoning that the motives and effects of the legislation, policies, or practices are to negatively hurt African Americans. She makes no effort to dismiss counter-arguments that the true negative impacts of such legislation are on specific age groups, education

⁴⁸ Alexander 56-57.

⁴⁹ Ibid 2.

statuses, or socioeconomic classes. Of course, this does not immediately indicate that such counter-arguments are either correct or incorrect. They simply need to be explored.

Furthermore, Alexander does not seem to fully explain the Republican “Southern Strategy” fully enough to make the conclusion that the strategy’s intent was to manipulate racist motives. Alexander quotes specific Nixon advisors, but the “Southern Strategy” was not devised by Nixon advisors or even first attempted during his presidential campaign. Instead, Kevin Phillips devised the strategy and Barry Goldwater made the first attempt to implement it.⁵⁰

Needless to say, the holes left in Alexander’s arguments need to be explored. To begin this exploration, this paper will first turn to Bruce Western’s *Punishment and Inequality in America* which explores one of the most pivotal questions of this research area: is race or socioeconomic status the greatest precipitating factor in rates of imprisonment? Western’s work explores mass imprisonment as a method for social stratification.⁵¹

Although Western does not make a specific overall claim about whether or not the motives behind implementing modern-day mass imprisonment were racist in nature, he does provide some evidence which would indicate as such. Regarding the nature of the criminal justice policy implementation, Western comments, “Crime rates themselves may not have driven the prison boom, but long-standing fears about crime and other social anxieties may form the backdrop for the growth in imprisonment.”⁵² If anything, Western’s philosophy regarding the American penal system’s impact on race is that it was simply an inevitable consequence of a larger social conflict between socioeconomic classes.⁵³

⁵⁰ These will be discussed more later in the paper.

⁵¹ Western.

⁵² Ibid 48.

⁵³ Ibid 54.

According to this philosophy, the majority feels that the social order is threatened by the idle poor, as they may “refuse to work, reject the dominant values of hard work and achievement, and advocate revolutionary change.”⁵⁴ Therefore, those in power use the criminal justice system as a tool “to enforce conformity and maintain order among socially marginal groups.”⁵⁵ As such, the corollaries of higher imprisonment rates are also indicators of these socially marginal groups (i.e. income inequality, overall unemployment, and unemployment amongst minorities).⁵⁶ In sum, “Crime did not drive the rise in imprisonment directly, but formed the background for a new style of politics and punishment. As joblessness and low wages became enduring features of the less-skilled inner-city economy, the effects of a punitive criminal justice system concentrated on the most disadvantaged.”⁵⁷ Although Western denies a direct connection between racist motives and the current criminal justice system in America, his argument regarding those in power maintaining social order over the socially marginal could easily be applied to the construct with whites as those in power and blacks as the marginalized group.

While Western’s conclusions regarding the motives behind America’s mass imprisonment system differs greatly from Alexander’s, he does agree nearly point-by-point with Alexander’s analysis of the methods used. Specifically, Western points to the wars on crime and drugs as the chief methods used to implement the economic stratification desired by the majority: “[T]he transformation of American criminal justice, through the wars on crime and drugs, needed an agent of change and a method for implementing the new punitive policy. The main

⁵⁴ Ibid 54.

⁵⁵ Western 54.

⁵⁶ Ibid 56.

⁵⁷ Ibid 79.

agent was the Republican party.”⁵⁸ Concurring with Alexander’s analysis, Western specifically mentions the Republican’s effort to use street crime, forcefully associated with the civil rights protests, as a way to manipulate the votes of whites with “growing unease about racial violence.”⁵⁹ Conservative politicians used the “law and order” political movement to mobilize whites with racial fears centered on the changes of the 1960s such as the desegregation of schools and the Civil Rights Act.⁶⁰

Western’s argument that the impetus behind creating the mass imprisonment system was centered on socio-economic unrest as opposed to racist sentiments is strengthened by the fact that incarceration rates “increased most among those whose jobless rates were the highest.”⁶¹ However, Western does bring up the correlating factors of race and low education: “By the early 2000s, the chances of imprisonment were more closely linked to race and school failure than at any other time in the previous 20 years.”⁶²

Stepping aside from his own theory momentarily, Western makes the following hypothesis based upon Loïc Wacquant’s theory that mass imprisonment is the latest social institution implemented to keep blacks subordinate:

If mass imprisonment is a stage in the institutional evolution of American racial domination, the prison boom will likely have fallen most heavily on the most economic disadvantaged blacks. Not only would imprisonment have increased, but race and class inequality in imprisonment would have deepened. This is the

⁵⁸ Western 58.

⁵⁹ Ibid 59.

⁶⁰ Ibid 59.

⁶¹ Ibid 78.

⁶² Ibid 79.

sense in which mass imprisonment is race-making, attaching the marker of moral failure to the collective experience of an entire social group.⁶³

This very hypothesis seems to be true, according to all of the evidence submitted thus far. For this reason, Western's work is compelling but does not seem to come together as a cohesive whole. He seems to make too many arguments and counters himself at several turns. His evidence is solid, but his conclusion-drawing needs to be tightened.

However, importantly, Western emphasizes the futility of using mass incarceration as a method of ridding society of the economically disadvantaged: "If crime stems from poor economic opportunity and broken homes, and incarceration reduces pay and family stability, mass imprisonment may be a self-defeating strategy for public safety."⁶⁴ Put more simply, mass imprisonment may lead to more crime, not less. Furthermore, if the theory behind incarceration is supposedly a method of deterrence, as is the common line in American political rhetoric, having a system of mass imprisonment is also self-defeating. Western explains, "as rates of incarceration become very high, the stigma of incarceration is diluted and the power of incarceration to deter crime is weakened."⁶⁵ The negative effects of incarceration on employment and family life cyclically lead to an even greater prison boom but do little to avert or reduce crime. For this very reason, it would seem that any logical analysis of the current criminal justice system in America must conclude that there is some ulterior motive other than crime control behind the implementation of current policies.

The next author to address the subject of disparities within the American criminal justice system is Michael Tonry in his 2004 book, *Thinking about Crime: Sense and Sensibility in American Penal Culture*. Tonry's central thesis in this work is that America's current criminal

⁶³ Western 57.

⁶⁴ Ibid 168.

⁶⁵ Ibid 187.

justice system is the product of a convoluted process of policy making influenced by temporary public anxieties, political cynicism, inevitable cycles of sensibilities, and, all too often, a lack of political courage.⁶⁶ The convergence of these symptoms in American society has led, according to Tonry, to a system so vast, so harsh, and so historically and geographically unprecedented that, taking a step back, no single policy maker or authority would have knowingly chosen to create such a system. Tonry's conclusion and coinciding challenge is for America to take a collective step back and see what they have done: "Because American policy makers lost their way, hundreds of thousands of people are in prison because they were in the wrong place at the wrong historical moment."⁶⁷

Perhaps the most central (and in turn stirring) point that Tonry makes in order to prove his thesis is the following: "American imprisonment rates did not rise because crime rose. They rose because American politicians *wanted* them to rise."⁶⁸ Therefore, American drug and crime control policies must not be viewed as instrumental policies towards completing some specific purpose, but instead as policies which are expressions of the political will of the nation.

As is discussed in the introduction, scholars widely agree that crime rates in and of themselves do not lead to rising arrest or imprisonment rates. However, the crucial distinction that Tonry insists upon is the intent behind the changing penal system. Tonry is blunt and curt in his assessment of where the fault behind America's mass imprisonment system lies:

...public opinion findings showing that Americans regard crime or drugs as the nation's most pressing problem typically follow, not precede, media and political concentration on crime....it is not public opinion per se that leads to harsher policies, but politicians proposals and posturing and sensational media coverage

⁶⁶ Tonry, (2004).

⁶⁷ Ibid 10.

⁶⁸ Ibid 33, *emphasis mine*.

that lead to changes in public opinion....Responsibility for recent policies lies not with the public but with public officials who failed to provide balanced and humane leadership.⁶⁹

And while Tonry does not mince words in this assessment, unlike Michelle Alexander's passionate but all-too-often less than fully explained opinions, Tonry provides ample reasoning behind his curt criticisms.

Tonry relies heavily upon historian David Musto's description of a cyclical pattern of behavior and beliefs regarding drugs.⁷⁰ According to Musto's hypothesis, a nation will have an influx of both drug use and drug availability as the nation's populace has a widespread tolerance for drug usage. However, as this portion of the cycle begins to abate, the majority of the populace begins to eliminate their personal drug usage. When the population's drug usage comes to some form of equilibrium, the majority begins to come to the belief that their personal choice to eliminate drug usage is not just personally right but morally right. When this happens the populace is ready, willing, and eager to accept drug control policies that, at any other time, they could never fathom.⁷¹

During this time of all-too-often draconian policy-making, which Musto labels a "moral panic," the socially marginalized and racial minorities tend to be the focus of the moralistic outrage⁷²:

There is a regular interaction between declines in drug use, enactment of harsh public policies, and demonization of minority groups. The pattern has recurred in the past twenty years in the United States, with drug use peaking in 1979-80 for

⁶⁹ Tonry (2004) 37-38.

⁷⁰ Ibid 80.

⁷¹ Ibid 83.

⁷² Ibid 111.

most drugs (and 1982-84 for cocaine), the harshest anti-drug laws being passed in the late 1980s, and black inner-city residents being portrayed as the enemy in the drug wars.⁷³

After this period of “moral panic” has played out for a time, Musto observes that national policies and beliefs towards drugs tend to even out and, as a result, so do the draconian policies. This begins the waning face of the cycle of sensibilities surrounding drug use and policy. According to Musto’s premise, this waning of intensity of anti-drug policies and the emergence of more moderate or left-leaning voices in the political debate are inevitable occurrences.

Next, Tonry extends Musto’s hypothesis regarding drugs to criminal justice sensibilities. After acknowledging a similar cyclical pattern of falling crime rates, followed by an equilibrium amongst the majority creating a feeling of moral superiority, which then leads to harsh crime control policies, Tonry acknowledges that the final step to Musto’s hypothesis also extends to criminal justice policies, “Just as is happening with drugs, monolithic anti-criminal views are breaking down, and competing values are again being urged.”⁷⁴ As a result, drug rehabilitation programs and community and restorative justice programs are gaining momentum across the country.⁷⁵ However, despite this acknowledgement, Tonry still urges for mass changes across the criminal justice policy realm. This seems idiosyncratic as according to the very premise of Tonry’s argument, the harsh crime control policies and punitive practices should continue to naturally abate.

Furthermore, the policies that Tonry condemns most vehemently were often short-lived policies that have been out of common usage or even overridden for years or even decades. It seems that one of Tonry’s chief desires is the retroactive amelioration of past harsh laws. Tonry

⁷³ Tonry (2004) 109.

⁷⁴ Ibid 137.

⁷⁵ Ibid 137-138.

wants offenders who were sentenced decades ago under the harshest forms of legislation to be granted some form of *ex post facto* repair to an injustice caused by what Tonry frequently labels “being caught in the wrong place at the wrong historical moment.”

While the idea of repairing the damage of every law that has since been deemed unduly harsh may seem pleasant or even right, the American criminal justice system rarely allows for the retroactive reversal of the effects of past policies. For instance, when the Supreme Court ruled in 1966 that every arrested individual must be made explicitly aware of his or her rights, the effects of the unjust policy were only reversed in the individual case of Ernesto Miranda, but not to the universal scale of every individual arrested and subsequently convicted without being made fully aware of his or her constitutional rights as a defendant. *Ex post facto* broad scale reversals of the effects of criminal justice policies are simply unheard of, if not entirely impossible within the American political and criminal justice system.

Another area in which Tonry’s analysis falls short is his rejection of the partisan politics argument. In the early sections of his book, Tonry explicates numerous theories postulated to date to rationalize the reasons and intentions behind America’s current system of mass imprisonment. One of the arguments that Tonry rejects which he labels the “partisan politics argument” is nearly identical to Michelle Alexander’s thesis in *The New Jim Crow*. Tonry seems to agree with much of what is said in this argument, but he ultimately rejects it as invalid because he claims that it does not explain why mass imprisonment has emerged in the United States and not elsewhere.

One of the central factors that Tonry uses to judge the legitimacy of an argument is whether it offers a geographically broad explanation. The argument cannot be entirely America-centric to the exclusivity of other countries. Tonry insists upon this because America’s crime

trends broadly resemble the crime trends of comparable Western countries, and therefore one must devise an explanation for America's penal system that takes into account why America adopted such harsh criminal justice policies while comparable Western countries did not. For this reason, Tonry rejects the notion that a Republican desire to consolidate power using racist sentiments and subtexts caused mass imprisonment because the same thing never happened in other Western countries.

However, an argument could easily be made that America's history of racial suppression and caste systems (from slavery to Jim Crow) makes it a unique player in this arena and not fully comparable to its Western counterparts in understanding the reasons why policy makers made certain choices. Even if the authors that Tonry cites in explaining the "partisan politics" argument do not give an argument regarding America's geographic uniqueness, it does not automatically mean that such an argument cannot be made.

Ironically, in Michael Tonry's 2011 book, *Punishing Race*, the author makes the same general argument as Michelle Alexander, but without much of the bluster and exasperation. The tone is more academic and the explanations more complete. The premise of his book is very similar to Alexander's: Tonry argues that the current system of mass imprisonment is a symptom of the ongoing American politics of race. While Tonry focuses primarily on the impact of America's criminal justice system on African Americans, he believes that the penal policies of the U.S. are just one symptom of a much larger problem:

On every demographic measure of well-being—life expectancy, infant mortality, income, education, employment, home ownership—black people in America are

substantially worse off than whites. The reasons for that are inextricably caught up in the politics of race, and the public policies they engender.⁷⁶

Tonry argues that America's criminal justice policies for the last thirty to forty years "have disabled young black men from successful participation in American life and thereby damaged not only them but also their children, their families, and their communities."⁷⁷

Tonry believes that the reasons behind the disproportionate negative impact of the criminal justice system of black Americans are three-fold: (1) the profile of offenders who commit crime and who are sentenced share many similar qualities (e.g. disadvantaged childhoods, lack of education, drug and alcohol dependence, etc.), all of which are more likely to describe African Americans than white Americans; (2) the legislative policies enacted (e.g. War on Drugs, 100-to-1 drug sentencing disparities) and the police policies enforced (e.g. drug arrests targeted at urban areas and racial profiling) target blacks much more than whites; and (3) legislators have enacted policies such as three-strikes-and-you're-out and mandatory-minimum sentence laws that not only enable but require unprecedentedly long prison sentences specifically for crimes for which blacks are much more likely to be arrested and convicted.⁷⁸

Unlike Alexander, Tonry explicitly details the racial nature behind the very creation of the Republican "Southern Strategy," as designed by Kevin Phillips:

Phillips political rationale was that ethnic group conflict has always characterized American politics. "Southern politics," he observed, "like those of the rest of the nation, cleave along distinct ethnic (racial in this case) lines. Whereas in NYC, the Irish are lined up against the Jews, in the South it is principally a division between Negroes and whites." That is why the Republican Part "decided to break

⁷⁶ Tonry (2011) viii.

⁷⁷ Ibid ix.

⁷⁸ Ibid (2011) ix.

with its formative antecedents and make an ideological bid for the anti-civil rights South.” ...Phillip's conclusion was that manipulation of racial passions would enable Republicans to achieve political dominance in the South and strengthen their appeal to working-class whites elsewhere.”⁷⁹

Tonry writes that Phillip’s plan was based upon “an extraordinary non-sequitor: that black/white differences in the South are indistinguishable from ethnic differences at other times and places in American history.”⁸⁰ Despite this flawed premise, Republican politicians latched onto the Southern Strategy and implemented a “tough on crime” policy platform specifically designed to “impose no special burdens on their white constituency.”⁸¹ The War on Drugs zeroed in specifically on those drugs that African Americans traffic and consume, and the police were instructed to look in the places that blacks exclusively sell these drugs. On those unforeseen occasions that these tough narco-trafficking sentences began to negatively impact large portions of white Americans (e.g. marijuana in the 1970s), the policies were rapidly altered.⁸² As David Cole puts it, “The white majority can ‘afford’ the costs associated with mass incarceration because the incarcerated mass is disproportionately nonwhite.”⁸³

The second reason why blacks were disproportionately targeted in the wars on drugs and crime Tonry admits is much more complex, subtle, and difficult to accept: “...unjustifiable racial disparities...help white Americans maintain social, economic and political dominance over blacks.”⁸⁴ As evidence of this, Tonry explains:

⁷⁹ Tonry (2011) 3.

⁸⁰ Ibid 2.

⁸¹ Ibid 3-4.

⁸² Ibid 4.

⁸³ Cole 27.

⁸⁴ Tonry (2011) 4.

After the large-scale migration of millions [of black Americans] from south to north to escape Jim Crow in the early 20th century, the big-city ghettos and employment and housing discrimination kept blacks subordinate. And when deindustrialization and the flight of jobs to the suburbs left disadvantaged blacks marooned in urban ghettos, the modern wars on drugs and crime took over.⁸⁵

While Tonry does not fully explain this point, other works more focused on the subject of the nationwide treatment of African Americans seem congruent with Tonry's point. For instance, Mary Pattillo-McCoy discusses this phenomenon in depth in her book *Black Pickett Fences: Privilege and Peril Among the Black Middle Class*. She describes how, in order to discriminate against middle class blacks, white landlords must be more creative than simply quoting unaffordable prices (as they would for lower class whites). Instead, they may utilize such tactics as lying and saying that a property has just been rented when a prospective renter shows up and the landlord suddenly realizes that they are black.⁸⁶ Another discriminatory practice which law-abiding middle-class black youths must endure is the simple fact that their dress will be scrutinized much more harshly than their white peers. According to Pattillo-McCoy, "The race of the wearer affects the degree to which certain styles are criminalized."⁸⁷

Another example comes from William Julius Wilson's book addressing the struggle of the poor in American society. *When Work Disappears* briefly addresses the topic of widespread racial discrimination, specifically regarding whites' disapproval of government assistance programs targeted at helping African Americans:

Whereas eight of every ten African-Americans believe that the government is not spending enough to assist blacks today, only slightly more than one-third of white

⁸⁵ Tonry (2011) 5.

⁸⁶ Pattillo-McCoy 3.

⁸⁷ Ibid 188-119.

Americans feel this way. The idea that the federal government “has a special obligation to help improve the living standard of blacks” because they “have been discriminated against for so long” was supported by only one in five whites in 1991 and has never exceeded more than one in four since 1975.⁸⁸

To further explain his point regarding negative racial intentions towards blacks, Michael Tonry looks to Douglas Massey:

Whether whites care to admit it or not, they have a selfish interest in maintaining the categorical mechanisms that perpetuate racial stratification. As a result, when pushed by the federal government to end overt racial discriminatory practices, they are likely to innovate new and more subtle ways to maintain their privileged position in society... As discrimination moved underground, new mechanisms for exclusion were built into the criminal justice system for African Americans.⁸⁹

This is supported by the fact that those individuals more inclined to support punitive criminal justice policies, those same policies that disproportionately affect African Americans, “are especially likely to harbor anti-black resentments.”⁹⁰ Furthermore, the media plays a large role in maintaining the widespread stereotype of Africans Americans as criminals. Tonry notes, “Studies by media scholars demonstrate that the mass media—news and entertainment both—regularly portray criminals as blacks and victims as whites. Those stereotypes seep into people’s thinking....When asked to envision a drug addict or a violent criminal, most white people assume the typical offender to be black.”⁹¹

⁸⁸ Wilson, William Julius. *When Work Disappears: The World of the Urban Poor*. New York: Vintage Books, 1996. 202. Print.

⁸⁹ Massey, Douglas S. *Categorically Unequal: The American Stratification and the Making of the Underclass*. New York: Russell Sage Foundation, 2007. 54, 251. Print.

⁹⁰ Tonry (2011) 7.

⁹¹ Ibid 7.

All of this supports Tonry's conclusion that the white majority can easily support punitive policies with disproportionately harsh effects on non-whites because both "social distance and racial stereotype make white empathy for blacks who are affected weak and uncommon."⁹² Furthermore, America's political climate tends to be short on empathy due to three factors: (1) the "paranoid streak in American politics" in which political movements are seen as zero-sum games in which there can be no middle ground; (2) Evangelical Protestantism whose adherents often place criminal justice issues in strictly moralistic right versus moralistic wrong categories, making criminals morally wrong and thus undeserving of empathy or mercy; and (3) the politicization of the American criminal justice system through both the election of judges and prosecutors and the influence of short-term emotions on criminal justice legislation.⁹³

Tonry describes the implementation of the Republican Southern strategy as follows:

Rising crime rates in the 1970s and 1980s, compounded by anxieties associated with rapid social and economic changes, including the fruits of the civil rights movement, made Americans anxious and eager for simple solutions to complex problems. Politicians offered them. The Republican Southern Strategy allowed politicians to appeal to whites' racial anxieties and resentments without doing so openly. American moralism made drugs and street crime understandable problems to attack...Attacking drugs and street crime with vigor and self-righteousness appeals to white and middle-class voters in part because those priorities posed little threat to people like them.⁹⁴

And so police and legislators attacked drugs and street crime with vigor. Legislators imposed draconian sentences, and Tonry writes that "Black Americans have borne the brunt of this

⁹² Tonry (2011) 8-9.

⁹³ Ibid 9.

⁹⁴ Ibid 10-11.

tougher sentencing. Arrest rates for black people for drug crimes are far higher—three to four times higher—than for whites and bear no relationship to levels of black Americans drug use of involvement in drug trafficking."⁹⁵ The police focus on arresting blacks, despite the fact that they use drugs no more frequently than whites. They do this because blacks are the easiest targets: "Police can arrest inner-city street level drug dealers almost at will, meaning that arrests are more a measure of police activity than of criminality. Disparities in arrests for drug offenses occur because people to choose to arrest more black people."⁹⁶ Furthermore, the legislators specifically impose the harshest sentences "for drug offence for which blacks are more often arrested."⁹⁷

In sum, the Republican Southern Strategy has placed extremely tough tolls on the African American populace. Furthermore, legislators and law enforcement officers knew exactly what they were doing when they began (and continue to) enact and impose policies that disproportionately affect African Americans. There can be little doubt that, after all of this time, there is any other explanation for the continued disparities than a desire to keep African American subjugated.

Although Tonry's explanation is extremely thorough and convincing, there can be more added to improve his argument. Expanding on what has already been said about the Republican Southern Strategy, this paper briefly turns to Robert Perkinson's book *Texas Tough* in his further explanation of the basis for the widespread Republican acceptance of the strategy doctored by Kevin Phillips. Arizona Senator Barry Goldwater, though he miserably failed in his grasp for the presidency, awoke the Republican Party to the notion that Republicans, for the first in decades,

⁹⁵ Tonry (2011) 28.

⁹⁶ Ibid 40.

⁹⁷ Ibid 29.

could compete (and win) in the South.⁹⁸ Goldwater successfully won five ex-Confederate states by declaring that “law and order” would become a pressing political issue. This new focus on crime control was a strategy to gain white votes:

“We’re not going to get the Negro vote,” [Goldwater] told a southern audience, “so we ought to go hunting where the ducks are.” To Goldwater, this meant bagging frustrated, fearful white voters not by hurling racial slurs but by honing a message of states’ rights and crime control.⁹⁹

Perkinson notes that this shift in the GOP to a solid stance as the voice opposed to civil rights was a notable shift from just two years previous when voters found no perceivable difference between the two major parties on civil rights and race issues.¹⁰⁰

These two examples of early racist intentions behind criminal justice policies serve to strengthen Tonry’s (and Alexander’s) argument that the current system of mass imprisonment was implemented due to racist subtexts and in a desire to maintain the racial subjugation of African Americans.

⁹⁸ Perkinson, Robert. *Texas Tough: The Rise of America’s Prison Empire*. New York: Picador, 2010. 293. Print.

⁹⁹ Ibid 293.

¹⁰⁰ Ibid 294.

Conclusions

This paper has taken the form of a literature review which critiques the downfalls and credibility of individuals who address the subject of racial disparities in the criminal justice system. Even 150 years following the end of slavery, decades following the downfall of Jim Crow laws, and three and a half years since the election of the first African American president, African Americans are still largely stuck in a perpetual state of political, economic, and social subjugation. The motive must remain hidden, and every policy must be *prima facie* racially neutral. However, the evidence is clear: "Racial disparities in imprisonment and the enormous absolute number of black people behind bars are major impediments to the creation of an America in which race does not matter."¹⁰¹

Nothing in this paper should be seen as shocking or new; the racial disparities described are readily known by anyone who inquires. Tonry makes the following compelling statement: "What is most striking about these patterns of racial disparity is not that they exist, but that they are well-known, have long been well-known, and have changed little in recent decades."¹⁰² It brings to mind the phenomena described earlier regarding a lack of empathy for minority groups on the part of the majority.

In closing, the dangerousness of the perpetuation of such racial disparities must be acknowledged:

The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional

¹⁰¹ Tonry (2011) 26.

¹⁰² Ibid 12.

protections in theory, the Supreme Court validated the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black.”¹⁰³

America’s criminal justice system is based on the notion of “Equal Justice Under Law,” a notion so supposedly precious to the existence of the justice system that it is etched upon the magnificent marble façade of the United States Supreme Court building. Yet for the past several decades, a new era of racial subjugation has emerged under the façade of an equitable criminal justice system.

Although this paper criticizes Tonry’s 2004 book for desiring the retroactive reversal of the negative effects of unjust legislation, perhaps such a drastic measure is what is needed to reclaim the legitimacy of America’s broken justice system. This nation is riddled with political immobility and an utter lack of audacity among legislators when it comes to politically infused topics such as criminal justice. This nation needs a change, but it can never occur without some audacious proclamation of just how unjust the current system is.

¹⁰³ Cole 27.

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