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## 27. The New Jim Crow

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Conversations and debates about race—much less racial caste—are frequently dismissed as yesterday’s news, not relevant to the current era. Media pundits and more than a few politicians insist that we, as a nation, have finally moved beyond race and entered into the era of postracialism and color blindness. Not just in America but around the world, President Obama’s election has been touted as the final nail in the coffin of Jim Crow, the bookend placed on the history of racial caste in America.

This triumphant notion of postracialism is nothing more than fiction—a type of Orwellian doublespeak made no less sinister by virtue of the sincerity of those espousing it. Racial caste is not dead; it is alive and well in America. The mass incarceration of poor people of color in the United States amounts to a new caste system—one specifically tailored to the political, economic, and social challenges of our time. It is the moral equivalent of Jim Crow.

I first encountered the idea of a new racial caste system in the mid-1990s when I was rushing to catch a bus in Oakland, California, and a bright orange poster caught my eye. It screamed in large bold print, “THE DRUG WAR IS THE NEW JIM CROW.” I recall pausing for a moment and skimming the text of the flyer. A radical group was holding a community meeting about police brutality, the new three-strikes law in California, the drug war, and the expansion of America’s prison system. The meeting was being held at a small community church a few blocks away; it had seating capacity for no more than fifty people. I sighed and muttered to myself something like, “Yeah, the criminal justice system is racist in many ways, but it really doesn’t help to make such absurd comparisons. People will just think you’re crazy.” I then crossed the street and hopped on the bus. I was headed to my new job, director of the Racial Justice Project for the American Civil Liberties Union (ACLU) in northern California.

When I began my work at the ACLU, I assumed the criminal justice system had problems of racial bias, much in the same way that all major institutions in our society do. As a civil rights lawyer, I had litigated numerous class-action employment discrimination cases, and I understood well the many ways that racial stereotyping can permeate

subjective decision-making processes at all levels of an organization with devastating consequences. While at the ACLU, I shifted my focus from employment discrimination to criminal justice reform and dedicated myself to the task of working with others to identify and eliminate racial bias whenever and wherever it reared its ugly head.

By the time I left the ACLU, I had come to suspect that I was wrong about the criminal justice system. It was not just another institution infected with racial bias but rather a different beast entirely. The activists who posted the sign on the telephone pole were not crazy; nor were the smattering of lawyers and advocates around the country who were beginning to connect the dots between our current system of mass incarceration and earlier forms of social control. Belatedly, I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.

I state my basic thesis in the introduction to my book *The New Jim Crow*:

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.<sup>1</sup>

I reached this conclusion reluctantly. Like many civil rights lawyers, I was inspired to attend law school by the civil rights victories of the 1950s and 1960s. Even in the face of growing social and political opposition to remedial policies such as affirmative action, I clung to the notion that the evils of Jim Crow lie behind us and that, while we have a long way to go to fulfill the dream of an egalitarian, multiracial democracy, we have made real progress. I understood the problems plaguing poor communities of color, including crime and rising incarceration rates, to be a function of poverty and lack of access to quality education—the continuing legacy of slavery and Jim Crow. I strenuously resisted the idea that a new caste system was operating in this country; I was nearly offended by the notion. But after years of working on issues of racial profiling, police brutality, and drug law enforcement in poor communities of color and attempting to assist people released from prison to reenter a society that never seemed to have much use for them in the first place, I had a series of experiences that began an awakening to a racial reality that is so obvious to me now that what seems odd in retrospect is that I was blind to it for so long.

Here are some facts I uncovered in the course of my work and research that you probably have not heard on the evening news:

- More African American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began.
- In 2007 more black men were disenfranchised than in 1870, the year the Fifteenth Amendment was ratified prohibiting laws that explicitly deny the right to vote on the basis of race. During the Jim Crow era, African Americans continued to be denied access to the ballot through poll taxes and literacy tests. Those laws have been struck down, but today felon disenfranchisement laws accomplish what poll taxes and literacy tests ultimately could not.
- In many large urban areas in the United States, the majority of working-age African American men have criminal records; in Chicago, the figure in a recent year was nearly 80 percent.

Those bearing criminal records and cycling in and out of our prisons today are part of a growing undercaste—not class, caste—a group of people, defined largely by race, who are relegated to a permanent second-class status by law, denied the right to vote, automatically excluded from juries, and legally discriminated against in employment, housing, access to education, and public benefits, much as their grandparents and great-grandparents were during the Jim Crow era.

When I tell people that mass incarceration amounts to a New Jim Crow, I frequently meet with shocked disbelief: “How can you say that a racial caste system exists? Just look at Barack Obama! Just look at Oprah Winfrey! Just look at the black middle class!” But we ought to question our emotional reflexes. The great success of some African Americans in recent years does not mean that a caste system no longer exists. No caste system in the United States has ever governed all black people. There have always been free blacks and black success stories, even during slavery and Jim Crow. During slavery, some blacks owned slaves—not many, but some. And during Jim Crow, some black lawyers and doctors practiced their profession; not many, but some. The unprecedented nature of black achievement in formerly white domains does not mean the end of racial caste. If history is any guide, it may have simply taken a different form. Racism is highly adaptable. The rules and reasons the legal system employs to enforce status relations of any kind evolve and change. In my book, I describe the cyclical rebirths of racial caste in America. Since our nation’s founding, African Americans have been repeatedly controlled through institutions, such as slavery and Jim Crow, that appear to die but then are reborn in new form, tailored to the needs and constraints of the time.

For example, following the collapse of slavery, the system of convict leasing came about—a system many historians believe was worse than slavery. After the Civil War, police arrested black men by the thousands for minor crimes, such as loitering and vagrancy, and sent them to prison. They were then leased to plantations. It was our nation’s first prison boom. The idea was that prisoners leased to plantations were supposed to earn their freedom. But the catch was they could never earn enough to pay back the plantation owner the cost of their food, clothing, and shelter and thus were effectively re-enslaved, sometimes for the rest of their lives. It was a system more brutal in many respects than slavery, because plantation owners had no economic incentive to keep convicts healthy or even alive. They could always get another one.

The criminal justice system effectively re-creates caste in America. Consider how our prison system has quintupled for reasons that have stunningly little to do with crime. In less than thirty years, the U.S. penal population exploded from around three hundred thousand to more than two million. The United States now has the highest rate of incarceration in the world, dwarfing that of nearly every developed country, including highly repressive regimes like China and Iran.

In fact, if our nation were to return to the incarceration rates of the 1970s—a time when civil rights activists thought that imprisonment rates were egregiously high—we would have to release four out of five people who are in prison today. More than a million people employed by the criminal justice system could lose their jobs. That is how enormous and deeply entrenched the new system has become in a very short time. The overwhelming majority of the increase in imprisonment has been poor people of color, with the most astonishing rates of incarceration found among black men. Several years ago in Washington, D.C.—our nation's capital—three out of four young black men (and nearly all those in the poorest neighborhoods) could expect to serve time in prison. Rates of incarceration nearly as shocking can be found in other communities of color across America.

What accounts for this vast new system of control? Crime rates? No, they have remarkably little to do with skyrocketing incarceration rates. Crime rates have fluctuated over the past thirty years and are currently at historical lows, but incarceration rates have soared. Most criminologists and sociologists today acknowledge that crime rates and incarceration rates have, for the most part, moved independently of one another. Rates of imprisonment—especially black imprisonment—have soared regardless of whether crime has been rising or falling in any given community or the nation as a whole.

So what does explain this vast new system of control, if not crime rates? Ironically, the activists who posted the sign on that telephone pole were right: the War on Drugs. It and the get-tough movement explain the explosion in incarceration in the United States and the emergence of a vast, new racial undercaste. In fact, drug convictions alone accounted for about two-thirds of the increase in the federal system and more than half the increase in the state prison population between 1985 and 2000. Drug convictions have increased more than 1,000 percent since the drug war began, an increase that bears no relationship to patterns of drug use or sales.

The drug war has been waged almost exclusively in poor communities of color, even though studies consistently find that people of all races use and sell drugs at remarkably similar rates. This evidence defies our basic stereotype of a drug dealer as a black kid standing on a street corner with his pants hanging down. Drug dealing happens in the ghetto, to be sure, and everywhere else in America as well. Illegal drug markets, it turns out—like American society generally—are relatively segregated by race. Blacks tend to sell to blacks, whites to whites, Latinos sell to each other. University students sell to each other. People of all races use and sell drugs. A kid in rural Kansas does not drive to the 'hood to get his pot or meth or cocaine; he buys it from somebody down the road. In fact, the research suggests that where significant differences by race can be found, white youth are more likely to commit drug crimes than youth of color.

But that is not what you would guess when entering our nation's prisons and jails, overflowing as they are with black and brown drug offenders. In the United States, those who do time for drug crime are overwhelmingly black and brown. In some states, African Americans constitute 80 to 90 percent of all drug offenders sent to prison.

Violent crime is not responsible for the prison boom. Violent offenders tend to get longer sentences than nonviolent offenders, which is why the former compose such a large share of the prison population. One study suggests that the entire increase in imprisonment can be explained by sentence length, not increases in crime. To get a sense of how large a contribution the drug war has made to mass incarceration, consider that more people languish in prison today just for drug offenses than were incarcerated in 1980 for all reasons. The reality is that the overwhelming majority of people who are swept into this system are nonviolent offenders.

Note that most people who are under correctional control are not in prison or jail. As of 2008, approximately 2.3 million people were in prisons and jails, and a staggering 5.1 million people were under “community correctional supervision”—that is, on probation or parole. Millions more have felony records and spend their lives cycling in and out of prison, unable to find work or shelter, unable to vote or serve on juries. This system depends on the prison label, not prison time. It does not matter whether you have actually spent time in prison; your second-class citizenship begins the moment you are branded a felon. It is this badge of inferiority—the criminal record—that ushers you into a parallel social universe in which discrimination is perfectly legal.

How did this system of control come to pass? Most people believe that the War on Drugs arose in response to rising drug crime and the emergence of crack cocaine in inner city communities. But drug crime was actually declining, not rising, when President Ronald Reagan officially declared the drug war in 1982. From the outset, the war had little to do with drug crime and much to do with racial politics.

The drug war was part of a highly successful Republican Party strategy—often known as the Southern Strategy—of using racially coded political appeals on issues of crime and welfare to attract poor and working-class white voters who were resentful of, and threatened by, desegregation, busing, and affirmative action. Poor and working-class whites had their world rocked by the civil rights movement. White elites could send their kids to private schools and give them the advantages of wealth. But poor and working-class whites were faced with a social demotion. It was their kids who might be bused across town and forced to compete for the first time with a new group of people they had long believed to be inferior for decent jobs and educational opportunities. Affirmative action, busing, and desegregation created feelings of vulnerability, fear, and anxiety among a group already struggling for survival.

Republican party strategists found that promises to “get tough” on “them”—the racially defined others—could induce many poor and working-class whites to defect from the Democratic New Deal Coalition and join the Republican Party. As H. R. Haldeman, President Richard Nixon’s chief of staff, put it, “[T]he whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”<sup>2</sup>

A couple years after the drug war was announced, crack cocaine hit the streets of inner-city communities. The Reagan administration seized on this development, publicizing inner-city crack babies, crack mothers, the so-called crack whores, and drug-related violence. The goal was to make inner-city crack abuse and violence a media sensation that would bolster public support for the drug war and would lead Congress to devote millions of dollars in additional funding to it.

The plan worked. For more than a decade, black drug dealers and users became regulars in newspaper stories and saturated the evening TV news—forever changing

our conception of who the drug users and dealers are. Once the enemy in the war was racially defined, a wave of punitiveness took over. Congress passed harsh mandatory minimum sentences for drug crimes—sentences longer than murderers receive in many countries. Many black politicians joined the get-tough bandwagon, unwittingly contributing to a system of social control that would, in less than two decades, become unprecedented in world history.

Almost immediately, Democrats began competing with Republicans to prove that they could be even tougher on “them.” In President Bill Clinton’s boastful words, “I can be nicked on a lot, but no one can say I’m soft on crime.”<sup>3</sup> The facts bear him out. His policies produced the largest increases in federal and state prison inmates of any American president. Unsatisfied, he and the so-called new Democrats championed legislation banning drug felons from public housing (no matter how minor the offense) and denying them basic public benefits, including food stamps, for life. Discrimination in virtually every aspect of political, economic, and social life is now perfectly legal, once you’re labeled a felon.

Media images of violence in ghetto communities led many to believe that the drug war focused on the most serious offenders. Yet nothing could be further from the truth. Federal funding has flowed to those state and local law enforcement agencies that dramatically increase the volume of drug arrests, not those most successful in bringing down the bosses. What has been rewarded in this war is sheer numbers—the sheer volume of drug arrests. Sometimes the rewards have been pecuniary—federal drug forfeiture laws allow state and local law enforcement agencies to keep for their own use 80 percent of the cash, cars, and homes seized from drug suspects, thus granting law enforcement a direct monetary interest in the profitability of the drug market itself.

People of color have been rounded up en masse for relatively minor, nonviolent drug offenses. In 2005, for example, four out of five drug arrests were for possession, only one out of five for sales. Most people in state prison for drug offenses have no history of violence or even of significant selling activity. In fact, during the 1990s—the period of the most dramatic expansion of the drug war—nearly 80 percent of the increase in drug arrests was for possession of marijuana, a drug generally considered less harmful than alcohol or tobacco and at least as prevalent in middle-class white communities as in the inner city.

In this way, a new racial undercaste has come about in an astonishingly short period of time. Millions of people of color are now saddled with criminal records and legally denied the very rights that were supposedly won in the civil rights movement.

The U.S. Supreme Court, for its part, has mostly turned a blind eye to race discrimination in the criminal justice system. The Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing. Law enforcement officials are largely free to discriminate on the basis of race today, provided that no one admits it. In *McCleskey v. Kemp* and *United States v. Armstrong*, the Supreme Court made clear that only evidence of conscious, intentional racial bias—the sort of bias that is nearly impossible to prove these days in the absence of an admission—is deemed sufficient. No matter how impressive the statistical evidence, no matter how severe the racial disparities and racial impacts might be, the Supreme Court is not interested. The Court has, as a practical matter,

closed the door to claims of racial bias in the criminal justice system. It has immunized the new caste system from judicial scrutiny for racial bias, much as it once rallied to legitimate and protect slavery and Jim Crow.

Significant differences mark mass incarceration and earlier forms of racial control. Yet all three—slavery, Jim Crow, and mass incarceration—have operated as tightly networked systems of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race. Just consider a few of the rules, laws, and policies that apply to people branded felons today and ask yourself if they remind you of a bygone era:

- Denial of the right to vote. Forty-eight states and the District of Columbia deny prisoners this right. Even after the term of punishment expires, states are free to deny people who have been labeled felons the right to vote for a period of years or their entire lives. In a few states, one in four black men has been permanently disenfranchised. Nationwide, nearly one in seven black men is either temporarily or permanently disenfranchised as a result of felon disenfranchisement laws.
- Exclusion from jury service. One hallmark of Jim Crow was the systematic exclusion of blacks from juries. Today, those labeled felons are automatically excluded from juries; others are routinely excluded if they have had negative experiences with law enforcement. Good luck finding a person of color in a ghetto community today who has not yet had a negative experience with law enforcement. The all-white jury is no longer a thing of the past in many regions of the country, in part because so many African Americans have been labeled felons and excluded from juries.
- Employment discrimination. Employment discrimination against felons is deemed legal and absolutely routine. Regardless of whether your felony occurred three months ago or thirty-five years ago, for the rest of your life you're required to check that box on employment applications asking the dreaded question: "Have you ever been convicted of a felony?" In one survey, about 70 percent of employers said they would not hire a drug felon convicted for sales or possession. Most states also deny a wide range of professional licenses to people labeled felons. In some states, you can't even get a barber's license if you're a felon.
- Housing discrimination. Housing discrimination is perfectly legal. Public housing projects as well as private landlords are free to discriminate against criminals. In fact, those labeled felons may be barred from public housing for five years or more and legally discriminated against for the rest of their lives. These laws make it difficult for former prisoners to find shelter, a basic human right.
- Public benefits. Discrimination in public benefits is legal against those who have been labeled felons. In fact, federal law renders drug offenders ineligible for food stamps for the rest of their lives. Fortunately, some states have opted out of the federal ban, but it remains that thousands of people, including pregnant women and people with HIV/AIDS, are denied even food stamps, simply because they were once caught with drugs.

During the Jim Crow era, light-skinned blacks often tried to pass as white to avoid the stigma, shame, and discrimination associated with their race. Today, people labeled criminals lie not only to employers and housing officials but also to their friends, acquaintances, and family members. Children of prisoners lie to friends and relatives, saying, “I don’t know where my daddy is.” Grown men who have been out of prison for years still glance down and look away when asked who they will vote for on Election Day, ashamed to admit they can’t vote. They try to “pass” to avoid the stigma and discrimination associated with the new caste system. Even in neighborhoods hardest hit by mass incarceration—places where nearly every house has a family member behind bars or recently released from prison—people rarely “come out” fully about their own criminal history or that of their loved ones, even when speaking with relatives, friends, and neighbors.

More than forty-five years ago, Martin Luther King, Jr., warned that blindness and indifference to racial groups is actually more important than racial hostility to the creation and maintenance of systems of racial control. Those who supported slavery and Jim Crow, he argued, typically were not bad or evil people; they were just blind. Many segregationists were kind to their black shoe shiners and maids and genuinely wished them well. Even the justices who decided the infamous *Dred Scott* case, which ruled “that the Negro had no rights which the white man was bound to respect,” were not wicked men, he said. On the whole, they were decent and dedicated men. But, he hastened to add, “[t]hey were victims of spiritual and intellectual blindness. They knew not what they did. The whole system of slavery was largely perpetuated by sincere though spiritually ignorant persons.”<sup>24</sup>

The same is true today. People of good will—and bad—have been unwilling to see black and brown men and women, in their humanness, as entitled to the same care, compassion, and concern that would be extended to one’s friends, neighbors, or loved ones.

After all, who among us would want a loved one struggling with drug abuse to be put in a cage, labeled a felon, and then subjected to a lifetime of discrimination, scorn and social exclusion? Most Americans would not wish that fate on anyone they cared about. But whom do we care about? In America the answer to that question is still linked to race. Dr. King recognized that it was this indifference to the plight of African Americans that supported the institutions of slavery and Jim Crow. And this callous racial indifference supports mass incarceration today.

Affirmative action, though, has put a happy face on this racial reality. Seeing black people graduate from Harvard and Yale and become CEOs or corporate lawyers—not to mention president of the United States—causes us all to marvel at what a long way we have come. As recent data show, though, much of black progress is a myth. In many respects, if you take into account prisoners, African Americans as a group are doing no better than they were when King was assassinated and uprisings swept inner cities across America.

When we pull back the curtain and take a look at what our so-called color-blind society creates without affirmative action, we see a familiar social, political, and economic structure—the structure of racial caste. And the entry into this new caste system can be found at the prison gate.



NOTES

1. Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010).
2. Willard M. Oliver, *THE LAW & ORDER PRESIDENCY* 126–27 (2003).
3. Michael Kramer, *The Political Interest Frying Them Isn't the Answer*, *TIME*, Mar. 14, 1994, at 32, available at <http://www.time.com/time/magazine/article/0,9171,980318,00.html>.
4. Martin Luther King, Jr., *STRENGTH TO LOVE* 45 (Fortress Press 1981) (1963).