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**Critical Perspectives on Police, Policing, and Mass
Incarceration**

Richard Delgado and Jean Stefancic

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Critical Perspectives on Police, Policing, and Mass Incarceration

RICHARD DELGADO* AND JEAN STEFANCIC**

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** Professor and Clement Research Affiliate, University of Alabama. © 2016, Jean Stefancic. We presented an early version of this Article at the University of Washington College of Education 2015 Common Book program and thank our audience, copanelists, and organizers for insightful comments and suggestions. Thanks to Lee Gilmer for expert research assistance and to V. Noah Gimbel for suggestions and guidance.

INTRODUCTION

Public clamor over police–community relations began in the mid-1990s and has now started to reach fever pitch.¹ It is unlikely to subside soon for a number of reasons. The minority community is concerned about the large number of its youth who end up in the criminal justice system, often for minor offenses such as possession of small amounts of marijuana, driving with a burned-out taillight, or jaywalking.² Their encounters with police can turn deadly, especially when the officer is white and concerned more with asserting authority than de-escalating conflict.³ When a police–citizen interaction turns violent, bystanders often record it and post the video on the Internet.⁴ The combination of a large and vocal minority community, an intractable police force, and a system of social media that widely broadcasts encounters ensures that the current turmoil is apt to continue, if not worsen, in the immediate future.

Imprisonment has also begun to draw attention.⁵ The United States not only arrests, charges, and convicts a larger percentage of its population than does

1. See *infra* notes 99–112 and accompanying text.

2. See *infra* notes 29–30 and accompanying text.

3. See *infra* Section II.C.1 (discussing the new hyperaggressive style of policing, which includes favoring crowd control and the exercise of authority over conflict resolution, public safety, and other less action-packed objectives). For a sampling of highly publicized cases involving a black victim and white officers, see, for example, Associated Press, *Grand Jury Declines to Indict Cleveland Officer in Fatal Shooting of 12-Year-Old Tamir Rice*, L.A. TIMES (Dec. 28, 2015, 3:00 PM), <http://www.latimes.com/nation/la-na-tamir-rice-grand-jury-20151228-story.html> [https://perma.cc/GE6R-RBS5]; Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html> [http://perma.cc/2ASS-DSUW]; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [http://perma.cc/]; Jake Halpern, *The Cop*, NEW YORKER (Aug. 10 & 17, 2015), <http://www.newyorker.com/magazine/2015/08/10/the-cop> [https://perma.cc/8958-QJRP]; Benjamin Mueller et al., *James Blake's Arrest Brings Swift Apologies from New York Officials*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/nyregion/james-blake-new-york-police-officer.html> [http://perma.cc/N4YQ-KFRC]. But members of racial minorities are not the only ones on the receiving end of violent treatment at the hands of police. See Christine Clarridge & Sara Jean Green, *Hard Shove from Deputy Proves Fatal 6 Years Later*, SEATTLE TIMES, Dec. 12, 2015, at A1 (discussing the case of a thirty-year-old white man “who suffered a catastrophic brain injury after being slammed into a concrete wall by a King County sheriff’s deputy” when a witness wrongly identified him as a suspect in a fight).

4. See, e.g., Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/> [https://perma.cc/BG8G-U9X5]. Many commentators posit that the ubiquity of cellphone cameras that enable bystanders to capture police violence on film is responsible for exposing many cases that formerly would have remained invisible. See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/> [https://perma.cc/GPP9-NNWK]. But studies indicate that police violence is actually increasing. See Joanna Drowos et al., *Variations in Mortality from Legal Intervention in the United States—1999 to 2013*, 81 PREVENTIVE MED. 290, 293 (2015).

5. See Russell Berman, *The Moment for Criminal-Justice Reform?*, ATLANTIC (July 10, 2015), <http://www.theatlantic.com/politics/archive/2015/07/congress-obama-criminal-justice-reform/398045/> [https://perma.cc/].

almost any other nation, it also sentences them to longer terms.⁶ Consequently, many prisons are severely overcrowded,⁷ with some states spending more on incarceration than on public education—a disparity so glaring that both Republicans and Democrats have taken note of it.⁸ A disproportionate number of minority families have a member ensnared in the criminal justice system or struggling to rejoin society following a prison term.⁹ These families lose a primary wage-earner, and communities are deprived of workers.¹⁰ But the costs are not merely economic. Families also suffer the loss of loved ones, including fathers, sons, brothers, and sisters, while their communities lose potential voters and role models.¹¹

Journalists and community activists first called attention to these problems.¹² In the past decade, a new generation of scholars began analyzing them closely.¹³ This Article reviews some of this body of writing, noting undertheorized areas

cc/QEY5-JNW5] (noting the growing consensus that the United States needs “an overhaul of the nation’s crowded, costly prison system”); *infra* Part III.

6. See Philip Bump, *The Disproportionate Prison Population of the United States, Visualized*, WASH. POST (Dec. 18, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/18/the-disproportionate-prison-population-of-the-united-states-visualized/> [https://perma.cc/6RTA-MAWB]; Editorial, *The U.S. Locks Up Way Too Many People. That Could Change.*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/opinions/the-us-locks-up-way-too-many-people-that-could-change/2015/07/16/699b65a6-2bf0-11e5-a5ea-cf74396e59ec_story.html [http://perma.cc/W967-Y9AH]; Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/> [https://perma.cc/ZUK3-U9ZV].

7. See *infra* notes 140–41 and accompanying text.

8. See MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION 8 (2014) (noting that eleven states spent more on corrections than on higher education in 2013); Berman, *supra* note 5 (noting that the high cost of incarceration may soon produce a bipartisan consensus in favor of reform); see also Peter Baker, *Obama Calls for Effort to Fix a ‘Broken System’ of Criminal Justice*, N.Y. TIMES (July 14, 2015), <http://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html> [http://nyti.ms/1GkHdHy] (noting that with the \$80 billion it spends annually on incarceration, the United States could provide preschool for every three- and four-year old or double the salaries of every high school teacher in the country).

9. See, e.g., *Racial Disparity*, THE SENTENCING PROJECT: RESEARCH & ADVOCACY FOR REFORM, <http://www.sentencingproject.org/template/page.cfm?id=122> [https://perma.cc/X6F4-G2DC] (noting that over sixty percent of prisoners are racial and ethnic minorities); Rakoff, *supra* note 6 (noting that African-American males make up forty percent of the population of U.S. prisons).

10. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [https://perma.cc/9YNR-VSG3].

11. See *id.*

12. See *infra* Part I; *infra* note 23.

13. See, e.g., HEATHER MAC DONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* (2016) (advocating a heightened version of the prevailing tough-on-crime approach); MALCOLM SPARROW, *HANDCUFFED: WHAT HOLDS POLICING BACK, AND THE KEYS TO REFORM* (2016) (advocating a position similar to the one in this Article); Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1193–94 (2008) (reviewing recent scholarship on police practices); Peter Moskos, *Lockdown Nation: How Military-Style Policing Became America’s New Normal.*, PAC. STANDARD (July 9, 2013), <http://www.psmag.com/books-and-culture/book-review-lockdown-nation-military-style-policing-radley-balko-60861> [https://perma.cc/V2QH-YRU9] (noting journalist Radley Balko’s work tracing changes in American policing

and opportunities for reform. Addressing these areas and opportunities is likely to continue well into the future. The minority community will soon stand at fifty percent of the U.S. population,¹⁴ yet most police forces are predominantly white.¹⁵ The two groups often find themselves at cross-purposes: minorities want the police to be more flexible and respectful, while the police want more weaponry and a greater degree of discretion.¹⁶ With violent crime at record lows,¹⁷ many citizens of color see little reason for the latter view, yet the police often believe that criminals only understand force.¹⁸ The two groups, then, not only have different objectives, they also see and interpret the problem of crime and its management differently.¹⁹

Part I of this Article considers recent writing about police and policing, beginning with a modern classic, Michelle Alexander's *The New Jim Crow*,²⁰ still one of the best scholarly treatments of the subject. Using her text as a point of departure, we put forward in Part II three main points. First, we live, in many respects, in a police state that uses forcible relocation to manage many discontent groups, not just blacks.²¹ Next, reforming this system will require those groups to take united and coordinated action. Finally, society will always require some form of policing—the question is which kind best suits ours. We outline one such approach and explain why it would be superior to the current one.

Part III examines recent scholarship on imprisonment. Part IV proposes a simple change in our approach to punishment that can mitigate some of the

from colonial times to present); David Schimke, *A Theorist Unchained*, CHRON. HIGHER EDUC., Aug. 7, 2015, at B6 (discussing Professor Lisa Guenther's work on prisoner advocacy).

14. See SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 1 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> [<https://perma.cc/73FN-AAGH>] (“[B]y 2044, more than half of all Americans are projected to belong to a minority group . . .”).

15. See Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html> [<https://perma.cc/R7ZP-G3J8>].

16. See Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (June 8, 2014), <http://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html> [<http://perma.cc/4PGA-AJ48>].

17. See Justin Wolfers, *Perceptions Haven't Caught Up to Decline in Crime*, N.Y. TIMES (Sept. 16, 2014), <http://www.nytimes.com/2014/09/17/upshot/perceptions-havent-caught-up-to-decline-in-crime.html> [<https://perma.cc/C4UR-NK7F>]. Of course, a decline in crime nationally may be scant consolation for police officers in districts where it is high or rising. Officers in such districts may, with some justification, want all the tools they can get to make their jobs safer.

18. See *infra* notes 95–96 and accompanying text.

19. See, e.g., Baker, *supra* note 8 (noting President Obama's statement that money spent on imprisonment could support beneficial social programs such as universal preschool classes); see also *infra* Section II.C.2 (discussing an alternative style of policing calculated to address concerns of minority communities).

20. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

21. See Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 332 (2015).

flaws in the current one. To conclude, we explain why change and reform are eminently possible despite current political and social divisions.

I. *THE NEW JIM CROW* ON POLICE AND POLICING

Even before the recent outbreak of highly publicized police shootings,²² journalists and scholars examined styles of policing and their suitability for a diverse society such as ours, a body of scholarship that burgeoned beginning around 2000.²³ As the nation's war on drugs caused the prison population to swell,²⁴ writing on the subject of incarceration increased in volume and sophistication as well.²⁵

Alexander's *The New Jim Crow* remains the leading work on policing and its discontents. She examines policing in light of the nation's war on drugs, which she believes has produced a cascade of adverse consequences, including use of drug laws to disproportionately target black and Latino men.²⁶ She also highlights the dismal prospects of a convicted offender, even one who has served his term and emerged resolved to lead a better life.²⁷ Replete with statistics on the war's social and economic costs,²⁸ *The New Jim Crow* builds a powerful case against these laws and the aggressive techniques required to enforce them.

22. See *supra* note 3.

23. E.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998); Tracey Maclin, Terry v. Ohio's *Fourth Amendment* Legacy: *Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

24. See ALEXANDER, *supra* note 20, at 5, 48–53 (describing how the war on drugs began and rose to fever pitch during the early years of the Reagan Administration); see also Baker, *supra* note 8 (discussing President Obama's call to reduce the mass incarceration of the past two decades in part by reducing or eliminating mandatory minimum sentences for drug offenders).

25. E.g., LOÏC WACQUANT, PRISONS OF POVERTY (2009); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, 13 NEW LEFT REV. 41 (2002).

26. See ALEXANDER, *supra* note 20, at 58–136. Journalists and public officials have also noted adverse consequences. See, e.g., Berman, *supra* note 5; Matthew Pulver, *Why America's Prison Problem is So Much Worse than Barack Obama Wants to Let On*, SALON (July 19, 2015, 3:59 PM), http://www.salon.com/2015/07/19/why_americas_prison_problem_is_so_much_worse_than_even_barack_obama_wants_to_let_on/ [https://perma.cc/2A4K-8SKV].

27. See ALEXANDER, *supra* note 20, at 1, 92–94, 137–72, 187–88; see also JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 125–26 (2014) (explaining that mentally ill parolees often return to prison for minor violations because they do not receive meaningful treatment while on parole); Editorial, *Forcing Black Men out of Society*, N.Y. TIMES (Apr. 25, 2015), <http://www.nytimes.com/2015/04/26/opinion/sunday/forcing-black-men-out-of-society.html> [http://perma.cc/Rf9V-KJXT] (noting that “criminal convictions for black men seeking employment were virtually impossible to overcome . . . partly because convictions reinforced powerful, longstanding stereotypes”). For a description of some of the collateral consequences of a conviction for the family of a felon or former felon, see Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, NATION (Feb. 10, 2016), <http://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/> [https://perma.cc/7XEH-3ZDL]; Shaila Dewan, *The Collateral Victims of Criminal Justice*, N.Y. TIMES (Sept. 5, 2015), <http://www.nytimes.com/2015/09/06/sunday-review/the-collateral-victims-of-criminal-justice.html> [https://perma.cc/C547-TCZT].

28. See ALEXANDER, *supra* note 20, at 71–83.

The New Jim Crow also shows how judicial leniency toward common police practices stokes resentment, particularly among black youths harassed on sidewalks when merely out for a walk with friends.²⁹ Police surveillance and profiling increase the anxiety and risk of driving, walking, or standing while black, but do little to improve the conviction rate for law enforcement authorities.³⁰ Judicial tolerance of these practices makes it difficult for attorneys suing on behalf of minorities who have suffered the indignity of an unjustified search or arrest.³¹ This judicial intransigence makes reform difficult even for the best-intentioned attorneys and legislators.

Alexander explains how heavy-handed policing and onerous conditions of imprisonment have precedents in Jim Crow and slavery³² and reviews social-science teachings about race, implicit bias, and eyewitness identification.³³ She concludes by encouraging the civil rights community to end its obsession with university affirmative action, which she considers a distraction from reform of drug laws.³⁴

The New Jim Crow makes a notable contribution to public discourse, shedding light on how society became trapped in the current web of overzealous punishment and then pointing the way out. Still, one could wish for the deeper insights that a critical angle of vision, focused on broad social patterns and motivations over an extended period, might have produced.

II. IMPRISONED IN A BLACK-WHITE PARADIGM OF RACE: RECENT SCHOLARSHIP THAT FAILS TO TAKE ACCOUNT OF A POLICE STATE

Teachers of critical theory often encourage students to look for patterns of historical treatment extending beyond just one or two groups.³⁵ This is not merely a matter of theoretical interest or a means of showing solidarity. Rather, seeing the interplay between the forces that keep one group down and buoy another up can lead to understanding phenomena on a broader scale, which allows for the framing of an intelligent response.

Although *The New Jim Crow* is an excellent example of a certain type of investigation—one that looks at the experience of a single group through a

29. *See id.* at 58, 95–136.

30. *See id.* at 62–71, 79–83, 106, 131–33. *See generally* HARRIS, *supra* note 23 (explaining why police profiling cannot work).

31. *See* ALEXANDER, *supra* note 20, at 62–68, 105–36; Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), <http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html> [https://perma.cc/66DU-GZ8L].

32. *See* ALEXANDER, *supra* note 20, at 1–2, 11, 187–88, 192–95.

33. *See id.* at 7; 44–46, 103–05, 122, 133, 179, 222–23.

34. *See id.* at 9–10, 233–36.

35. *See, e.g.,* Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997) (calling attention to an implicit binary of racial thought that “defines, but also limits, the set of problems that may be recognized in racial discourse”); Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 290–91 (2000) (rejecting a binary conception of race as harmful).

microscope—this narrow focus limits its impact. It addresses the African-American experience; other groups, such as Latinos, Native Americans, Asian-Americans, Muslims, and ethnic whites are almost entirely missing.³⁶ Many recent books on policing styles exhibit this same oversight. For example, three otherwise exemplary books recently reviewed in an annual law review issue devoted to books on law focused almost exclusively on problems between the police and the black community.³⁷ Even James Q. Wilson's groundbreaking work on broken-windows policing exhibits the same focus on the black community and its offenders.³⁸

A. MANY JIM CROWS: CONSIDERING THE EXPERIENCE OF NONBLACK MINORITY GROUPS

Identifying parallels in the experience of nonblack groups would have been fairly simple and would have repaid these authors' efforts. For example, consider spatial relocation as a control device. Imprisonment removes African-Americans—particularly young men, often for drug offenses—from the street, the voting rolls, and the job market, thus reducing competition with whites over jobs, political power, and the distribution of genes in the next generation.³⁹ Police stops and arrests of black males are, of course, a means of increasing their incarceration rate.⁴⁰

An even greater percentage of the U.S. population (17.4 versus 13.2 percent for African-Americans in 2014),⁴¹ Latinos are also marginalized and disadvantaged, although in ways different from those haunting blacks. Statistics show that Latinos have low average family income, school completion rates, and

36. ALEXANDER, *supra* note 20, at 15–16 (“[L]ittle is said here about the unique experience of women, Latinos, and immigrants in the criminal justice system, though these groups are particularly vulnerable to the worst abuses and suffer in ways that are important and distinct. This book focuses on the experience of African American men in the new caste system.”).

37. See Delgado, *supra* note 13. See generally STEVE HERBERT, *CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY* (2006) (mentioning Latinos and Asian-Americans in passing, without covering many matters, such as immigration searches and dragnets, that are of great concern to those communities); RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* (2006) (same); *POLICE INNOVATION: CONTRASTING PERSPECTIVES* (David Weisburd & Anthony A. Braga eds., 2006) (same).

38. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/past/docs/politics/crime/windows.htm> [<https://perma.cc/XA97-PXWR>] (explaining that broken-windows policing focuses on areas suffering urban blight, where criminals feel comfortable, congregate on street corners, and endanger the well-being of everyone who lives or works there).

39. See ALEXANDER, *supra* note 20, at 1, 49–50, 139, 145–50, 153–56, 184, 187–88.

40. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817 (2015); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving while Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/U5WY-SLMY>].

41. *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/RHI125214/00> [<https://perma.cc/MMT2-B4Q2>].

access to health care.⁴² They are, however, by and large a law-abiding group,⁴³ whose percentage of the U.S. prison population (just over fifteen) is slightly lower than their share of the overall population.⁴⁴ Many are undocumented and hail from small villages that are socially cohesive;⁴⁵ they are thus strongly motivated to avoid coming to the attention of the authorities while working hard to support themselves and their families and to send a little money to relatives back home.⁴⁶ The criminal justice system is therefore not a ready avenue for controlling their numbers and patterns of settlement. Instead, our system employs immigration quotas, detention, and deportation to achieve these ends.⁴⁷

Imprisonment, then, removes blacks from the American mainstream, whereas deportations and their specter accomplish the same for Latinos.⁴⁸ Even the resulting numbers are similar for both mechanisms.⁴⁹ That these two mechanisms determine the fates of two large groups of near-equal size suggests that they have much the same social purpose—namely, control.

42. See, e.g., Anna Brown & Eileen Patten, *Statistical Portrait of Hispanics in the United States, 2012*, PEW RES. CTR. (Apr. 29, 2014), <http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-hispanics-in-the-united-states-2012> [https://perma.cc/MCN4-57DJ].

43. Communities with a high immigrant population almost invariably exhibit lower rates of crime than ones with high native populations. See John M. MacDonald & Robert J. Sampson, Opinion, *Don't Shut the Golden Door*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/opinion/the-beneficial-impact-of-immigrants.html> [http://perma.cc/Q3PK-TVHB].

44. See THE SENTENCING PROJECT, *HISPANIC PRISONERS IN THE UNITED STATES 1* (2003), http://www.sentencingproject.org/doc/publications/inc_hispanicprisoners.pdf [https://perma.cc/U82K-F9FJ]; see also E. ANN CARSON, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2013*, at 8 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [perma.cc/26DP-84VF] (reporting a slightly higher figure of twenty-two percent for Hispanic males in the overall prison population).

45. See generally RODOLFO F. ACUÑA, *CORRIDORS OF MIGRATION: THE ODYSSEY OF MEXICAN LABORERS, 1600–1933* (2008) (noting that Mexican immigrants from a given village or family tend to follow the same pattern of migration in succeeding waves of migration).

46. See Associated Press, *Alabama: Many Immigrants Pull Children from Schools*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/us/alabama-many-immigrants-pull-children-from-schools.html> [http://perma.cc/W77P-79YY]; D'Vera Cohn et al., 2. *Remittance Trends*, PEW RES. CTR. (Nov. 14, 2013), <http://www.pewhispanic.org/2013/11/14/2-remittance-trends/> [https://perma.cc/BSB9-U32G].

47. See *Barack Obama, Deportee-in-Chief*, ECONOMIST (Feb. 8, 2014), <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama> [https://perma.cc/6FD8-PRF9] (noting that the “deportation machine” tears families apart and “costs more than all other federal criminal law-enforcement areas combined”); Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 25, 2015), <http://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html> [https://perma.cc/8H8J-BN3Z] (explaining that Homeland Security officials initially detained immigrant families “to send a message to others in Central America to deter them from coming to the United States illegally”).

48. The high deportation rate blights the lives even of Latinos who are here legally. They fear being stopped and questioned. And they fear that friends, neighbors, and relatives who are undocumented, but law-abiding and responsible, may be deported, leaving a hole in their lives. Stephen Dinan, *Latinos Say Deportation a Top Concern*, WASH. TIMES (Mar. 25, 2015), <http://www.washingtontimes.com/news/2015/mar/25/latinos-say-deportation-a-top-concern/> [https://perma.cc/F5GX-V6V8].

49. See *Barack Obama, Deportee-in-Chief*, *supra* note 47 (noting that the Obama Administration had deported about two million illegal immigrants as of February 2014, five years into his presidency). The number of African-Americans incarcerated at a given time is about 37% of a total prison population of over 1.5 million. See CARSON, *supra* note 44. The numbers, then, are comparable, at least in their drastic effects on the respective communities.

History reveals a similar pattern for Native Americans. The Discovery Doctrine⁵⁰ and, a few decades later, the Trail of Tears,⁵¹ the Dawes Act,⁵² and relocation to reservations⁵³ removed them from land and opportunities that whites coveted. For Asians, Chinese Exclusion,⁵⁴ alien land laws,⁵⁵ and wartime removal of Japanese-Americans⁵⁶ achieved much the same. For Muslims and Middle Eastern people, close surveillance, profiling, and demands for immigration restriction send the message that they are unwelcome.⁵⁷ History, then, discloses five groups—blacks, Latinos, Native Americans, Asians, and Muslims—removed from the principal arenas of American life: one to large prisons, a second to foreign countries, a third to reservations located far from where their ancestors were buried, a fourth to wartime concentration camps, and a fifth barred entirely, but each dispossessed of heritage, freedom of movement, and opportunity to participate in American life.

Sometimes, examining the experience of a single group through a microscope enables one to discern important patterns. Alexander shows how society employed slavery, the Black Codes, Jim Crow, and imprisonment to control blacks as the needs of the majority group shifted.⁵⁸ At other times, however, looking at matters through a wider lens—a telescope rather than a microscope—brings broader patterns into view. Reviewing similarities among the experiences of each of the major groups of color could have brought to light common features calling for redress on a broader scale.

B. RESPONDING TO OPPRESSION: NOTICING ALIGNMENTS, CRAFTING COALITIONS, AND STRIKING WHILE THE IRON IS HOT

With a broader framework in place, policymakers and activists can better anticipate future developments and begin to alleviate some of the worst consequences for communities living under oppressive conditions. For example, a look through Alexander's microscope shows that conservatives in high places put in place punitive drug laws beginning around 1982 just as the civil rights

50. See *Johnson v. M'Intosh*, 21 U.S. 543, 567–68, 572–73 (1823) (declaring that European colonizers divided up the new lands and, to minimize conflict, tacitly agreed to a policy of granting control to those who arrived in a region first).

51. See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 207–13 (3d ed. 2015).

52. See *id.* at 223–25, 852, 1051–53.

53. See *id.* at 243–45.

54. See *id.* at 395–400.

55. See *Terrace v. Thompson*, 263 U.S. 197, 222–24 (1923) (upholding a Washington state measure that effectively barred the Japanese from owning or leasing farms). See generally Jean Stefancic, *Terrace v. Thomson and the Legacy of Manifest Destiny*, 12 NEV. L. REV. 532 (2012) (reviewing the background of *Terrace*).

56. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 93–114 (1943) (upholding wartime curfew); *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944) (upholding wartime removal and detention).

57. See Wajahat Ali, *The Muslim Drill*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/09/opinion/the-muslim-drill.html> [<https://perma.cc/SF4C-6TP2>].

58. See ALEXANDER, *supra* note 20, at 1–2, 11, 61–71, 85–88, 105–06, 139, 153–66, 175, 185–89.

revolution of the '60s and '70s was losing ground and the nation was returning to business as usual.⁵⁹ That is true so far as it goes. But a more encompassing study might have disclosed that the criminalization of drugs such as marijuana started much earlier, around 1920, when policymakers noticed that Mexicans living in the southwest used it recreationally and that its use was catching on with black musicians.⁶⁰

Criminalization of recreational drugs emerged, then, not only as a means of controlling musically inclined black youth, but as a way of keeping tabs on Mexicans as well. Appreciating this aspect of the drug laws might have enabled reformers to begin countering them nearly a century ago and not now, when the jails are bulging with African-American men and women. For example, black musicians might have made common cause with Mexicans when the authorities first cracked down on them. Later, when authorities began targeting Native Americans for ingesting peyote during religious ceremonies,⁶¹ other minority groups might have rallied to their defense more strongly than they did.

Moreover, once one recognizes that social, as well as spatial, control is the ultimate prize, one is in a position to see how society sometimes treats one group—say, blacks—poorly in order to curry favor with another—say, working-class whites.⁶² This was a principal tool of Richard Nixon's "southern strategy" and of southern slave-owners before him.⁶³ It is reviving, as we shall see, in a new form today.⁶⁴

Other times, society will single out one group—for example, Latinos—for harsh treatment because it wants to teach that group's members a lesson, perhaps that they must not make common cause with another group that society has decided it wants to oppress.⁶⁵ Occasionally, society will promote one group, deeming them honorary whites, in order to discourage its members from entering into a coalition with another group.⁶⁶ On still other occasions, society will bring in a group—say black Buffalo Soldiers—to oppress another, such as the Indians.⁶⁷ All these measures naturally interfere with outgroups perceiving

59. See ALEXANDER, *supra* note 20, at 5–6, 48–54 (discussing the development of the war on drugs during the conservative administrations of Ronald Reagan and George H. W. Bush).

60. See Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T. L. REV. 359, 361–62 (2013); Dr. David F. Musto: Interview, PBS: FRONTLINE (Winter 1997–1998), <http://www.pbs.org/wgbh/pages/frontline/shows/dope/interviews/musto.html> [<https://perma.cc/8RHX-W69R>].

61. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 874, 889 (1990) (upholding Oregon law prohibiting peyote use, even for Native American Church sacramental purposes).

62. See Delgado, *supra* note 35, at 294–95.

63. See *id.*; *infra* notes 125–27 and accompanying text.

64. See *infra* Section II.C.3.

65. See Delgado, *supra* note 35, at 289–93.

66. See PEREA ET AL., *supra* note 51, at 478–96. See generally GEORGE YANCEY, WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003) (discussing how white policymakers are beginning to deem Asian-Americans and Latinos honorary whites in order to maintain ascendancy during a time of demographic change).

67. See *Buffalo Soldiers*, NAT'L PARK SERV., <http://www.nps.gov/yose/learn/historyculture/buffalo-soldiers.htm> [<https://perma.cc/2Z32-E9R7>].

interests that they have in common, organizing, and presenting a common front.⁶⁸

If one sees that the unstated goal is social control, one can be a more effective advocate for reform. Because relocation is perhaps the ultimate form of social control, recognizing its historical role can enable reformers to appreciate its significance more readily today. One can then target excess imprisonment for blacks, while remaining aware of the forcible relocations of different kinds that await other groups⁶⁹—one day, perhaps, even one's own.

C. ANTICIPATING THE FUTURE: INTEREST CONVERGENCE AND ALIGNMENT OF FORCES

By the same token, if incarceration, especially for drug offenses, did emerge as a tool of social control, then one might ask what will happen when society grows weary of the drug laws and begins repealing them, as have a few states, or putting them on the back burner, as have many cities and local police forces.⁷⁰ Drug laws, after all, interfere with white lives, careers, recreation, and liberty, too, even if the extent of that interference is somewhat lesser than it is for blacks.⁷¹

Restrictions on gay marriage ended swiftly.⁷² Drug laws, at least for marijuana, may well follow suit.⁷³ What will replace them as means of social management once they are gone? We hazard that empowered groups will

68. Community meetings and dialogue are thus necessary to overcome distrust and friction. *See generally* KIM BOBO ET. AL., *ORGANIZING FOR SOCIAL CHANGE: MIDWEST ACADEMY MANUAL FOR ACTIVISTS* (3d ed. 2010) (discussing how to organize a social movement); Bernice Johnson Reagon, *Coalition Politics: Turning the Century*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 343 (Barbara Smith ed., 2000) (discussing coalition work).

69. *See supra* Section II.A.

70. The District of Columbia and Colorado have legalized private use and possession of small quantities of marijuana, and many jurisdictions do not prosecute the offense vigorously. *See States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> [<https://perma.cc/LK55-4SAD>].

71. Whites and nonwhites buy and use drugs roughly at the same rate, even if whites usually suffer less severe consequences when this comes to the attention of the authorities. *See* Ian Urbina, *Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests*, N.Y. TIMES (June 3, 2013), <http://www.nytimes.com/2013/06/04/us/marijuana-arrests-four-times-as-likely-for-blacks.html> [<http://perma.cc/G9Y2-E3ZX>]. Treating drug use and addiction medically and therapeutically is gaining ground, in part because this approach benefits middle-class, majority-race victims. *See, e.g.*, Katharine Q. Seelye, *Massachusetts Chief's Tack in Drug War: Steer Addicts to Rehab, Not Jail*, N.Y. TIMES (Jan. 24, 2016), <http://www.nytimes.com/2016/01/25/us/massachusetts-chiefs-tack-in-drug-war-steer-addicts-to-rehab-not-jail.html> [<http://perma.cc/DV6N-MJQM>] (“The idea that addiction should be treated as a health issue instead of a crime has gained currency as heroin has spread from inner cities to the . . . white middle class.”).

72. *See* Conor Friedersdorf, *A Very Silly Argument Against the Gay-Marriage Movement*, ATLANTIC (Apr. 5, 2013), <http://www.theatlantic.com/politics/archive/2013/04/a-very-silly-argument-against-the-gay-marriage-movement/274693/> [<https://perma.cc/PJK8-494H>]; Richard A. Posner, *How Gay Marriage Became Legitimate*, NEW REPUBLIC (July 24, 2013), <https://newrepublic.com/article/113816/how-gay-marriage-became-legitimate> [<https://perma.cc/Z3FG-MC24>].

73. *See* Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html> [<http://perma.cc/4DGW-7SA4>] (noting that Democratic and Republican presidential candidates for

deploy two new tools—police brutality of the type we have seen in Baltimore, Ferguson, Cleveland, and the streets of Chicago and New York, and an updated southern strategy that pits Latinos against blacks and poor whites. We discuss the latter strategy in recent and upcoming articles and merely outline it here.⁷⁴ In this Article, we consider social control through hyperaggressive policing and how its harbingers have already arrived.

1. The New Hyperaggressive Policing

Hyperaggressive policing is a key issue because if marijuana laws end, at least some authorities are apt to search, reflexively, for new ways of controlling black men. As mentioned, the drug laws are essentially a means of managing populations that the police regard as sources of potential disorder.⁷⁵ Social control is the end game, with drug arrests and imprisonment simply a means to that end, at least until now. Accordingly, as marijuana prohibitions fade,⁷⁶ a different tool—police violence—has come to the fore with a sharp rise in police shootings and beatings of unarmed black men.⁷⁷

We believe that this is not entirely accidental. If drug arrests have been merely a convenient means of keeping poor black people in check, we should expect new methods to arise once states repeal the legislation—namely, the drug laws—that formerly enabled the authorities to crack down on them. To put it simply, some police, deprived of the opportunity to make large numbers of stops and arrests, would compensate by making a smaller number much more painful for those singled out. A rise in harsh police tactics—like lynching a century ago⁷⁸—would remind black men not to step out of line merely because these laws were no longer in force. Denied the ability to arrest black men and send them to prison for medium-length sentences, some police forces would compensate by imposing on-the-spot, severe, and highly visible punishment on those who mouth off, cross the street at the wrong place, or just act carefree or

2016 wanted to ease mandatory minimum sentences, and several Republican candidates wanted to expand drug treatment as an alternative to prison).

74. Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303 (2015) [hereinafter Delgado & Stefancic, *Southern Dreams*]; Richard Delgado & Jean Stefancic, *Strict Scrutiny and Majoritarian Oppression in an Age of Multi-Group Politics*, 104 CALIF. L. REV. (forthcoming 2016); *infra* Section II.C.3.

75. See *supra* notes 39–40, 59 and accompanying text.

76. See *supra* notes 70–71 and accompanying text.

77. See D. Watkins, Opinion, *In Baltimore, We're All Freddie Gray*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/2015/04/29/opinion/in-baltimore-were-all-freddie-gray.html> [<http://perma.cc/54XD-C4FK>] (“To us, the Baltimore Police Department is a group of terrorists, funded by our tax dollars, who beat on people in our community daily, almost never having to explain or pay for their actions.”); *supra* notes 3–4.

78. See, e.g., ALEXANDER, *supra* note 20, at 30, 37; PEREA ET AL., *supra* note 51, at 149–52; Shaun King, *Five Ugly and Uncanny Parallels Between Lynchings and Police Killings in America*, DAILY KOS (Nov. 13, 2014, 5:42 PM), <http://www.dailykos.com/story/2014/11/13/1344670/-5-ugly-and-uncanny-parallels-between-lynchings-and-police-killings-in-America> [<https://perma.cc/X8AL-U3BS>].

defiant.⁷⁹

This new tool is as unacceptable as its predecessor. The starting point is to realize how and why this approach might be attractive to some of the police. One reason is simple demography. Police officers, like anyone else, realize that the country is rapidly becoming more multicultural and interracial and that by 2044, half the population will be of color.⁸⁰ Because many police officers see themselves as defenders of the current order—meaning white values, well-being, safety, and privilege—this troubles them, shadowing their daily interactions with young men of color.⁸¹

Critical race theorists often incur criticism for being negative and not offering solutions to the problems they highlight.⁸² Thus, before outlining the second social management tool (a renewed southern strategy), we take a few paragraphs to posit a new approach to policing—namely, cops as guardians or even friends. What we sketch below is only the end game, a new regime that should replace the current one. The idea is that it is easier to choose one's strategy if one knows in advance where one would like to end up. Here is where the two of us would like to wind up, and why.

2. A Replacement Style of Policing: Police Officers as Friends

a. The End Game. Suppose you and I are friends, and one day you start doing something out-of-character. Ordinarily, you are socially conscious and law-abiding, but what you are doing now is not only illegal, it is immoral, frightening, and likely to harm innocent people.

What would I do? I would certainly try to talk you out of it. I would physically restrain you if I had to. But I would try not to hurt you because I hope that you will come to your senses and stop doing the thing that is alarming me and others. I would want you to do the same for me if I went off the deep end one day.

79. See *supra* notes 3, 29; see also Jonathan M. Smith, *Police Unions Must Not Block Reform*, N.Y. TIMES (May 29, 2015), <http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html> [<http://perma.cc/BLH6-B5UX>] (noting that, in U.S. Department of Justice investigations of over twenty police departments from 2010 to 2015, “force was much more likely to be used against African-Americans than against whites”).

80. See COLBY & ORTMAN, *supra* note 14; see also Janell Ross, *The United States’ Decreasing Whiteness, in 1 Map*, WASH. POST (Dec. 28, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/28/the-united-states-decreasing-white-ness-in-1-visualization/> [<https://perma.cc/377V-2U2N>]; Jeffrey S. Passel & D’Vera Cohn, *U.S. Population Projections: 2005–2050*, PEW RES. CTR. (Feb. 11, 2008), <http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/> [<https://perma.cc/Q53J-35KP>].

81. See Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [<https://perma.cc/TC78-3MK2>] (“Because officers use more force when they perceive a greater threat, unconscious bias can lead officers to react more aggressively when confronting black men than they would when confronting others in otherwise identical situations.”).

82. See, e.g., Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 77–78 (2014).

Something like that is the model of policing we have in mind. White parents are fond of telling their children that the police are their friends, that if they are lost or in trouble they can approach a police officer and ask for help.⁸³ Minority parents rarely do this, but it would be a good model for everyone, including the police. They should act like they are our friends—not enemies—at least when interacting with members of the community they are policing.⁸⁴ Some departments do, in fact, adopt this model.⁸⁵ More should.⁸⁶

Students of police theory and practice will realize that this proposal is a close relative of community policing.⁸⁷ In our version, the police would communicate with the people in the community—not just the opinion makers and solid citizens, but all of them.⁸⁸ The officers would get out of their cars and walk

83. *E.g.*, MARK BUSCHENA, *POLICE OFFICERS ARE YOUR FRIENDS!* (2013) (conveying this very message, with a cover showing a police officer kneeling next to and smiling at a young blond girl).

84. When the police are not interacting with the members of the community that they are policing, but with an alien outsider force (such as foreign terrorists) or a violent outside group (such as a skinhead gang), they should adopt a more familiar model, namely that of righteous defender. Then they may act much as a member of the armed forces would—deploy force to repel or disable the invader. *See* U.S. ARMY, *FOUNDATIONS OF LEADERSHIP: MSL II* 138–49 (2008) (describing an overarching commitment to a “warrior ethos” and courage even under pressure in defense of mission and country).

85. *See* J. David Goodman, *In New York, Testing Grounds for Community Policing*, N.Y. TIMES (Aug. 23, 2015), <http://www.nytimes.com/2015/08/24/nyregion/for-new-york-police-a-radical-change-for-queens-residents-a-step.html> [<https://perma.cc/5QG3-5M85>]; Tom Casady, *Community Based Policing*, LINCOLN POLICE DEP’T, <https://www.lincoln.ne.gov/city/police/cbp.htm#> [<https://perma.cc/6GCA-V989>]; *see also* Al Baker, *Police Leaders Unveil Principles Intended to Shift Policing Practices Nationwide*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/30/nyregion/police-leaders-unveil-principles-intended-to-shift-policing-practices-nationwide.html> [<https://perma.cc/5HRK-NAT4>] (describing meeting of 200 police officials that led to proposals to reform current practice, including de-escalating police-community interactions and reducing the use of force); Al Baker, *U.S. Police Leaders, Visiting Scotland, Get Lessons on Avoiding Deadly Force*, N.Y. TIMES (Dec. 11, 2015), <http://www.nytimes.com/2015/12/12/nyregion/us-police-leaders-visiting-scotland-get-lessons-on-avoiding-deadly-force.html> [<https://perma.cc/6GPL-DYBB>] [hereinafter Baker, *Visiting Scotland*] (reporting on a delegation of American law enforcement leaders’ visit to Scotland to learn how police in that country avoid resorting to deadly force).

86. *See* Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html> [<http://perma.cc/J25W-ULRS>] (“[A] small but vocal set of law enforcement officials are calling for a rethinking of . . . axioms that have emphasized how to use force, not how to avoid it.”). It is worth noting that community policing is no guarantee that a police department will avoid an attack by a misguided or psychotic individual. *See* Radley Balko, *What the Dallas Police Department Does Right—and Why Doing Those Things Could Now Be More Difficult*, WASH. POST (July 8, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/07/08/what-dallas-pd-does-right-and-why-doing-those-things-could-now-be-more-difficult/> [<https://perma.cc/6NY6-24VF>].

87. *See* Delgado, *supra* note 13, at 1195–203 (discussing this and other models of policing); Editorial, *Mayor de Blasio’s Reversal on More Police*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/25/opinion/mayor-de-blasios-reversal-on-more-police.html> [<https://perma.cc/3LA3-996P>] (boosting this form of policing); Baker, *Visiting Scotland*, *supra* note 85 (same). Community policing is the polar opposite of broken windows policing, in which the cops crack down on even minor violations such as loitering, panhandling, writing graffiti on walls, or urinating in alleyways. *See* Delgado, *supra* note 13, at 1202. If one cleans up signs of neglect and disorder, the theory holds, the real criminals will leave and go somewhere else. *See id.*

88. *See* Baker, *Visiting Scotland*, *supra* note 85 (discussing how Scottish police often opt to “take a step back and talk to people, because it works”); *see also* *Charleston’s Mayor on Confronting Racism*

around. As in the standard approach, they would make a point of getting to know the responsible members of the neighborhood—the minister, postal carrier, teacher’s aide, and the retired lady who keeps watch from her window and knows everything that goes on outside. They would hold regular meetings at a neighborhood school, community center, or church to hear the community’s concerns. Perhaps an abandoned building is starting to turn into a crack house. Perhaps a small group of teenagers has been congregating on a certain corner, and the lady at the window knows they are up to no good.

They would befriend the little kids, as well. They would invite the young children into their patrol cars and let them turn on the siren and flashing lights. They would take pains to get to know the teenagers who hang out on porches or street corners and talk to them by name: “Hey, Marvin, how’s that hook shot of yours?” “Keyshawn, it’s almost eight o’clock. Are you going to make it to school on time today? Your mom is going to kill you if you don’t.” They would operate out of small, decentralized offices located in every neighborhood, not out of a large, imposing building three miles away.⁸⁹ If the community desires establishment of a citizen review board, they would not oppose it.⁹⁰

This form of policing is more expensive than one in which the cops cruise in their cars waiting for calls from the dispatcher and then rush in hoping to make an arrest.⁹¹ But some big-city departments practice and swear by it.⁹² Even tough-minded officers concede that a suspect who is not angry is easier to control than one who is.⁹³ The same is true for communities. It is much easier to police a community that is not constantly up in arms over mistreatment of innocent youth and men, that reports crime willingly, that warns police officers of dangerous situations and persons, and that views the police as allies, not enemies.⁹⁴

with *Honesty*, PBS NEWSHOUR (June 24, 2015, 6:30 PM), <http://www.pbs.org/newshour/bb/charlestons-mayor-confronting-racism-honesty/> [<https://perma.cc/6MH4-E63E>] (noting that police in Charleston aim to serve citizens in part through good communication).

89. See Casady, *supra* note 85 (describing police department’s decentralized decision making approach and narrow geographic responsibility and assignments).

90. See Noam Scheiber, *Police Struggle with Loss of Privileged Position*, N.Y. TIMES (May 5, 2015), <http://www.nytimes.com/2015/05/06/us/police-struggle-with-loss-of-privileged-position.html> [<https://perma.cc/D6AA-D4B4>] (discussing a police union’s campaign against approval of a civilian oversight board in St. Louis and noting that “amid a rash of high-profile encounters involving allegations of police overreach . . . the political context in which the police unions have enjoyed a privileged position is rapidly changing”). See generally Kevin King, *Effectively Implementing Civilian Oversight Boards to Ensure Police Accountability and Strengthen Police-Community Relations*, 12 HASTINGS RACE & POVERTY L.J. 91 (2015) (discussing civilian review board models).

91. Keli Goff, *How to Solve the Policing Crisis*, DAILY BEAST (Jan. 5, 2015, 5:45 AM), <http://www.thedailybeast.com/articles/2015/01/05/the-way-to-solve-the-policing-crisis.html> [<https://perma.cc/EZ93-X5JB>].

92. See *supra* note 85.

93. See *Re: Prison Planet*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/12/magazine/re-prison-planet.html> [<http://perma.cc/37AS-HM5G>] (“[T]reating prisoners humanely . . . makes a guard’s job easier.”).

94. See *infra* notes 106–11 and accompanying text.

Currently, a we–they attitude prevails in which the police believe civilians simply do not understand what things are like on those mean streets.⁹⁵ They believe the bad guys only understand force.⁹⁶

Over time, this mindset can become self-reinforcing, attracting certain personality types to police jobs—those who relish law and order, are highly moralistic, see things in black and white, and welcome the opportunity to stamp out behavior that they think threatens majoritarian values.⁹⁷ Once in uniform, such authoritarian personality types can be walking time bombs, just waiting for the opportunity to unleash deadly force against someone.⁹⁸ But one should want police officers who have the opposite inclination. One wants someone who, like a friend with a buddy who has gone haywire, will do the least amount of damage consistent with restoring the situation to one everyone can live with.

95. See DAVID A. HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* 105–08 (2012) (describing “an unfortunate feeling among police that ‘it’s us’ (our fellow police officers) ‘versus them’ (the public, the bosses—really, everyone else)”); Sunil Dutta, *I’m a Cop: If You Don’t Want to Get Hurt, Don’t Challenge Me.*, WASH. POST (Aug. 19, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/> [<https://perma.cc/C35N-7G7F>] (“An average person cannot comprehend the risks and has no true understanding of a cop’s job.”); Julie Hirschfeld Davis & Michael D. Shear, *Obama Puts Focus on Police Success in Struggling City in New Jersey*, N.Y. TIMES (May 18, 2015), <http://www.nytimes.com/2015/05/19/us/politics/obama-to-limit-military-style-equipment-for-police-forces.html> [<https://perma.cc/7NWJ-LY86>] (quoting a sheriff stating that academic elites “did not understand the world that many police officers operate in daily” and “what goes on at ground level in these often difficult situations”).

96. See Apuzzo, *supra* note 86 (noting that the typical police cadet receives fifty-eight hours of training on how to use a gun and forty-nine hours on defensive tactics, but only eight hours learning to calm situations before force is needed); Spencer Kimball, *Violence, Poverty and Militarized Police in America*, DEUTSCHE WELLE (May 24, 2014), <http://www.dw.com/en/violence-poverty-and-militarized-police-in-america/a-18462473> [<https://perma.cc/4Q3L-T5XG>] (“[M]any law enforcement agencies have increasingly adopted a ‘warrior’ mentality as they’ve acquired military equipment, viewing the people they serve and protect as potential enemies.”); see also Dutta, *supra* note 95 (noting the hair-trigger reaction of many cops to the slightest hint of noncompliance).

97. See Richard Delgado, *Authoritarianism: A Comment*, 13 *RUTGERS RACE & L. REV.* 65, 72–73 (2012). See generally T. W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950) (explaining and describing this personality type); BRUNO BETTELHEIM & MORRIS JANOWITZ, *SOCIAL CHANGE AND PREJUDICE* (1964) (same). Police departments need to be watchful for this personality type and screen it out in the application process. Some people find police work so attractive that if they cannot pass the test, they instead serve as volunteer deputies, crossing guards, neighborhood watchmen, or participants in ride-along programs that enable them to feel like police officers for a few hours. See, e.g., Lizette Alvarez & Carla Buckley, *Zimmerman is Acquitted of Killing Trayvon Martin*, N.Y. TIMES (July 14, 2013), <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<http://nyti.ms/181oT6a>] (describing the case of a neighborhood watch volunteer who shot an unarmed black youth while patrolling his neighborhood). Some even impersonate the police, outfitting their personal cars with lights and sirens and rigging themselves in official-looking uniforms and badges. See Elahe Izadi, *Florida Man Pretending to be a Cop Tried Pulling Over Two Detectives, Police Say*, WASH. POST (Apr. 14, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/14/florida-man-pretending-to-be-a-cop-tried-pulling-over-two-detectives-police-say/> [<http://perma.cc/S24X-Q9P6>].

98. For a recent example of authoritarian policing, see Abby Phillip, *Indian Grandfather Slammed to the Ground by Cop Wasn’t a Threat, Fellow Officer Says*, WASH. POST (Sept. 3, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/09/03/indian-grandfather-slammed-to-the-ground-by-cop-wasnt-a-threat-fellow-officer-says/> [<https://perma.cc/3ULT-PLAY>].

Currently, police culture emphasizes control.⁹⁹ Defiance is a cardinal sin warranting immediate punishment.¹⁰⁰ But in the black community, disrespect is an even greater sin,¹⁰¹ so many police encounters are apt to end badly. Imagine the cop approaches a black youth and says something like “Hey, you, come over here. I want to talk to you.” The youth says, “Hey, man. What you hassling me for? I was just out for a walk with my friends.” Things go downhill from there. Or in an encounter with a Latino youth, the officer says, “Hey kid, get over here. Do you speak English?” The kid says, “Of course I speak English. What’s up?” And things go downhill from there.

No one talks with a friend like that. We need to begin moving toward a different concept of policing. For example, not every policeman or woman needs a gun, at least not all the time.¹⁰² Some police can be, essentially, watchmen, who stand by, offer aid, and intervene only if trouble erupts. All of them can be friends of the communities they serve. In many developed countries, such as Norway and Denmark, police killings are rare, in part because they are trained and expected to act in this fashion—as friends, not enemies of ordinary citizens, even ones with faces or surnames that differ from the norm.¹⁰³ And relatively few people kill their friends. *The New York Times* reported recently that England has not had a fatal shooting by a police officer in two years.¹⁰⁴ During that same period, no officer in that country died from a weapon attack either.¹⁰⁵

Fear-based policing may be a little less expensive than the kind we have been describing.¹⁰⁶ If you and I are friends, and I want you to do something, I will have to talk to you about it, remind you that it is expected, and give you reasons why you really should do it. If I am not your friend but have a badge and a gun, I can simply order you to do it, and most times you will. The cost of this second approach is lower, and I can soon go on to bully the next person. But people treated in this fashion will eventually respond in ways that increase the cost of

99. See Apuzzo, *supra* note 86 (quoting Dallas police chief on how some of his officers “feel like . . . they can’t back down when someone is running from them, no matter how minor the underlying crime is”); Baker, *Visiting Scotland*, *supra* note 85 (quoting a police chief who questioned whether she could implement tactical withdrawal in confrontations, because if she did, “they’re going to say, ‘What happened to Terry Shortell?’”).

100. See Dutta, *supra* note 95 (noting how challenging a police officer’s authority, especially in a direct fashion, can bring down harsh on-the-spot punishment).

101. See generally Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004) (discussing how hip-hop culture embraces this norm).

102. English police follow this practice. See, e.g., Apuzzo, *supra* note 86.

103. See Paul Hirschfield, *Why American Cops Kill so Many Compared to European Cops*, HUFFINGTON POST (Nov. 30, 2015, 7:16 PM), http://www.huffingtonpost.com/entry/american-cops-lethal_us_565cde59e4b079b2818b8870 [https://perma.cc/7SFD-Y8XD]. One reason for the lower rate of police violence in Europe and Scandinavia may be that the civilian population in those societies owns fewer guns. See *id.*

104. See Apuzzo, *supra* note 86.

105. *Id.*

106. See Goff, *supra* note 91.

disrespectful policing¹⁰⁷; subversion of the law,¹⁰⁸ anti-snitching campaigns,¹⁰⁹ rioting,¹¹⁰ jury nullification,¹¹¹ and cop-watching,¹¹² among others. People living in poor communities are not stupid. They will not trust a police department they see as an invading army that devalues them and believes that they are either thugs or thugs-in-waiting.¹¹³

In international relations, it is well known that one way to enjoy peaceful relations with another country is to increase trade and student exchanges.¹¹⁴ The same holds true of policing. The police should, if possible, live in the communities where they work and let their neighbors see them as they go about their lives.¹¹⁵ They should park their police cruisers outside their homes at night in

107. See Delgado, *supra* note 13, at 1194. See generally PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009) (describing many of these approaches as aspects of hip-hop justice).

108. See Regina Austin, "An Honest Living": *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2119–20 (1994) (urging that minorities of color not be too law abiding, especially in connection with minor economic crimes); cf. Editorial, *New York Policing, by the Numbers*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/28/opinion/new-york-city-policing-by-the-numbers.html> [<https://perma.cc/F6F2-TMVM>] (noting that after a federal judge ruled against the city's "stop and frisk" policy, the rate of violent and nonviolent crime dropped as "enforcement actions" declined).

109. See, e.g., Delgado, *supra* note 13, at 1204–05 (discussing these indigenous campaigns that aim to punish those who cooperate with the police).

110. See Watkins, *supra* note 77 ("We are all starting to believe that holding hands, following pastors and peaceful protests are pointless. The only option is to rise up and force [the authorities] to make what should be an easy choice: Stop protecting the livelihoods of the cops who killed Freddie Gray, or watch Baltimore burn to the ground.").

111. See Butler, *supra* note 101, at 1011–13 (discussing, illustrating, and defending jury nullification, which occurs when a juror, often a black person, refuses to vote to convict a young black man if the juror believes that the man would be more valuable to the community free than behind bars, or believes that the prosecution was tinged by bias).

112. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. (forthcoming 2016) (discussing citizen patrols that keep an eye on the police and deeming this a form of "bottom-up" accountability and a vital form of community participation).

113. Imagine that a police officer is arresting a suspect named Rashid in front of twenty-five bystanders. If the bystanders trust that the officer probably knows what he is doing, the bystanders are apt to think and say, "There goes Rashid. He's at it again, always getting into trouble." If the officer (or the entire department) has a poor reputation, the bystanders are apt to think and say, "There goes that cop again. He's always hassling people like Rashid." See Mark Landler, *Obama Offers New Standards on Police Gear in Wake of Ferguson Protests*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/us/politics/obama-to-toughen-standards-on-police-use-of-military-gear.html> [<http://perma.cc/SKV8-BTNE>] (quoting President Obama's comment that there is a "simmering distrust that exists between too many police departments and too many communities of color").

114. See Loren Mooney, *Matthew O. Jackson: Can Trade Prevent War?*, STANFORD GRADUATE SCH. OF BUS. (May 28, 2014), <https://www.gsb.stanford.edu/insights/matthew-o-jackson-can-trade-prevent-war> [<https://perma.cc/G7GB-VXB6>].

115. See Watkins, *supra* note 77 (explaining that a primary reason for police-community conflict in Baltimore "is that many Baltimore police officers don't live in Baltimore City" so they "don't know or care about the citizens of the communities they police"). This pattern is fairly common. In Los Angeles, for example, many police live in middle-income, largely white communities like Simi Valley. See Orith Goldberg, *Home? Not L.A. for Cops—80 Percent of LAPD Officers Reside Outside Los Angeles*, DAILY NEWS L.A., June 24, 2001, at N1. Many San Francisco police officers live outside that city, in blue-collar Pacifica or similar towns in San Mateo County. See Heather Knight, *Guess Where Most S.F. Police Officers and Firefighters Live? Hint: Not Here.*, SFGATE (Apr. 24, 2011, 9:12 AM), <http://blog.sfgate.com>.

full view. They should send their kids to school in the neighborhood where they live, buy their groceries at local stores, and play basketball and work out at the local gym.¹¹⁶

b. How Would We Get There? The Problem of Means. One would begin moving in this direction by changing police recruitment, training, and reward systems. One would look for a different personality type and profile—for mature, conflict-averse pragmatists—and screen out the type of recruit who could easily turn into a “rogue cop.”¹¹⁷ One would hire more women and minorities.¹¹⁸ After hiring carefully vetted individuals, one would train them in many approaches for dealing with antisocial behavior, not just one.¹¹⁹ The reward system would not place a premium on making the largest possible number of arrests, but the smallest, consistent, of course, with maintaining public safety. One would deploy cop-watching, mass protests, jury nullification, negotiation, and other forms of influence (including friends in high places) in order to persuade the authorities to move in this direction.¹²⁰

These measures might not solve many of the structural problems that give rise to unpleasant encounters between citizens and the police, especially in poor communities.¹²¹ But in combination with efforts to end structural racism and class-based disadvantage, they may allow us to begin discussing problems in an

sfgate.com/cityinsider/2011/04/24/guess-where-most-s-f-police-officers-and-firefighters-live-hint-not-here/ [https://perma.cc/5LZ5-W8MD].

116. This may expose officers to risk of harm from citizens looking for revenge—but only if the officer has earned the enmity of the community. If the officer has earned its respect and gratitude, the risk should be no greater than it is for judges, prosecutors, and teachers, many of whom go about their daily lives with no great burden of fear.

117. See Anthony M. DeStefano, *NYPD Looking to Focus on Attracting Kinder, Gentler Recruits, Officials Say*, *NEWSDAY* (Nov. 2, 2015), <http://www.newsday.com/news/new-york/nypd-looking-to-focus-on-attracting-kinder-gentler-recruits-officials-say-1.11049620#> [https://perma.cc/NK6D-9RFW]; Seth Stoughton, Opinion, *A Former Cop on What Went Wrong in McKinney*, *TPM* (June 9, 2015, 10:49 AM), <http://talkingpointsmemo.com/cafe/two-mckinney-cops-former-police-officer-guardian-warrior> [https://perma.cc/B7UN-7NX6].

118. Some departments try to do this now. See Matt Apuzzo & Sarah Cohen, *Police Chiefs, Looking to Diversify Forces, Face Structural Hurdles*, *N.Y. TIMES* (Nov. 7, 2015), <http://www.nytimes.com/2015/11/08/us/politics/police-chiefs-looking-to-diversify-forces-face-structural-hurdles.html> [http://nyti.ms/1iJy2pd]. On the ubiquity of implicit bias in the criminal justice system, including the police, see, for example, Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 *ALA. L. REV.* 871, 881–82, 905–11 (2015).

119. See, e.g., Baker, *Visiting Scotland*, *supra* note 85; Mitch Smith, *Missouri Governor Calls for Improved Police Training*, *N.Y. TIMES* (Aug. 6, 2015), <http://www.nytimes.com/2015/08/07/us/missouri-governor-calls-for-improved-police-training.html> [https://perma.cc/7TJC-9KL5]; Stoughton, *supra* note 81; Lisa H. Thureau, Letter to the Editor, *Training Police in Social and Communication Skills*, *N.Y. TIMES* (July 3, 2015), <http://www.nytimes.com/2015/07/04/opinion/training-police-in-social-and-communication-skills.html> [https://perma.cc/SH48-DYPS]; Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, *N.Y. TIMES* (June 27, 2015), <http://www.nytimes.com/2015/06/28/us/longtaughttouseforcepolicewarilylearntodeescalate.html> [https://perma.cc/NHF5-ZHPF].

120. See *supra* notes 107–11 and accompanying text.

121. For example, poverty, inadequate child care and nutrition, and inadequately funded schools will continue to concentrate crime in poor neighborhoods until society tackles the underlying problems.

atmosphere less fraught with hatred and suspicion. Advocating such a course would be a more fitting end to a book like *The New Jim Crow*, which currently ends with a denunciation of university-level affirmative action.¹²² A more satisfying conclusion also would have considered incarceration and conservatives' manipulation of relations between Latinos and blacks.¹²³

3. The New Southern Strategy

Earlier, we mentioned that oppression of one group will often turn out to be so closely linked to that of another that relief requires responding broadly to both.¹²⁴ In the early 1960s, for example, Nixon's Republican Party devised what is now known as the southern strategy in an effort to counter the influence of the civil rights movement, which had found a political home in the Democratic Party.¹²⁵ By championing this movement, the Democrats had secured the loyalty of most minorities and many white liberals. In response, the Republicans circulated the myth that gains for blacks came at the expense of working-class whites, many of whom until then had reliably voted Democratic because of that party's longstanding support of labor and workers' rights.¹²⁶ The maneuver was successful. Nixon won the election in 1968, and many southern states, which had previously maintained Democratic majorities, became solidly Republican and have remained so to this day.¹²⁷ It has only been comparatively recently that the Democratic Party has made renewed efforts to back consumer protection, college loan relief, national health insurance, and other measures close to the heart of the middle and working classes.¹²⁸

Fifty years later, the conservative wing of the Republican Party faces a slightly different, but equally acute, predicament stemming from the growth of minority groups, especially Latinos, whose numbers have grown rapidly and now surpass those of blacks.¹²⁹

122. See *supra* note 33 and accompanying text.

123. See *infra* Part III and Section II.C.3.

124. See *supra* Section II.B.

125. See ALEXANDER, *supra* note 20, at 43–44; KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* xxi–xxiv (Princeton Univ. Press, The James Madison Library in Am. Politics ed. 2015) (1969); Joshua Green, *Birth of the Southern Strategy*, BLOOMBERG BUS. WK. (Dec. 4, 2014, 7:59 AM), <http://www.bloomberg.com/news/articles/2014-12-04/birth-of-the-southern-strategy> [<https://perma.cc/7WED-NJWY>]; Ian Haney-López, *How the GOP Became the "White Man's Party"*, SALON (Dec. 22, 2013, 12:00 PM), http://www.salon.com/2013/12/22/how_the_gop_became_the_white_mans_party/ [<https://perma.cc/7DWY-DXZH>].

126. See ALEXANDER, *supra* note 20, at 45; see also Haney-López, *supra* note 125 (explaining that this effort marked the rise of “dog whistle politics”).

127. See *How Red or Blue is Your State?*, THE HILL (Oct. 24, 2014, 6:00 AM), <http://thehill.com/blogs/ballot-box/house-races/221721-how-red-or-blue-is-your-state> [<https://perma.cc/S8FJ-T7ZD>].

128. See Kevin Carey, *A Quiet Revolution in Helping Lift the Burden of Student Debt*, N.Y. TIMES (Jan. 24, 2015), <http://www.nytimes.com/2015/01/25/upshot/a-quiet-revolution-in-helping-lift-the-burden-of-student-debt.html> [<https://perma.cc/8ARK-UHWV>]; see also *Our Platform: The 2012 Democratic Platform*, DEMOCRATS, <https://www.democrats.org/party-platform> [<https://perma.cc/8BWM-22DL>] (outlining the party's support for many of these measures).

129. See COLBY & ORTMAN, *supra* note 14, at 9.

If Latinos, who reliably vote Democratic,¹³⁰ continue to increase in numbers and form an alliance with blacks, the future prospects of the Republican Party—as currently constituted—will dim. Accordingly, Republicans are quietly putting into effect a new version of the southern strategy, urging aggressive enforcement of immigration laws while intimating to African-Americans that Latino gains come at their expense.¹³¹ This is generally not true,¹³² but it has a superficial plausibility that lends it a false air of credibility.

Republican elites have a second objective, however, which they keep hidden: to eliminate the social safety net—including food stamps, Medicare, Medicaid, and welfare—particularly for blacks, whom many consider undeserving.¹³³ They would like to force these blacks back to work, especially at jobs that they currently find unattractive, such as performing domestic labor.¹³⁴ For this to be feasible, however, conservatives must first reduce the number of Latinos, many of whom are eager to fill these jobs.¹³⁵

Reduction of Latino numbers, then, will serve two purposes: it will reduce the number of Democratic voters, while enabling conservatives to cut welfare for blacks, thus pleasing some of their white supporters. This new southern strategy is currently in its early stages. If blacks and their supporters fail to recognize it and mistakenly deem Latinos their competitors and enemies, they will find that once this group is dispatched, their own fate will be far worse than before.¹³⁶

130. Frank Newport & Joy Wilke, *Hispanics of All Ages Tilt Democratic*, GALLUP (July 15, 2013), <http://www.gallup.com/poll/163451/hispanics-ages-tilt-democratic.aspx> [<https://perma.cc/S6HS-FEG2>].

131. See Delgado & Stefancic, *Southern Dreams*, *supra* note 74, at 337–43; Suzanne Gamboa, *GOP: Illegal Immigrants Taking Minorities' Jobs*, NBC NEWS.COM (Mar. 2, 2011, 8:54 AM), http://www.nbcnews.com/id/41866272/ns/politics-capitol_hill/t/gop-illegal-immigrants-taking-minorities-jobs/#.Vq6cNk3cjIU [<https://perma.cc/8V92-YZ7N>].

132. See Delgado & Stefancic, *Southern Dreams*, *supra* note 74, at 339–40. Latino immigrants take relatively few “black jobs” because they have different skills and credentials than do African-Americans and are looking for different kinds of work. See Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES (July 9, 2006), <http://www.nytimes.com/2006/07/09/magazine/09IMM.html> [<https://perma.cc/ZR2X-PU87>]. The principle of complementarity holds that the arrival of a large number of immigrants with few years of formal education in a community generally creates jobs for working-class whites and African-Americans because “a surplus in one part of the production scheme raises the demand for every other one.” *Id.*

133. See Delgado & Stefancic, *Southern Dreams*, *supra* note 74, at 340; Lowenstein, *supra* note 132; Michael Tomasky, *Trump*, N.Y. REV. BOOKS (Sept. 24, 2015), www.nybooks.com/articles/2015/09/24/trump/ [<https://perma.cc/3Q6H-5KJB>] (noting that Republicans resent the “moocher class”).

134. See Delgado & Stefancic, *Southern Dreams*, *supra* note 74, at 342 (noting that these jobs are unattractive because they are associated with slavery).

135. See *id.* at 341–43.

136. That is, welfare, low-income health clinics, and family income supports will be cut; to avoid destitution, African-American poor will have to perform hard, low-status labor of a type that Latinos largely now carry out, such as construction, crop picking, or meat processing—jobs that are unattractive to blacks inasmuch as they carry connotations of slavery and Jim Crow. See *id.*

III. MASS INCARCERATION ON TRIAL: THE PROBLEM OF EXCESS IMPRISONMENT

In addition to heavy-handed policing, excessive imprisonment is a source of misery for African-Americans and other minorities. Alexander addresses this subject only briefly in *The New Jim Crow*. A different body of writing addresses it head-on.¹³⁷ The American system of mass incarceration, Jonathan Simon writes in *Mass Incarceration on Trial*, is urgently in need of reform.¹³⁸ Our prisons house over two million inmates, a much larger percentage of the population than that of any other country.¹³⁹ Overcrowded and lacking in the most basic necessities—including treatment for obvious physical and mental disorders¹⁴⁰—the nation's prisons are a calamity and a disgrace.¹⁴¹ They are also costly, nearly bankrupting several states.¹⁴² Inadequately staffed and monitored, the prisons are dens of violence, brutality, and rape.¹⁴³ The real authorities are gangs.¹⁴⁴

Simon echoes many of the same themes as Alexander, but focuses on a later point in the penal process, namely what happens after arrest and conviction. For instance, as with certain police practices,¹⁴⁵ prisons, particularly private ones, are profitable, giving rise to an industry with a reward system and momentum of

137. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (discussing prisons as institutions of control); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001) (collecting essays by prominent social scientists); SIMON, *supra* note 27 (reviewing the rise of mass incarceration, especially in California, and calling for reforms); CALEB SMITH, *THE PRISON AND THE AMERICAN IMAGINATION* (2009) (discussing prison in myth and literature); WACQUANT, *supra* note 25 (positing that the increasing use of criminal enforcement dismantles the welfare state and keeps poor people under control).

138. See SIMON, *supra* note 27, at 1–3; see also Jeannie Suk, 'Incarceration Nations,' by Baz Dreisinger, N.Y. TIMES (Feb. 19, 2016), <http://www.nytimes.com/2016/02/21/books/review/incarceration-nations-by-baz-dreisinger.html> [<http://perma.cc/ER5S-AKDJ>] (calling the United States "the world's top jailer," with the longest sentences and "shocking racial disparities in imprisonment rates").

139. See Rakoff, *supra* note 6 (putting the number at 2.2 million); see also Editorial, *Too Many Behind Bars*, WASH. POST (Oct. 25, 2015), https://www.washingtonpost.com/opinions/too-many-behind-bars/2015/10/25/74330486-687e-11e5-9223-70cb36460919_story.html [<https://perma.cc/3VM3-74LL>] (noting that the United States would still have the highest per capita incarceration rate in the world even if all drug offenders were released); Marc Mauer & David Cole, Opinion, *How to Lock up Fewer People*, N.Y. TIMES (May 23, 2015), <http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html> [<http://perma.cc/BRK5-KRJ4>] (noting that the United States would still have 1.7 million prisoners even if those imprisoned for drugs were released).

140. SIMON, *supra* note 27, at 6–7.

141. See *id.* at 5–6; Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 17, 2015), <http://www.nytimes.com/2015/07/17/us/obama-el-reno-oklahoma-prison.html> [<http://perma.cc/C8P5-GFEH>]; Berman, *supra* note 5.

142. See Mauer & Cole, *supra* note 139; see also ALEXANDER, *supra* note 20, at 14 ("Many of the states that have reconsidered their harsh sentencing schemes have done so . . . out of concern for bursting state budgets in a time of economic recession."); Rakoff, *supra* note 6 (noting that "it costs more than \$80 billion a year to run our jails").

143. See SIMON, *supra* note 27, at 4, 60–62.

144. *Id.* at 50–57 & 181 n.11, 182 n.19.

145. E.g., Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger> [<https://perma.cc/D93K-NCSA>]. Recent investments by local law enforcement in paramilitary equipment such as armored vehicles and helicopters are also profitable for those in the business of supplying such

its own.¹⁴⁶ Unlike Alexander, Simon concludes on a hopeful note by discussing prison reform cases that promise to mitigate some of the worst abuses.¹⁴⁷ With exposure and attention, society can temper the rush to punish and find better ways of dealing with poverty and other deep-seated social ills.¹⁴⁸

Alexander may have set the stage for Simon. After *The New Jim Crow* appeared in print, several states began reconsidering mass incarceration.¹⁴⁹ Simon's book can only accelerate that trend. It shows how society gets little for its lock-up money; indeed, most inmates emerge angrier and more hardened than when they entered.¹⁵⁰ The system also debases human dignity,¹⁵¹ setting the stage for atrocities by other social institutions such as the military.¹⁵²

California's prison system, for example, was so overcrowded that the U.S. Supreme Court ordered the state to take remedial action.¹⁵³ Earlier, a federal district court had ordered it to bring prison medical services up to a decent level.¹⁵⁴ Simon sees in these and other cases a ray of hope. Although many proceed under the Eighth Amendment clause prohibiting cruel and unusual

equipment. See Apuzzo, *supra* note 16 (noting the rise in cities' use of federal grant money to purchase heavy material).

146. See CHRISTOPHER HARTNEY & CAROLINE GLESMANN, NAT'L COUNCIL ON CRIME & DELINQUENCY, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. (2012), http://www.nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf [<https://perma.cc/78TK-DVQL>]; SIMON, *supra* note 27, at 44–45; Rakoff, *supra* note 6; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<https://perma.cc/8GMT-U7AC>].

147. See SIMON, *supra* note 27, at 170–72. Alexander's book ends less cheerily, but does note, citing Martin Luther King Jr., that "the arc of history . . . bends toward justice." ALEXANDER, *supra* note 20, at 247.

148. See SIMON, *supra* note 27, at 7–132 (discussing a line of prison reform cases); see also Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), <http://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> [<http://perma.cc/94S3-F2UR>] (discussing a recent effort to reform a maximum-security prison and describing it as "the crest of a wave" of scrutiny of excessive solitary confinement). For a related avenue that activists pursue to reform wayward police departments—namely "structural reform litigation" under a federal statute authorizing the U.S. Department of Justice to intervene—see generally Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015).

149. See Mauer & Cole, *supra* note 139. The police and prison reform movements exhibit parallels because of the common forces—including antiminority animus and the desire to control dissent—that create the need for them. See ALEXANDER, *supra* note 20, at 3–4.

150. See Coates, *supra* note 10. Or, if not angry, then the inmates emerge devoid of hope. See SIMON, *supra* note 27, at 124–26 & 190–91 n.24, 165 (discussing recidivism); Mauer & Cole, *supra* note 139 (noting that many prisoners re-offend within three years).

151. See SIMON, *supra* note 27, at 133–54.

152. See *id.* at 21–22, 60–61 (linking unpopular wars with public disgust over crime and drawing a comparison between U.S. prison conditions and those that prevail at Guantanamo Bay and other sites of human torture).

153. See *Brown v. Plata*, 563 U.S. 493, 543–45 (2011). California had instituted mass incarceration based on the conviction that crime was out of control and that only total incapacitation could counter it. See SIMON, *supra* note 27, at 17–46.

154. *Coleman v. Wilson*, 912 F. Supp. 1282, 1296–97, 1323 (E.D. Cal. 1995) (summarizing findings and ordering California authorities to carry out certain remedial measures); see also SIMON, *supra* note 27, at 73–85 (discussing *Coleman*).

punishment, Simon believes that a new, more general prohibition is emerging against treating offenders in a manner that degrades their fundamental humanity.¹⁵⁵ If so, prison conditions such as lack of medical treatment, solitary confinement, inadequate opportunities for learning and recreation, and pervasive rape and violence would become violations of fundamental human rights—rights inherent in human dignity.¹⁵⁶

Such an approach, Simon writes, would reject the reasoning of earlier judicial rulings that denied relief merely because punishment was a state prerogative or because releasing felons into society after a short term would be too risky.¹⁵⁷ It would prohibit treating mentally ill inmates with physical restraints, high doses of psychiatric medication, and solitary confinement merely because if allowed to mingle with the other inmates, some of them might cause trouble or require extra attention from the staff.¹⁵⁸

In close cases, the approach would draw on decisions establishing a right against cruel and unusual punishment¹⁵⁹ or look to international human rights law and the experience of other nations for guidance.¹⁶⁰ It would evoke “empathy, a feeling of ‘There but for the grace of God go I.’”¹⁶¹ It would make “the visible suffering of people the focus and rationale for political arguments and legal institutions.”¹⁶² As Simon explains: “Mass imprisonment must end. It endangers human dignity. It is a violation of human rights It does not protect public safety. The human dignity of prisoners . . . provides our best guide going forward as we reimagine criminal justice”¹⁶³ This new approach to punishment would be less pessimistic¹⁶⁴ and would feature smaller, more specialized prisons,¹⁶⁵ shorter sentences,¹⁶⁶ and more opportunities for

155. See SIMON, *supra* note 27, at 2–3, 8–9, 15–16, 70, 133–37, 140–56, 160, 165–72.

156. See *Brown*, 563 U.S. at 510–11 (“Prisoners retain the essence of human dignity A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”); see also SIMON, *supra* note 27, at 165–67 (noting “the ascendance of dignity as a constitutional value within the legal system” and that “we must examine the crisis of mass incarceration for what dignity might mean as a legal value today”). Simon describes some of these conditions in horrifying detail. See SIMON, *supra* note 27, at 109–32. Recently, editorial boards and national leaders have been speaking out against practices such as solitary confinement. See, e.g., Editorial, *President Obama Speaks Out on Solitary*, N.Y. TIMES (Feb. 2, 2016), <http://www.nytimes.com/2016/02/02/opinion/president-obama-speaks-out-on-solitary.html> [<https://perma.cc/82SP-NK3D>].

157. SIMON, *supra* note 27, at 43–44, 156–58.

158. See *id.* at 52, 143–44. Recent federal cases reject solitary confinement for mere disordered behavior. See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1279–80 (N.D. Cal. 1995) (rejecting extreme solitary confinement for inmates who are mentally ill).

159. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239 (1972); *Trop v. Dulles*, 356 U.S. 86, 103 (1958); see also SIMON, *supra* note 27, at 137–40, 171.

160. See SIMON, *supra* note 27, at 137, 140–41, 166.

161. *Id.* at 149.

162. *Id.*

163. *Id.* at 172.

164. See *id.* at 156.

165. *Id.* at 161.

166. *Id.*

inmates to work, take classes, and receive needed medical attention.¹⁶⁷

Simon's proposals would begin to bring U.S. penal practice in line with enlightened practice in the rest of the world. They would reduce the impact of incarceration on minority communities, help former felons reintegrate into the public world, and save money that society needs for other purposes. Whether lawmakers will heed his call in the face of popular tough-on-crime sentiment, however, remains to be seen.

IV. LITIGATING THE RIGHTS OF THE CONFINED: A GUIDELINE FOR COURTS AND REFORMERS

Like Alexander's book, *Mass Incarceration on Trial* issues a call for reform that most reasonable readers would agree is in order. If it has a flaw, it is that it is overly sanguine about the role that courts are likely to play in revising a system with which the majority of the public has little quarrel.¹⁶⁸ For many citizens, law and order is a more pressing concern than humane treatment for offenders.¹⁶⁹ Judges are thus unlikely to order sweeping relief, and even when they do, penal authorities might not follow their lead wholeheartedly.¹⁷⁰ Litigation works best when accompanied by a powerful social movement, which is currently absent.¹⁷¹

Developing a simple, easily understood guideline, rather than advocating change under an amorphous principle such as human dignity, might be a good start. We propose that no one convicted of an offense be made to suffer more

167. *Id.* at 160–61; see also John J. Lennon, Opinion, *Let Prisoners Take College Courses*, N.Y. TIMES (Apr. 5, 2015), <http://www.nytimes.com/2015/04/05/opinion/sunday/put-schools-back-in-prison.html> [<http://perma.cc/XQA4-MY2Q>] (urging prison classes as a means of easing prisoners' re-entry into civilian society); Nancy Joseph, *UW Students Join Their Classmates in Prison*, UNIV. OF WASH. COLL. OF ARTS & SCI. (Apr. 2014), <https://artsci.washington.edu/news/2014-04/uw-students-join-their-classmates-prison> [<https://perma.cc/75YF-JRDM>] (describing an experiment in which university students enrolled in classes in a prison and competed with inmates for grades). Some authorities urge higher education for inmates. See Editorial, *A College Education for Prisoners*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/16/opinion/a-college-education-for-prisoners.html> [<http://perma.cc/J8HG-CCJE>].

168. See SIMON, *supra* note 27, at 163–64: (“The *Brown v. Plata* three-judge court’s recommendations . . . [are] a tool kit for this reinvention; it’s already being used in California[] . . . and can be employed elsewhere. . . . Today . . . a degree of optimism about crime prevention runs across the system.”).

169. See ALEXANDER, *supra* note 20, at 54–55 (discussing the popularity of “law and order” and “tough on crime” slogans that have enjoyed broad support); SIMON, *supra* note 27, at 11 & 175 n.23, 21–25, 82–83, 156–57 (same).

170. See Chemerinsky, *supra* note 31 (noting that the Supreme Court has favored the law enforcement position even if it entailed protecting bad cops); Rakoff, *supra* note 6 (“It is probably too much to ask state judges in the thirty-seven states where judges are elected to adopt a position that could be characterized as ‘soft on crime.’”). See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d. ed. 2008) (discussing how judicial decrees encounter difficulties in effecting social change).

171. A recent example of such a movement would be Black Lives Matter. See, e.g., Editorial, *The Truth of ‘Black Lives Matter’*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html> [<http://perma.cc/7LR2-KDM8>].

than the degree of suffering he has created in acting as he did. This principle would be attractive even to cautious judges attuned to public opinion. And it would be relatively simple to apply. For example, a taxpayer who underreported his income to the tune of \$250 should not be fined \$50,000, even to send a message to others who might be thinking of doing the same.¹⁷² An inmate who has been rowdy in the mess hall or disrespectful to guards should not be confined in solitary conditions for several years. The disintegration of the human personality that accompanies long periods in isolation with no human contact or reading material exceeds in severity the misbehavior that prompted the reassignment.¹⁷³

In addition to imposing shorter, more carefully calibrated sentences—and eliminating them entirely for most nonviolent crimes—policymakers should pay attention to the conditions of confinement. For example, prison education reduces recidivism and should be liberally available to any inmate interested in it, even those who are imprisoned for short terms.¹⁷⁴ Long term solitary confinement produces profound losses akin to those seen in connection with human torture and should be abolished.¹⁷⁵ Even President Obama and one member of the Supreme Court have weighed in against it recently, noting that it does not make society safer to treat inmates in this fashion.¹⁷⁶ States should reduce the number of those incarcerated for nonviolent offenses and rely on noncarceral alternatives whenever possible—some are doing this already.¹⁷⁷ They should reduce the number of harsh collateral consequences that follow a

172. General deterrence—the theory that severe punishment of the occasional criminal caught in the act is justifiable to inspire fear in others who might be tempted to do the same thing—violates the principle of respect for persons by treating offenders as a means to an end, rather than as ends themselves. See generally Robert Johnson, *Kant's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 6, 2008), <http://plato.stanford.edu/entries/kant-moral/> [https://perma.cc/3RGR-BZZ6] (discussing Immanuel Kant's categorical imperative).

173. See, e.g., Editorial, *supra* note 156.

174. See Michelle Chen, *Prison Education Reduces Recidivism by over 40 Percent. Why Aren't We Funding More of It?*, NATION (Aug. 17, 2015), <http://www.thenation.com/article/prison-education-reduces-recidivism-by-over-40-percent-why-arent-we-funding-more-of-it/> [https://perma.cc/XYZ8-A7FD]; Lennon, *supra* note 167.

175. See, e.g., Editorial, *supra* note 156; Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html> [https://perma.cc/A9DR-UHP6]. Short periods of solitary confinement—similar to the brief “time outs” in use in schools and child-care centers—would still be permitted.

176. See Peter Baker & Erica Goode, *Critics of Solitary Confinement are Buoyed as Obama Embraces Their Cause*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html> [http://perma.cc/PT6G-BXFFV].

177. See Erik Eckholm, *How to Cut the Prison Population (See for Yourself)*, N.Y. TIMES (Aug. 11, 2015), <http://www.nytimes.com/2015/08/12/upshot/how-to-cut-the-prison-population-see-for-yourself.html> [http://perma.cc/6ZCK-SNPZ]; Editorial, *Legislature Needs to Escape Traditional Thinking on Criminal Justice Policy*, SEATTLE TIMES (July 26, 2015, 4:03 PM), <http://www.seattletimes.com/opinion/editorials/legislature-needs-to-escape-traditional-thinking-on-criminal-justice-policy/> [https://perma.cc/852F-CCPN]; Joseph Lehman & David Keenan, Opinion, *Alternatives to Reform Prisons to Reduce Outsourcing and Reoffending*, SEATTLE TIMES (July 7, 2015, 5:35 PM), <http://www.seattletimes.com/opinion/alternatives-to-reform-prisons-to-reduce-outsourcing-and-reoffending/> [https://perma.cc/BUV8-T2R8].

released felon and blight his or her chances in subsequent life, including unreasonable conditions of parole and probation.¹⁷⁸

CONCLUSION

Policing and punishment respond to basic human drives (for safety and retribution, respectively) and social imperatives. They need to be considered together and on a large scale; neither is exceptional, warranting treatment under principles intrinsic to it alone. We should start with basic principles of human interaction, including respect and friendship. Books like those we discussed in this Article are good starting points—among the best of those emerging from the current crisis. But scholars and policymakers should take into account how society treats all minority groups; how reform litigation needs to proceed in tandem with public mobilization; and how both litigation and popular advocacy require simple, easily grasped benchmarks such as proportionality in punishment. Society treats many of its members inhumanely—we operate many prison systems, not just one. Each form of Jim Crow requires separate, careful treatment. These works are merely a start in a long campaign.¹⁷⁹

178. See Jain, *supra* note 40 (listing deportation, eviction, loss of a professional license, and loss of custody as potential consequences); Berman, *supra* note 5 (“There are certain states where you cannot become a barber if you have a criminal record. We are creating a situation where people have nowhere to go but a life of crime.”); Shaila Dewan, *Probation May Sound Light, but Punishments Can Land Hard*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html> [<http://perma.cc/2LGC-CUS9>] (“[E]ven a supposedly light punishment like probation can severely disrupt a working-class life and weigh heavily on its prospects.”).

179. See SIMON, *supra* note 27, at 1 (noting that rates of imprisonment have slightly declined and that society may be poised for change); see also Thabiti Anyabwile, *A Call for Hope in the Age of Mass Incarceration*, ATLANTIC (Sept. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/09/why-there-needs-to-be-more-hope/404977/> [<https://perma.cc/48YT-AG8C>] (encouraging scholars who write about racial problems to offer solutions, not just bleak analysis of current predicaments).

