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The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration

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THE NEW JIM CROW?
RECOVERING THE PROGRESSIVE ORIGINS OF
MASS INCARCERATION

ANDERS WALKER[♦]

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 1 |
| I. JIM CROW'S PROGRESSIVE ROOTS | 5 |
| II. THE STRANGE CAREER OF STOP AND FRISK..... | 11 |
| III. THE LIBERAL WAR ON DRUGS | 18 |
| IV. THE LIBERAL WAR ON GUNS..... | 23 |
| CONCLUSION | 27 |

ABSTRACT

This article revisits the claim that mass incarceration constitutes a new form of racial segregation, or Jim Crow. Drawing from historical sources, it demonstrates that proponents of the analogy miss an important commonality between the two phenomena, namely the debt that each owe to progressive and/or liberal politics. Though generally associated with repression and discrimination, both Jim Crow and mass incarceration owe their existence in part to enlightened reforms aimed at promoting black interests, albeit with perverse results. Recognizing the aspirational origins of systematic discrimination marks an important facet of comprehending the persistence of racial inequality in the United States.

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INTRODUCTION

Few issues of racial injustice eclipse the mass incarceration of African Americans in the United States.¹ According to the Pew Center on the States, one in nine black males between the ages of 20 and 34 is “behind bars,” a staggering number that has prompted scholars to draw comparisons between black imprisonment today and the legal system of racial segregation, or Jim Crow, in the American South.² According to criminal law scholar Michelle Alexander, mass incarceration rivals and in some aspects even surpasses Jim Crow as a “racialized system of social control,” condemning millions of blacks to a “hidden underworld of legalized discrimination and permanent social exclusion” in the twenty-first century.³ Junking the shibboleth that American racial politics have followed a line of “linear progress” over time, Alexander posits that “it is not at all obvious that it would be better to be incarcerated for life for a minor drug offense than to live with one’s family, earning an honest wage under the Jim Crow regime.”⁴

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¹ PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 3 (2008). MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8, 188 (2010); Carol S. Steiker, *Mass Incarceration: Causes, Consequences, and Exit Strategies* 9 OHIO ST. J. CRIM. L. 1 (2011); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

² MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8, 188 (2010); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 723 (2000); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 NEW LEFT REVIEW 41 (2002); Carol S. Steiker, *Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1 (2011); PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 3 (2008).

³ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010).

⁴ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 22 (2010).

Others disagree. According to civil rights scholar James Forman Jr., the Jim Crow analogy “oversimplifies the origins of mass incarceration,” meanwhile “diminish[ing] our understanding of the particular harms associated with the Old Jim Crow.”⁵ Forman explains how African Americans themselves endorsed “punitive” anti-crime measures in the 1970s and 80s, how violent crime played a role in the incarceration story, and how black imprisonment disproportionately impacts the black poor.⁶ Further, Forman notes that analogies between mass incarceration and Jim Crow tend to de-emphasize the “brutal, unremitting violence upon which Jim Crow depended.”⁷

Though Forman is right to underscore important differences between mass incarceration and Jim Crow, he occludes one important commonality between the two legal formations, a commonality that bolsters Michelle Alexander’s thesis, though not in the way she describes. As this Article shall demonstrate, both Jim Crow and mass incarceration emerged not simply out of a tendency towards “unremitting violence,” racial extremism, or conservative “backlash,” but progressive politics.⁸ To demonstrate, this Article will proceed in four parts. Part I recovers the moderate origins of the old Jim Crow, showing how progressive reformers in the American South couched racial segregation and disfranchisement in the rhetoric of reducing political corruption, preventing crime, and providing blacks with important public accommodations. Part II shows how similarly aspirational impulses helped to lay the foundations for mass incarceration, recovering the Supreme Court’s efforts to improve police procedure in the 1960s, particularly its inadvertent contribution to the rise of aggressive, constitutionally protected strategies of stop and frisk. Part III recovers the role of moderate politics in the rise of mass incarceration, focusing on liberal support for the War on Drugs, meanwhile comparing that support to moderate endorsements of Jim Crow laws in the turn-of-the-century South. Finally, Part IV extends the analogy to gun control, showing how federal gun laws popular among liberals have contributed to the “entrapment” of black defendants in several midwestern states.

The road to prison, this Article concludes, has consistently been paved with good intentions, progressive efforts at reform that have sought to ameliorate racial injustice and reduce racial tension, albeit with perverse results. Progressivism here defined includes turn-of-the-century progressives who worked to ameliorate tensions between rich and poor, as well as progressive-minded liberals in the 1960s, 70s, and 80s; in essence

⁵ James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 23 (2012).

⁶ James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 56, 57-58 (2012).

⁷ James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 56, 57-58 (2012).

⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 22 (2010); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 56, 57-58 (2012).

political actors who acted out of a genuine interest in helping the dispossessed, meanwhile failing to anticipate the evils of their policy decisions.⁹ Recognizing this is important, both for understanding the rise of “racialized systems of social control,” and for comprehending racism itself.¹⁰ Though Alexander is not wrong to flag the dangers of backlash, class politics, and extremism, her account creates the false impression that the political sources of racial inequality are always the product of relatively simple, even formulaic political patterns; the rich dividing the poor along racial lines, for example, or whites simply legislating their prejudice into law. Sadly, the reality is more complex. As this article shall demonstrate, neither the old nor the new Jim Crow emerged simply because white elites “appeal[ed] to the racism and vulnerability of lower-class whites,” as Alexander claims.¹¹ Nor did racial segregation or mass incarceration emerge simply because of “racial indifference,” a concept that Alexander defines as “a lack of compassion and caring about race and racial groups.”¹² On the contrary, racialized systems of social control derive their strength from a convergence of interests – to borrow from Derrick Bell – including commendable aims like fighting corruption, promoting peace, and protecting life.¹³ Indeed, critical to understanding “how racial oppression actually works” is close attention to the manner in which the evils of oppression stem not simply from animus or indifference but also from the deliberate pursuit of the collective good.¹⁴

⁹ ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 8 (2009).

¹⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 173 (2010).

¹¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010).

¹² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 203 (2010).

¹³ I borrow the notion of interest convergence from Derrick Bell. Though Bell used the term to explain why states move to protect the rights of minorities, I argue that it also applies to state campaigns that hurt minorities. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARVARD L. REV. 518 (1980).

¹⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 183 (2010). As employed here, aspirational racism refers to policies that advance the interests of a particular racial group, either by improving its health, advancing its ideals, or protecting it from perceived threats. It is therefore related to what Michel Foucault termed “biopolitics” namely a configuration of power around the preservation and promotion of life, a “formative,” “ordering mechanism[]”harnessed to “varied progressive projects.” See, e.g. ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT’S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* 9 (1995). See also Simona Forti, *The Biopolitics of Souls: Racism, Nazism, and Plato* 34 *POLITICAL THEORY* 9 (2006) (discussing racism as an embodiment of metaphysical ideals). For southern historians who argue that aspirational rhetoric operated essentially as a ruse for rationalizing oppression, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3rd ed. 1974); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* (1984); GLENDA ELIZABETH GILMORE,

I. JIM CROW'S PROGRESSIVE ROOTS

To fully comprehend the analogy between mass incarceration and Jim Crow, it is helpful to flag Michelle Alexander's particular notion of social control. According to Alexander, racial segregation and mass incarceration both embody/ied "racialized" systems of "social control" that in turn foster/ed a "racial caste system," a term that Alexander defines loosely to mean any system that locks "a stigmatized racial group" "into an inferior position by law and custom," regardless of whether those laws and customs derive from direct racial animus or "indifference."¹⁵ Though mass incarceration differs from the "old" Jim Crow in that it does not rely on overt racial classifications, the overall impact of America's criminal justice system on black felons, argues Alexander, nevertheless bears striking similarities to the impact that segregation had on African Americans in the pre-*Brown* South, including "disfranchisement," "exclusion from juries," "racial segregation," and the perpetuation of "racial stigma."¹⁶ To document the manner in which such burdens are tied to criminal justice, Alexander expands her notion of mass incarceration to include "the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison," allowing her to bring in thousands of African Americans who leave prison each year only to "enter a hidden underworld of legalized discrimination and permanent social exclusion."¹⁷

The idea of exclusion plays a prominent role in Alexander's thesis, tying her into a much larger historiography of Jim Crow segregation, one that casts doubt on the causal elements of her argument.¹⁸ To demonstrate, this section will place Alexander's thesis within the larger context of Jim Crow historiography, showing how it would be better served by adopting a more nuanced attention to historian C. Vann Woodward, and to his critics. As we shall see, the notion that white "conservatives" simply offered the white poor a "racial bribe" misses much of Woodward's own story, in particular the role that progressive rhetoric played in black disfranchisement and segregation.¹⁹

GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920 (1996).

¹⁵ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 12, 203 (2010).

¹⁶ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 192, 193, 197 (2010).

¹⁷ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010).

¹⁸ See e.g., Howard Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865-1890*, 63 JOURNAL OF AMERICAN HISTORY 325 (1976).

¹⁹ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 34 (2010). For the Woodward thesis, see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 50 (3rd ed. 1974).

Long before offering poor whites a racial “bribe,” southern conservatives had themselves relied on black voters to bolster their power from the end of Reconstruction through the 1880s.²⁰ By the 1890s, however, an economic depression realigned black interests, pushing African Americans to favor white “radicals,” or Populists, who sought to forge a “pragmatic alliance” across racial lines and against economic elites.²¹ Rather than “bribe” poor whites, those elites “bought” and “intimidated” black voters into supporting them; undercutting populist hopes of interracial reform.²² As populism collapsed, argues Woodward, conservatives worked diligently to rework southern politics, assuaging radical anger at their own manipulation of black votes by calling for “disfranchisement of the Negro,” both as a “guarantee” that “white factions” would not rally black support “in the future” and also as a “progressive” measure aimed at halting political corruption.²³

This last point is significant. Though Woodward places ultimate responsibility for the rise of Jim Crow on the shoulders of extremists, he concedes that calls for black disfranchisement struck many at the time as a “progressive” reform that challenged conservative interests, even as it promised to clean up southern politics.²⁴ As Woodward explains it, “the typical progressive reformer rode to power in the South on a disfranchising or white-supremacy movement.”²⁵ This was true in Georgia, North Carolina, Virginia, and other states, so much so that “[r]acism was conceived by some as the very foundation of southern progressivism.”²⁶

That racism could be progressive sounds alien to us today. However, the racism that moved white voters to endorse Jim Crow in the South in the 1890s was deeply intertwined with aspirational ideals, not just clean government but other noble goals as well, like fighting crime. No historian demonstrates this more starkly than Glenda Elizabeth Gilmore.²⁷ Focusing on North Carolina, Gilmore shows how a cadre of “young” business-minded, “New White Men” sought power not only by employing the progressive rhetoric of reducing corruption in government, but also by emphasizing “safety of the home.”²⁸ One such progressive, North

²⁰ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 75-76 (3rd ed. 1974).

²¹ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91, 45 (3rd ed. 1974). As radical Populist Tom Watson of Georgia put it, “[y]ou are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both.” C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 62-3 (3rd ed. 1974).

²² C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 79 (3rd ed. 1974).

²³ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 83 (3rd ed. 1974).

²⁴ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 83 (3rd ed. 1974).

²⁵ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91 (3rd ed. 1974).

²⁶ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91 (3rd ed. 1974).

²⁷ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920* (1996).

²⁸ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920* 66, 85, 93 (1996).

Carolina governor Charles Brantley Aycock, “exaggerated a series of sex crimes and allegations in order to strike terror into the hearts of white voters,” reframing segregation and disfranchisement as critical to the protection of white women.²⁹ Though Aycock and his “New White” conspirators knew such claims to be false, the extensive efforts they took to manufacture a “rape scare” suggest that average white voters in the state were unwilling to subordinate blacks without a pressing moral rationale: eliminating sexual crime.³⁰ Here, the fact that Aycock manipulated progressive anti-crime rhetoric underscores the salience of that rhetoric to the institutionalization of Jim Crow; whether its proponents believed it or not.³¹

And Aycock did not stop there. In a move that was even more “progressive,” he endorsed segregation as a means not of subordinating blacks but preserving for them a base level of social services, including education.³² As Aycock explained it, Jim Crow saved African Americans from an even worse fate than being relegated to separate, inferior accommodations: the possibility that they might be denied all public accommodations, a condition that historian Howard Rabinowitz has termed “exclusion.”³³ According to Rabinowitz, even worse fates could have befallen blacks than segregation and disfranchisement, including not just a blanket prohibition against all public services for blacks, but forced removal from the South, even genocide.³⁴ Radical leaders like South Carolina Governor “Pitchfork” Ben Tillman called for precisely such an outcome, promising white voters in 1898 that African Americans needed to either “remain subordinate or be exterminated.”³⁵ Meanwhile, others declared removal to be the key. According to South Carolina Senator Matthew Calbraith Butler, for example, the United States government should provide a place of emigration for blacks where African Americans could “work out their own destiny.”³⁶ Popular author and Thomas Dixon agreed, pushing for the colonization of blacks back to Africa.³⁷

²⁹ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920*, 83 (1996).

³⁰ Gilmore discusses the evidentiary problems with the propaganda warning of a rape scare in GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920* 86-88, 94 (1996).

³¹ C. Vann Woodward substantiates this point. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91-92 (3rd ed. 1974).

³² C. Vann Woodward substantiates this point. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91-92 (3rd ed. 1974).

³³ HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890* (1978); JOHN W. CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY* 175 (1982).

³⁴ JOHN W. CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY* 175 (1982).

³⁵ STEPHEN KANTROWITZ, *BEN TILLMAN & THE RECONSTRUCTION OF WHITE SUPREMACY* 258 (2000); see also Charles Crowe, *Racial Violence and Social Reform – Origins of the Atlanta Riot of 1906*, 53 *J. OF NEGRO HIST.* 234, 253 (1968).

³⁶ *Plans for the Negro*, N.Y. OBSERVER, Oct. 12, 1899, at 41.

³⁷ Charles Crowe, *Racial Violence and Social Reform – Origins of the Atlanta Riot of 1906*, 53 *J. OF NEGRO HIST.* 234, 245 (1968). For more on Dixon and the brand of extremist politics that he endorsed, see GLENDA ELIZABETH GILMORE, *GENDER AND JIM*

Even if removal and genocide were not likely outcomes, an increasing number of historians have located the rise of Jim Crow in policy initiatives that had little to do with bribing the poor. In North Carolina, for example, the black poor proved less relevant than the black middle class, whose success “set off alarms” among poor whites, even as “[a] new assertive generation of middle-class African Americans” began to “exercise” their rights in “daily actions” on the street.³⁸ Such actions often involved direct challenges to white authority, as happened in Charlotte, North Carolina in 1882, when a middle class black teenager named Jim Harris “pistol-whipped” a white man who had “insulted and struck” one of his female friends.³⁹ According to Glenda Gilmore, such instances of black middle class defiance stemmed from a very different brand of class politics than the kind either Alexander or Woodward focus on, not simply elite manipulation of the white poor so much as black middle class challenges to white supremacy, a concept that Gilmore reads through the southern analytic of “place.”⁴⁰

Perhaps nowhere was the concept of place more contested than on trains.⁴¹ “As the number of railroads” in the South “proliferated” in the 1880s, notes historian Edward Ayers, they created new unregulated spaces that forced whites and blacks to mix in uncomfortably close quarters.⁴² Prior to then, most public accommodations in southern towns and cities were segregated as a matter of custom, obviating the need for formal rules governing interracial contact.⁴³ However, the rise of trains threw blacks and whites together in close quarters, a problem that became particularly acute in first class cars where affluent whites took umbrage at “educated” and “relatively well-to-do” blacks who “insisted on imposing themselves on the white people” in the best cars, an increasing problem as “black wealth” increased “substantially” in the 1880s.⁴⁴ On train after train,

CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA (1996); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974).

³⁸ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920*, 15 (1996).

³⁹ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920*, 74 (1996).

⁴⁰ GLENDA ELIZABETH GILMORE, *GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920*, 3, 75 (1996).

⁴¹ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 137, 140 (1992).

⁴² EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 140 (1992).

⁴³ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 136 (1992). *See also*, Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865-1890*, 63 *JOURNAL OF AMERICAN HISTORY* 325 (1976); Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow* 75 *JOURNAL OF AMERICAN HISTORY* 842 (1988).

⁴⁴ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 140 (1992).

altercations between flustered white elites and “assertive” black elites exploded, leading to “overt conflict” and “violence.”⁴⁵

Though not a story of elite manipulation of the white poor, battles on trains played a critical role in the “first wave of segregation law[s]” to emerge in the post-Reconstruction South, forming a cornerstone in the racialized system of social control known as Jim Crow.⁴⁶ For example, blacks who were denied access to first class cars in the 1880s “resorted to the law in increasing numbers,” leading to a string of judicial decisions requiring either that railroads reimburse African Americans for their lost seats or, more commonly, provide equal accommodations to white and black passengers.⁴⁷ Separating passengers by race, argued state and federal judges alike, encouraged “peace, order, convenience, and comfort,” all laudable ideals.⁴⁸

Despite judicial orders that railroads provide separate accommodations, railroad companies balked at the “considerable expense and trouble of running twice the number of cars.”⁴⁹ Outraged, legislators across the South then moved to require separate accommodations by statute, leading Tennessee to commence the “first legislative attempt at statewide segregation” in the South in 1881.⁵⁰ Other states followed, stressing not simply that whites be free from black encroachments but also that blacks be protected from white abuses.⁵¹ For example, Florida enacted a law in 1887 holding that “[n]o white person shall be permitted to ride in a [N]egro car or to insult or annoy any [N]egro in such car.”⁵² Even if middle class whites did not want middle class blacks in their cars, in other words, they also did not want poorly behaved whites embarrassing them by disturbing black passengers, pointing to segregation’s complex role as a disciplinary mechanism targeting members of both races.⁵³

Contrary to Alexander’s story that Jim Crow simply targeted the working class, the regulation of trains in the South indicates that the

⁴⁵ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 139 (1992).

⁴⁶ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 145 (1992).

⁴⁷ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 142 (1992).

⁴⁸ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 142 (1992).

⁴⁹ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 142 (1992).

⁵⁰ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 143 (1992). See also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 97 (3rd ed. 1974).

⁵¹ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 143-4 (1992).

⁵² EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 143-4 (1992). See also HOWARD N. RABINOWITZ, *RACE, ETHNICITY, AND URBANIZATION: SELECTED ESSAYS* 155-6 (1994).

⁵³ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 143-4 (1992).

origins of segregation lay partly in a revolt by white middle class progressives, or “New White Men,” against white elites, particularly corporate elites who owned and operated trains.⁵⁴ In state after state, explains historian Edward Ayers, “one politician after another” “turned to the control of corporations,” particularly railroads, hoping to stem their “grasping, selfish, tyrannical,” and “overbearing demeanor.”⁵⁵ Though blacks protested their eviction from white cars, in other words, the whites orchestrating those evictions did not necessarily represent the white financial elite, but rather a rising middle class in the South who sought not simply to divide and conquer the poor, but also to regulate the rich.⁵⁶ Indeed, if the southern middle class wanted anything, it was to curb both “greedy monopolies” and also “unruly citizens.”⁵⁷ Segregation, to them, embodied a “sophisticated, modern, managed” approach to race relations, an approach that quickly spread from train cars to train stations to all manner of other public spaces, including waiting rooms, restrooms, water fountains, and so on.⁵⁸

Recovering the origins of segregation on trains helps to demonstrate the manner in which progressive goals ended up having profoundly repressive effects. Rather than examples of white elites manipulating the white poor, train statutes embodied a very different regulatory move, an effort by middle class whites to police their own ranks and also to protect the peace and tranquility of first class passengers white *and* black.⁵⁹

That racial segregation may have been a modern, even progressive solution to problems of racial strife is a point that C. Vann Woodward concedes briefly in *Strange Career*, and that subsequent historians have elaborated upon.⁶⁰ For example, both John W. Cell and Howard Rabinowitz argue that segregation was a moderate alternative to even harsher policies of racial exclusion.⁶¹ According to Cell, “the ideology of segregation was not the contribution of the most fanatical, ignorant, unbending racists of the period” but rather a legal regime sponsored by

⁵⁴ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 413-14 (1992).

⁵⁵ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 414 (1992).

⁵⁶ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 414 (1992).

⁵⁷ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 414 (1992).

⁵⁸ EDWARD AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION*, 145 (1992).

⁵⁹ Though Alexander may be right that such protections proved, over time, to be “a legal fiction,” she nevertheless misreads their origins, and in so doing fails to explain precisely how “racialized systems of social control” came into being. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 183 (2010).

⁶⁰ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 91 (3rd ed. 1974).

⁶¹ Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865-1890*, 63 *JOURNAL OF AMERICAN HISTORY* 325 (1976).

“moderate men” who “sought civility, peace, and harmony.”⁶² According to Rabinowitz, Radical Republicans first introduced segregation to the South as part of a larger effort to provide blacks access to services that had previously been denied them, including public schools, welfare, and health care.⁶³ Such arguments lend credence to Alexander’s point that the exclusionary effects of mass incarceration may actually be more damaging than Jim Crow; even as they underscore the larger conclusion, counter to Alexander, that new systems of racial control are often rationalized in progressive, forward-looking terms – not simply as expressions of animus or indifference.⁶⁴

Alexander’s failure to adequately capture the aspirational rhetoric of white southerners post-Reconstruction, prevents her from adequately explaining how Jim Crow emerged and – more importantly – how mass incarceration echoes it. The next section will demonstrate how moderate, even liberal reform led to a similar pattern at mid-century, as exemplified by the rise of formalized rules sanctioning police stop and frisks, a technique that Alexander cites repeatedly as a contributor to mass incarceration.⁶⁵ Proponents of such reforms included northern liberals desperate to correct unforeseen, negative consequences of the Supreme Court’s pro-defendant ruling in *Mapp v. Ohio*. Much like the moderate politics that animated the first Jim Crow; such efforts engendered unexpected, arguably perverse results.

II. THE STRANGE CAREER OF STOP AND FRISK

Even as progressive politics contributed to the rise of racial segregation, so too did liberal initiatives confound black interests in the civil rights era. Few examples provide a better illustration than *Mapp v. Ohio*, a pivotal case in the Warren Court’s criminal procedure revolution.⁶⁶ As this section shall demonstrate, the Court’s effort to curb police abuses against blacks in *Mapp* in 1961 ended up having an unanticipated effect, worsening police minority tensions in urban centers like New York. Praised by liberals for extending the exclusionary rule to the states, *Mapp* pushed many police to adopt aggressive means of questioning and evidence gathering on the street, prompting moderate reformers to lobby for a structured approach to stopping suspicious

⁶² JOHN W. CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 180 (1982).

⁶³ HOWARD N. RABINOWITZ, *RACE, ETHNICITY, AND URBANIZATION: SELECTED ESSAYS* 1138-140 (1994).

⁶⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 22 (2010).

⁶⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 77, 103, 124-25 (2010).

⁶⁶ PRISCILLA H. MACHADO ZOTTI, *INJUSTICE FOR ALL: MAPP VS. OHIO AND THE FOURTH AMENDMENT* 170 (2005).

persons. In 1965, the New York State Legislature heeded such efforts by adopting a “stop and frisk” law that ultimately survived Supreme Court review, contributing to what Alexander terms the first phase of mass incarceration.⁶⁷

By recovering the progressive origins of stop and frisk, this section seeks to make two points. First, the origins of policies that increased rates of minority incarceration in America did not necessarily result from conservative efforts to divide the poor along racial lines. Second, Alexander occludes an important component of the mass incarceration story, namely liberal efforts to improve racial inequality by emphasizing procedural rather than substantive reform. Though scholars tend to cite 1968 as a key turning point in Warren Court jurisprudence, a moment when liberal impulses on the Court succumbed to a conservative “counter-revolution,” this section suggests a more fractured narrative – one in which liberals and conservatives alike tolerated expansions of private liberty so long as such expansions did not threaten public violence.⁶⁸

The case began when police discovered obscene material in the home of Cleveland resident Dollree Mapp following an aggressive, warrantless search.⁶⁹ Though Mapp’s attorneys fought to exclude the evidence at trial, they abandoned that position on appeal, arguing instead that Ohio’s obscenity statute was unconstitutionally vague and that Mapp’s arrest was so outrageous as to warrant an acquittal.⁷⁰ This latter argument followed *Rochin v. California*, a 1952 Supreme Court case chastising police for ordering a defendant’s stomach pumped to retrieve heroine, something the Court found so egregious that it not only “shocked the conscience,” but violated the Constitution.⁷¹ Just as unconstitutional, argued Mapp’s counsel, was Ohio’s obscenity law, a relatively recent

⁶⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 103 (2010); *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶⁸ For the “counter-revolution” metaphor, see PRISCILLA H. MACHADO ZOTTI, *INJUSTICE FOR ALL: MAPP VS. OHIO AND THE FOURTH AMENDMENT* 170 (2005). See also Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L. J.* 1, 2-3 (1995); LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 407-411 (2000); Christopher Slobogin, *The Liberal Assault on the Fourth Amendment* 4 *OHIO ST. J. CRIM. L.* 603 (2007); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982); Devon W. Carbado, *(E)racing the Fourth Amendment* 100 *MICH. L. REV.* 946 (2002); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 *GEO. WASH. L. REV.* 1265, 1288 (1999); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 *MICH. L. REV.* 249, 256 (1968); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 192 (2nd ed., 1998); Dan M. Kahan & Tracy Mearns, *The Coming Crisis of Criminal Procedure*, 86 *GEO.L.J.* 1153, 1156-59 (1998).

⁶⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961). CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES & SEIZURES* 8 (2006).

⁷⁰ *Id.*, at 25.

⁷¹ *Rochin v. California*, 342 U.S. 165 (1952).

measure that expanded criminal liability from manufacturers and sellers of pornography to private citizens.⁷²

Yet, it was not the outrageous nature of Ohio's obscenity statute so much as the "racist police abuse" in *Mapp* that "convinced" the Supreme Court "to extend federal supervision to state criminal justice."⁷³ Ignoring the obscenity issue, the Court moved instead to incorporate the exclusionary rule to the states, suddenly protecting average citizens from warrantless searches by local police.⁷⁴ For many at the time, the decision constituted a clear victory for civil rights, and seemed to have an immediate positive impact on law enforcement.⁷⁵ According to Richard Kuh, Secretary of the New York State District Attorney's Association, police did in fact become more serious about acquiring warrants before conducting searches of private homes following the ruling.⁷⁶ Prior to *Mapp*, claimed Kuh, officers rarely requested a warrant before searching an individual's private "apartment, home, flat, [or] loft."⁷⁷ "All this has changed," he argued in September of 1962, noting that tendencies toward ignoring warrant requirements "changed overnight."⁷⁸

However, *Mapp* engendered unanticipated reactions on the street. Almost immediately, arrests for illegal lottery or "policy" violations dropped in New York City, totaling a thirty-five percent decline by the end of the year.⁷⁹ Convictions for "narcotics misdemeanor offenses" also dropped, along with convictions for "contraband – possession of weapons, [and] obscene prints."⁸⁰ Such declines, declared law enforcement, stemmed from officer confusion over whether they could lawfully search suspects who were not officially under arrest.⁸¹

⁷² CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES & SEIZURES* 26 (2006).

⁷³ Tracey Meares, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 105, 106 (2005) (describing the Warren Court's criminal procedure cases as "a branch of 'race law.'"); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: the Century of Fourth Amendment 'Search and Seizure' Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 983 (2010).

⁷⁴ CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES & SEIZURES* 26 (2006).

⁷⁵ CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES & SEIZURES* 26 (2006); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷⁶ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1.

⁷⁷ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1.

⁷⁸ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1.

⁷⁹ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1. *See also, Policy Prosecutions Here Cut by High Court Ruling*, N.Y. TIMES, July 16, 1962 at 1.

⁸⁰ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1. *See also, Policy Prosecutions Here Cut by High Court Ruling*, N.Y. TIMES, July 16, 1962 at 1.

⁸¹ *Narcotics Case Convictions Drop Since Ban on Illegal Searches*, N.Y. TIMES, Sep. 19, 1962, 35.

While a drop in arrests might be taken as a positive for blacks on the street, police testimony became increasingly “improbable” in cases that did go to trial, many officers testifying that suspects simply “removed” objects from their pockets and “threw” them to the ground, dispensing with the need for a search.⁸² Meanwhile, police assigned to search private homes began increasingly to claim that they had been “invited” in by defendants, again precluding the need for a warrant.⁸³ Not only did *Mapp* lower arrest rates, in other words, it also encouraged police to stretch the truth, telling more elaborate “stories” to bolster the arrests they did make.⁸⁴

In a study of almost 4,000 arrests, New York Legal Services offered hard data that *Mapp* negatively impacted police testimony, pushing officers to claim that suspects mysteriously “dropped” contraband before being approached and searched.⁸⁵ The New York Police Department (NYPD) reported a 71.8 percent spike in such “dropsies” during the year immediately following *Mapp*.⁸⁶ Meanwhile, reports that police found contraband “hidden on the person” of suspects declined significantly at precisely the same time, indicating that police were suddenly cautious about admitting to searches.⁸⁷

⁸² Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1, fn. 2; See also Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968); Joseph S. Oteri & Charlotte A. Perretta, “Dropsy” Evidence and the Viability of the Exclusionary Rule 1 CONTEMP. DRUG PROBS. 35, 41 (Winter 1971-1972); *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUMBIA J. LAW AND SOCIAL PROBLEMS 87 (1968); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1967) (arguing that police not only reported dropped evidence but “reconstruct[ed] a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards.”)

⁸³ *Narcotics Case Convictions Drop Since Ban on Illegal Searches*, N.Y. TIMES, Sep. 19, 1962, 35

⁸⁴ Richard H. Kuh, *The Mapp Case One Year After: An Appraisal of its Impact in New York*, THE NEW YORK LAW JOURNAL, Sept. 18, 1962, at 1, fn. 2.

⁸⁵ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 556 (1968). Another tactic employed to achieve dropped evidence was documented by criminal law scholar Dallin Oaks in 1970, who reported that “a police officer without a warrant may rush a suspect, hoping to give produce a panic in which the person will visibly discard the narcotics and give the officer cause to arrest him.” Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 699-700 n 90 (1970).

⁸⁶ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 556 (1968). Another tactic employed to achieve dropped evidence was documented by criminal law scholar Dallin Oaks in 1970, who reported that “a police officer without a warrant may rush a suspect, hoping to give produce a panic in which the person will visibly discard the narcotics and give the officer cause to arrest him.” Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 699-700 n 90 (1970).

⁸⁷ Legal Services distinguished uniformed officers from plainclothes officers and members of New York’s specialized Narcotic Bureau. Sarah Barlow, *Patterns of Arrests*

An NYPD officer provided a clue into the new dynamics of post-*Mapp* evidence recovery during an illegal search trial in New York City on September 12, 1962.⁸⁸ Charged with unlawfully searching a suspect, the officer claimed that he “frisked” suspects but did not actually search them.⁸⁹ The officer then demonstrated a standard frisk before the court, a relatively violent maneuver that aimed to shake evidence to the ground.⁹⁰ Rather than simply pat down the suspect’s clothing, for example, the patrolman “grabbed” the suspect “and practically lifted him off his feet”; meanwhile shaking him to loosen any items that might be secreted in his pockets, waistband, or belt.⁹¹ As a cigarette lighter and pair of eyeglasses “fell” to the floor, the manner in which a frisk might generate a drop suddenly became apparent, leaving open the question whether *Mapp*’s prohibition on searches also applied to frisks, even forceful ones like the one demonstrated by the officer.⁹²

Even if officers decided against frisks, police developed other means of procuring evidence from suspects without resorting to a search.⁹³ In Cincinnati, for example, patrolmen “rush[ed]” suspects, “hoping to produce a panic” that would then lead them to “visibly discard” evidence.⁹⁴ Here too, the Court’s application of the exclusionary rule had a counterintuitive effect; increasing the likelihood that police would engage in threatening behavior to get suspects to drop evidence.⁹⁵

Police efforts to induce dropped evidence indicate that rather than improve police conduct, *Mapp* actually intensified the use of force, lying, and deception, particularly on the street.⁹⁶ However, even *Mapp*’s effect on the search of homes and apartments came into question. According to New York Legal Services, for example, the actual location of arrests generally seemed to migrate out of private rooms and into public spaces

for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62 4 CRIM. L. BULL. 556 (1968).

⁸⁸ *Is “Frisk” Illegal? Judge to Decide*, N.Y. TIMES, Sep. 13, 1962, 54.

⁸⁹ *Is “Frisk” Illegal? Judge to Decide*, N.Y. TIMES, Sep. 13, 1962, 54.

⁹⁰ *Is “Frisk” Illegal? Judge to Decide*, N.Y. TIMES, Sep. 13, 1962, 54.

⁹¹ *Is “Frisk” Illegal? Judge to Decide*, N.Y. TIMES, Sep. 13, 1962, 54.

⁹² *Is “Frisk” Illegal? Judge to Decide*, N.Y. TIMES, Sep. 13, 1962, 54.

⁹³ Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 699-700 n 90 (1970).

⁹⁴ Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 699-700 n 90 (1970).

⁹⁵ Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 699-700 n 90 (1970).

⁹⁶ Evidence of *Mapp*’s detrimental effect was substantiated by a presidential commission appointed by Lyndon Johnson to investigate urban unrest in the 1960s, who found that “field interrogations are a major source of friction between the police and minority groups.” PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967). See also, Adina Schwartz, “*Just Take Away Their Guns*”: *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URBAN L.J. 317, 326 (1996). For a discussion of the difficulty of ascertaining the exclusionary rule’s full effect, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369 (1999).

following the decision. To illustrate, the location of most arrests prior to *Mapp* were streets (35%) and “unexplained rooms” (26%) meaning “rooms entered without explanation by the police.”⁹⁷ Following the ruling, however, police reported lower numbers of arrests in unexplained rooms, dropping them from 26% to 17.6%, meanwhile increasing arrests in “hallways,” “roof landings,” and “basements.”⁹⁸

Just as *Mapp* may have pressured officers to acquire warrants before entering homes, so too did the decision seem to refocus police attention on public space.⁹⁹ Rather than simply improve police professionalism, in other words, the decision also influenced the contours of police corruption, removing it from private homes to public areas (streets, hallways, roof landings, and basements), where police could then shake down suspects for evidence.¹⁰⁰ As New York Legal Services described it, officers simply “stopped entering private rooms” and turned instead to spending “more time in the streets and halls.”¹⁰¹ Rather than “level the playing field” between rich and poor, in other words, *Mapp* simply provided more privacy to the already well-off, particularly those wealthy enough to conduct their social and professional lives behind closed doors.¹⁰² Conversely, poor residents of cramped apartments and public housing projects – those most likely to utilize public spaces and the streets for social interaction – found themselves the targets of intensified police searches in their halls, landings, and sidewalks; all factors increasing the likelihood that African Americans might be incarcerated for random, search-generated crimes.¹⁰³

⁹⁷ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 570 (1968).

⁹⁸ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 570 (1968).

⁹⁹ That *Mapp* may have encouraged police to focus on public space provides an ironic backdrop to the argument made by criminal law scholar Tracey Meares that law enforcement should be “re-engineered” so that its “negative consequences [are] not visited upon weakly organized communities.” Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 696 (1998). See also Jeffrey Fagan’s argument that “poor, minority, inner-city communities generally conform to a place-based social organization model of crime.” See, e.g. Jeffrey Fagan, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City* 28 FORDHAM URB. L. J. 457, 474 (2000).

¹⁰⁰ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 570 (1968).

¹⁰¹ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62* 4 CRIM. L. BULL. 558 (1968).

¹⁰² For the playing field analogy, see William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1288 (1999). For the argument that 4th Amendment jurisprudence discriminates against the poor, see Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401-2 (2003).

¹⁰³ Here, data from New York sharpens the point made by I. Bennett Capers that police procedure is tied closely to the racialization of space. See, e.g. I. Bennett Capers, *Policing, Race, and Place* 44 HARV. C.R.-C.L. L. REV. 43, 46 (2009). *Mapp*’s impact on police strategy in New York City calls into question the extent to which race animated the opinion. Either the Court did not anticipate the opinion’s negative impact on urban minorities, or they never intended for the ruling to help African Americans, a contested

As *Mapp* engendered negative effects, reformers moved to clarify the constitutional landscape, pushing the playing field even further in the direction of mass incarceration, albeit unwittingly. By March of 1962, for example, New York Governor Nelson Rockefeller joined police in declaring that “confusion” had become *Mapp*’s primary contribution to the law of search and arrest.¹⁰⁴ To rectify matters, Rockefeller endorsed a statute authorizing officers “to search and question a person” suspected of committing a crime “without making an arrest.”¹⁰⁵ The law allowed for pat down searches in cases where police possessed a reasonable suspicion that the suspect might be armed, solving one of *Mapp*’s primary ambiguities.¹⁰⁶

Not everyone approved. Black leaders in New York objected to the stop and frisk legislation, arguing “that it would help create a ‘police state’ by subjecting the people of their districts to ‘even greater abuse than they now suffer at the hands of police.’”¹⁰⁷ At the time, the “highest concentration” of arrests in New York occurred in predominantly black neighborhoods, most notably Harlem.¹⁰⁸ According to black politicians, New York’s stop and frisk law would “allow policemen to ‘push around’ citizens and permit them to operate as ‘the Gestapo.’”¹⁰⁹ Such criticism indicated that not everyone, particularly not African Americans, believed that the corrupt practices engendered by *Mapp* would necessarily be solved by sanctioning stop and frisks.¹¹⁰

While black fears proved prescient, the Supreme Court of the United States approved the Empire State’s law in a 1968 case styled *Sibron v. New York*, holding that officers could “stop and frisk” suspects so long as they possessed “reasonable suspicion” that individuals were either “engaged in criminal activity” or posed “a danger.”¹¹¹ Though criticized by black leaders, the Court confessed to having noble objectives, even citing the excesses generated by *Mapp*, including its encouragement of police tactics aimed at creating the illusion of dropped evidence.¹¹²

point. For example, Capers argues that race animated the opinion. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 7 (2011).

¹⁰⁴ Nelson D. Rockefeller, Message of March 23, 1962, GOVERNOR’S MESSAGES TO THE LEGISLATURE, NEW YORK STATE LEGISLATIVE ANNUAL 297 (1962).

¹⁰⁵ *Governor to Offer Legislature A Program to Prevent Crime*, N.Y. TIMES, Jan. 7, 1964 at 23.

¹⁰⁶ *Governor to Offer Legislature A Program to Prevent Crime*, N.Y. TIMES, Jan. 7, 1964 at 23.

¹⁰⁷ *Assembly Votes Anticrime Bills*, N.Y. TIMES, Feb. 12, 1964, at 41.

¹⁰⁸ Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-1962*, 4 CRIM. L. BULL. 579 (1968).

¹⁰⁹ *Assembly Votes Anticrime Bills*, N.Y. TIMES, Feb. 12, 1964, at 41.

¹¹⁰ *Assembly Votes Anticrime Bills*, N.Y. TIMES, Feb. 12, 1964, at 41.

¹¹¹ *Sibron v. New York*, 392 U.S. 40, 60 (1968).

¹¹² *Sibron v. New York*, 392 U.S. 40, 46 (1968).

Further, the Court acknowledged in a companion case styled *Terry v. Ohio* that “frisking” had indeed become “a severely exacerbating factor in police-community tensions.”¹¹³

Much like early Jim Crow laws found themselves packaged in progressive rhetoric, so too did the formalization of stop and frisk rules in New York City provide a case study in the complexities, and evils, of reform. Though stop and frisk would contribute to mass incarceration, the formalization of the procedure emerged as a moderate solution to post-*Mapp* confusion, a corrective to an unforeseen development not of reactionary racism, but the Warren Court’s criminal procedure revolution. Michelle Alexander misses this, concluding simply that the “first step” in the mass incarceration of blacks was the Supreme Court’s decision “to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses,” i.e. *Terry v. Ohio*.¹¹⁴ Rather than simply a conservative plot to divide the working class, however, *Mapp*’s impact on stop and frisk resulted from a more complex sequence of events, suggesting a story about reform, reaction, and compromise, a convergence of conservative and liberal interests that contributed to mass incarceration.¹¹⁵ As the next section shall demonstrate, a similar narrative haunted the War on Drugs.

III. THE LIBERAL WAR ON DRUGS

Progressive reforms that rendered evil results did not end with the exclusionary rule. As race riots drew national attention to the American ghetto in the 1960s, liberals began to lament the profusion of controlled substances in predominantly poor, black neighborhoods, prompting calls for harsher penalties to protect African American communities.¹¹⁶ As James Forman, Jr. shows, even “black activists” requested such penalties, a point that Michelle Alexander downplays; blaming harsh drug policies on conservative efforts to break up “a solid liberal coalition based on economic interests of the poor and the working and lower-middle classes.”¹¹⁷ Though conservatives did seek working and lower-middle class votes, the War on Drugs proved more complicated than Alexander implies, a point this section shall demonstrate by focusing on liberal

¹¹³ *Terry v. Ohio*, 392 U.S. 1, 14, n. 11 (1968) citing PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967).

¹¹⁴ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 103 (2010).

¹¹⁵ William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1288 (1999).

¹¹⁶ Joseph B. Treaster, *Drug Wars, Cont.: The Liberals’ Unlikely Ally*, N.Y. TIMES, Feb. 5, 1995, E3; James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 36 (2012).

¹¹⁷ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 47 (2010); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 36 (2012).

support for heightened penalties that would, by the end of the twentieth century, contribute greatly to mass incarceration in the United States.¹¹⁸

Launched in the 1980s, the War on Drugs initially began as an effort to “go beyond traditional law enforcement,” by focusing on “education,” “treatment,” “research” and “foreign intervention,” a campaign that garnered support from liberals and conservatives alike.¹¹⁹ To illustrate, one of the earliest proponents of the war was Democratic Senator Joseph Biden, who became “convinced that the government needed a cabinet-level director of narcotics policy,” or drug “czar” to coordinate federal domestic and foreign efforts to thwart drug trafficking.¹²⁰ Meanwhile, liberals like Massachusetts Senator Edward Kennedy lobbied for uniform sentencing guidelines, hoping “to reduce the number of cases in which judges in different courts imposed widely varying sentences,” particularly in cases involving minorities.¹²¹ Though “well intended,” such guidelines turned out to have a negative impact on blacks, partly because of poor planning.¹²² For example, even though drug sentences were set under the guidelines, “[m]id-level” dealers, who tended to be white, found that they were able to procure lower sentences by exchanging lower charges for “fingering higher-ups,” while lower level dealers, who tended to be black, “had no such bargaining chips [and] ended up getting higher sentences.”¹²³

Just as sentencing guidelines emerged out of a series of poorly planned, unintentional, yet frequently well-meaning initiatives, so too did liberals endorse the decision to increase penalties for crack cocaine in 1986 – a move that Alexander argues “greatly exacerbated racial

¹¹⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49 (2010). Alexander focuses heavily on the 1970s and 80s, particularly the war on drugs. For example, Chapter 3 continues by showing how even as police tactics targeted minority communities in the 1980s and 90s, so too did cultural constructions of the war by the media and government paint drug abuse as “black and brown” despite the fact that whites were “more likely to engage in drug dealing than people of color” (p. 99). After demonstrating that drugs were and still are used by more whites than blacks, Chapter 4 discusses the negative impact of incarceration on black prisoners once they are released, even as chapter 5 compares mass incarceration to racial segregation in the American South, building the case for a new civil rights movement, the goals of which are addressed in chapter 6.

¹¹⁹ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 116-17 (2001); Morris J. Blachman and Kenneth E. Sharpe, *The War on Drugs: American Democracy under Assault* 7 *WORLD POLICY JOURNAL* 135 (1990); MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD’S GREATEST OUTLAW* 41 (2001).

¹²⁰ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 47 (2001).

¹²¹ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 58 (2001).

¹²² TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 61 (2001).

¹²³ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 61 (2001).

disparities in incarceration rates.”¹²⁴ “Lacking detailed information,” officials on all sides of the political spectrum began to call for increased penalties for crack in 1985, after a series of news stories linking the drug to violence began to make national headlines.¹²⁵ Early proponents of such a move included popular liberals like Democratic Senator Gary Hart, who claimed that crack caused “raging paranoia” and “senseless deaths.”¹²⁶ Democratic Senator Lawton Chiles of Florida declared that crack turned users into “slaves” while black Senator Charlie Rangel joined Nancy Reagan’s “Just Say No” to drugs campaign, even as he declared that “[w]hat is most frightening about crack is that it made cocaine widely available and affordable for abuse among our youth.”¹²⁷ Though Republican Senator Bob Dole recommended a mandatory minimum for crack “20 times higher” than for powder cocaine, it was Democrats who proposed a 100 to 1 ratio, all in the hopes of doing “something to save the black community.”¹²⁸ The death of black college basketball player Len Bias in June 1986 only intensified liberal furor, speeding enactment of the Anti-Drug Abuse Act of 1986 establishing substantially different penalties for crack versus powder cocaine.¹²⁹

Though Alexander cites the 1986 Anti-Abuse Act’s role in spurring “racial disparities in incarceration rates,” she fails to adequately account for the role that liberal hopes and aspirational rhetoric played in the legislative history of the act.¹³⁰ Instead, she focuses single-mindedly on moves by “the Reagan administration” to “publicize the emergence of crack” as part of a larger, “strategic effort to build public and legislative support” for the War on Drugs, which was announced in 1982, “before crack became an issue in the media”¹³¹ However, Republicans were actually “taken aback” that Democrats pushed for longer sentences than “the traditionally hardline Republicans had in mind.”¹³² Further, news of crack’s destructive effects pushed liberals to call for a de-emphasis on

¹²⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (2010); John J. Dilulio, Jr., *The Next War on Drugs: Targeting the Inner Cities*, 11 *BROOKINGS REVIEW* 28 (1993).

¹²⁵ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 118 (2001).

¹²⁶ 132 Cong. Rec. 27, 176 (daily ed. Sept. 30, 1986)(statement of Sen. Gary Hart).

¹²⁷ 132 Cong. Rec. 26,447 (daily ed. Sept. 26, 1986)(statement of Sen. Chiles); 132 Cong. Rec. 944 (daily ed. Mar. 21, 1986)(statement of Rep. Rangel).

¹²⁸ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 119-121 (2001).

¹²⁹ Douglas C. McDonald & Kenneth E. Carlson, *Why did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?* 6 *FEDERAL SENTENCING REPORTER* 223 (1994).

Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹³⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (2010).

¹³¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (2010).

¹³² TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 121 (2001).

Columbian cartels and a renewed focus on urban communities, inspiring noted liberals like New York Mayor Edward Koch to declare that it was “time to raise the battle flag” on drugs in 1988.¹³³ Others followed, arguing as Princeton Professor John J. Dilulio, Jr. did in 1993 that “[n]o new engines of inner-city job growth and revitalization can be started unless and until the drug-and-crime epidemic is checked,” a move that warranted “increas[ing] our big-city police forces and prison capacity as much as is necessary to make inner-city criminals and street gangsters aware that we are fighting a war on drugs.”¹³⁴

As Dilulio indicates – and Alexander argues – the War on Drugs did contribute directly to the evil of mass incarceration. However, the origins of that war stemmed not simply from a conservative conspiracy, as Alexander implies, but a complex set of concerns, including a liberal desire to help minorities trapped in high crime neighborhoods. By ignoring this side of the story, Alexander provides only a partial account of “how racial oppression actually works,” meanwhile missing a key parallel between mass incarceration and the old Jim Crow, namely the role that progressive politics and positive aspirations played in the creation of both regimes.¹³⁵

Yet another problem with Alexander’s comparison between mass incarceration and the old Jim Crow relates to her larger point about racial caste. Though she is certainly right to claim that today’s criminal justice system creates an “undercaste” of ex-convicts, it actually does much more than that.¹³⁶ Like the criminal penalties invoked when individuals violated Jim Crow laws, so too do current criminal penalties punish poor, unskilled, and uneducated minorities who seek to escape their lower class predicament. As sociologist Jennifer Hamer notes in her recent study of life and crime in East St. Louis, Illinois; African Americans living in poverty-stricken, predominantly black areas – whether inner cities or suburbs – face few legitimate avenues of upward mobility.¹³⁷ Cursed with inferior schools, limited opportunities, and no money, the isolated poor rely heavily on crime, whether prostitution or drugs, to escape deprivation.¹³⁸ Though such individuals may be able to scrape out an existence on minimum wage jobs and legitimate part-time work, what Hamer calls “clean” hustles, their hopes of rising out of the lower class

¹³³ Edward I. Koch, *The War on Drugs* 242 SCIENCE 495 (1988).

¹³⁴ John J. Dilulio, Jr., *The Next War on Drugs: Targeting the Inner Cities*, 11 BROOKINGS REVIEW 33 (1993).

¹³⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 123 (2010).

¹³⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010).

¹³⁷ JENNIFER F. HAMER, *ABANDONED IN THE HEARTLAND: WORK, FAMILY, AND LIVING IN EAST ST. LOUIS* (2011). See also SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2006).

¹³⁸ JENNIFER F. HAMER, *ABANDONED IN THE HEARTLAND: WORK, FAMILY, AND LIVING IN EAST ST. LOUIS* (2011).

often hinge on resorting to some kind of illegal activity, or “dirty hustle.”¹³⁹ “In a poor place like East St. Louis,” notes Hamer, “the decision to hustle is normal,” rational, and one of the few available options for those desiring “something better.”¹⁴⁰

If Alexander placed more emphasis on Hamer’s rationalization of the hustle, an acknowledgment that crime provides an important, available escape from caste, then she would be able to bolster her own argument about the “many parallels” between mass incarceration and Jim Crow, also a system that criminalized black efforts to transcend their plight.¹⁴¹ However, placing more emphasis on reasons why disadvantaged individuals might legitimately decide to commit crime would presumably undermine Alexander’s single-minded claim that both mass incarceration and Jim Crow derive from conservative “divide-and-conquer” politics, forcing her instead to make the less polemical point that a broad constellation of forces actually explains mass incarceration.¹⁴² Some of these forces undoubtedly stem from conservative politics, while others involve minority efforts to rise out of poverty, not to mention liberal efforts to help minorities that have gone horribly awry, engendering perverse results.

Liberal support for harsh sentences remains the most interesting aspect of America’s mass incarceration story, yet Alexander largely ignores it. Her occlusion marks perhaps the greatest weakness of her Jim Crow analogy, muddling her history of racialized systems of social control, meanwhile obscuring prescriptive solutions for dismantling those systems. For example, Alexander concludes her study by asking why the “civil rights community” has “been so slow to acknowledge” the problem of mass incarceration in America.¹⁴³ She posits that one problem has been an over-emphasis on litigation as a means of social change, together with a growing rift between civil rights lawyers and those most vulnerable to the criminal justice system.¹⁴⁴ Missing is sufficient acknowledgment of the bipartisan zeal for punishment that swept the nation in the 1980s and 90s, spurred by conservatives and liberals alike who believed that imprisonment might actually help the poor.¹⁴⁵

¹³⁹ JENNIFER F. HAMER, *ABANDONED IN THE HEARTLAND: WORK, FAMILY, AND LIVING IN EAST ST. LOUIS* 105 (2011).

¹⁴⁰ JENNIFER F. HAMER, *ABANDONED IN THE HEARTLAND: WORK, FAMILY, AND LIVING IN EAST ST. LOUIS* 105 (2011).

¹⁴¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 17 (2010).

¹⁴² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 34 (2010).

¹⁴³ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 223 (2010).

¹⁴⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 225 (2010).

¹⁴⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 229 (2010).

Though liberal efforts to embrace the “most oppressed” actually contributed to mass incarceration, Alexander keeps her sights on conservatives, arguably missing an opportunity to accomplish her ultimate objective, namely winning support for dismantling the American prison state. For example, Alexander might be able to pick up conservative supporters by selling mass incarceration as a misguided effort at big government, stressing the waste involved in providing “[f]ederal grant money for drug enforcement” meanwhile maintaining a massive “criminal justice bureaucracy.”¹⁴⁶ Such concerns could then be merged with a more traditionally liberal compassion for the poor, all the while marshaling her data to prove that lowering criminal sentences and ending the War on Drugs makes bipartisan sense. However, such a move would require junking her divide and conquer thesis in favor of a more nuanced attention to the evils wrought by liberal reform.¹⁴⁷ As the next section shall demonstrate, a similar argument could be brought to bear on the question of guns.

IV. THE LIBERAL WAR ON GUNS

A final critique of Alexander’s thesis emerges from yet another field that has enjoyed liberal support but contributed to the mass incarceration of African Americans, namely federal gun regulation. Pursuant to 21 U.S.C. §846 and 18 U.S.C. §924, defendants found in possession of firearms who either have past felony convictions or involvement in drug trafficking, face additional prison time for carrying a weapon.¹⁴⁸

The manner in which such gun regulations contribute to mass incarceration recently became evident in several Midwestern states as federal agents staged elaborate stings to net defendants suspected of drug distribution. To take just one example, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) joined city police in St. Louis, Missouri in a four month joint operation during the spring of 2013 that netted 159 defendants and 267 guns.¹⁴⁹ Though hailed by city officials as a victory against violent crime, the overwhelming number of defendants apprehended by the ATF turned out to be African American, even as questions arose concerning the predatory nature of the operation.¹⁵⁰ For

¹⁴⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 230, 232 (2010).

¹⁴⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49 (2010).

¹⁴⁸ 21 U.S.C. §846; 18 U.S.C. §924.

¹⁴⁹ Sam Dotson, Darryl Forté and Chuck Wexler, *Local/Federal Partnerships Work in Reducing Gun Violence*, ST. LOUIS POST-DISPATCH, Sept. 4, 2013.

¹⁵⁰ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Seizures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

example, “court records and interviews” revealed that the ATF had relied on three primary strategies for apprehending suspects in St. Louis: 1) “street-level drug purchases and arrests,” 2) “a sting involving a fake drug stash house,” and 3) a “St. Louis storefront used to buy guns”¹⁵¹

In the case of the storefront, federal agents opened a tattoo parlor and then repeatedly asked customers if they might be able to sell them firearms and drugs.¹⁵² Meanwhile, the stash house scheme featured an “undercover agent pretending to be a disgruntled drug courier” who actively “recruit[ed] others willing to rob a stash house claimed to be packed with drugs, and guarded by armed members of a fictional drug ring.”¹⁵³ Once agents identified a “prospective” robber, they would then “repeatedly” ask that individual if they were “prepared to go through with the plan” and, if so, whether they could procure a weapon “to pull it off.”¹⁵⁴ Once the unwitting robber acquired a weapon to conduct the imagined federal scheme, “[a]gents and police” would “swoop” down and arrest them.¹⁵⁵ Finally, federal agents conducted a series of “street-level drug purchases” during which undercover officers alternately purchased drugs and guns, only to then arrest the surprised sellers for federal offenses.¹⁵⁶

Defense attorneys in St. Louis criticized several aspects of the ATF tactics, particularly the phony drug house raids. According to them, federal agents “lured” unwitting, “nonviolent drug dealers” into the drug raid scheme “with promises of huge payouts” that attracted individuals who would not otherwise have committed a home invasion, meanwhile using the “fictional amounts of drugs” invented by police to charge the defendants with federal narcotics offenses.¹⁵⁷

Similar operations in other states incurred similar criticism. For example, a “fake ATF store” in Milwaukee drew criticism for “offering such high prices for guns that some were bought from local retailers and immediately resold to the agents.”¹⁵⁸ Meanwhile, Judge Richard Posner of the Seventh Circuit argued that a fake ATF stash house scheme in Chicago presented sufficient evidence of entrapment to be submitted to a jury

¹⁵¹ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵² Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵³ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵⁴ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵⁵ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵⁶ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵⁷ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

¹⁵⁸ Robert Patrick, *Four-Month ATF Operation in St. Louis Yields Arrests, Siezures of Guns and Drugs*, ST. LOUIS POST-DISPATCH, July 11, 2013.

precisely because it involved big money inducements.¹⁵⁹ According to Posner, “extraordinary inducements” demonstrate “that the defendant’s commission of the crime for which he’s being prosecuted is not reliable evidence that he was predisposed to commit it.”¹⁶⁰ In the Chicago case, styled *U.S. v. Kindle*, one of the defendants “had never robbed a stash house,” nor had he ever “been convicted of a drug offense.”¹⁶¹ In fact, after being released from prison in 2005 for an unrelated offense, the defendant “had tried to go straight – moving away from the city in which he’d lived and had had criminal associates and getting a legal job.”¹⁶² Convinced that the ATF had induced a reformed offender back into a life of crime, Posner lamented that the defendant “had earned his GED, an associate’s degree, and three vocational certificates in prison, and upon release had devoted personal time to volunteer activities.”¹⁶³ Despite such good works, however, the defendant nevertheless proved vulnerable to the government’s ridiculously high offer of “5 to 7 kilograms of cocaine with a street value of \$135,000 to \$189,000” for completion of the phony raid; an inducement “unlike any Mayfield” had ever seen.¹⁶⁴ According to Posner, “a reasonable jury could have found that [the defendant] was not a stash house robber, or even a drug dealer of any sort, was not predisposed to attempt a stash house robbery, and accepted the invitation because of financial desperation.”¹⁶⁵ Put simply, ATF stash house schemes amounted to a “disreputable tactic” employed by law enforcement to arrest minorities, “increase the amount of drugs that can be attributed to the persons stung,” and “jack up their sentences.”¹⁶⁶

That St. Louis Police Chief Sam Dotson praised such stash house schemes proved uncontroversial until conservatives in the state proposed a bill aimed at curtailing federal enforcement of gun laws in the state.¹⁶⁷ Styled House Bill 436, the measure represented, for many, a reactionary move by conservatives to impugn talk of tightening gun regulations following the massacre of school children by a deranged individual in Sandy Hook, Connecticut in December 2012.¹⁶⁸ However, even as liberals across the state lamented the bill, few recognized the law as a

¹⁵⁹ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶⁰ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶¹ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶² *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶³ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶⁴ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶⁵ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting).

¹⁶⁶ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting) citing Eda Katharine Tinto, *Undercover Policing, Overstated Culpability* 34 CARDOZO LAW REV. ___ (2013).

¹⁶⁷ *St Louis Police Chiefs, Mo. Police Union Oppose Gun Law Veto Override*, Sept. 5, 2013. Retrieved Oct. 18, 2013 from <http://stlouis.cbslocal.com/2013/09/05/in-letter-to-house-speaker-chief-fitch-opposes-gun-law-veto/>

¹⁶⁸ *St Louis Police Chiefs, Mo. Police Union Oppose Gun Law Veto Override*, Sept. 5, 2013. Retrieved Oct. 18, 2013 from <http://stlouis.cbslocal.com/2013/09/05/in-letter-to-house-speaker-chief-fitch-opposes-gun-law-veto/>

potential brake on federal prosecutions of overwhelmingly black criminal defendants in St. Louis and Kansas City ... except for Chief Dotson, who wrote an impassioned letter endorsing a gubernatorial veto of the statute.¹⁶⁹ As Dotson described it, the conservative gun law would disrupt joint operations between the city's police department and federal law enforcement; a problem since "federal agencies provide important resources in personnel, equipment, and intelligence about violent criminals."¹⁷⁰ Dotson's public protest revealed an arguably bizarre synergy between robust endorsements of the Second Amendment and the curtailment of mass incarceration in America.¹⁷¹

While Alexander focuses her critique of mass incarceration on conservative social policies stemming from the Reagan-era War on Drugs, the St. Louis story suggests a more complicated scenario.¹⁷² There, the ATF's aggressive enforcement of federal gun laws, an issue that liberals tend to support, contributed directly to the "entrapment" of African Americans who might otherwise have remained clear of prison.¹⁷³ At least this was the position of 7th Circuit Judge Richard Posner, who expressed open disdain for federal gun control tactics in *United States v. Kindle*.¹⁷⁴

However, lifting such regulations garnered little support on the left.¹⁷⁵ On the contrary, it was conservative support for the Second Amendment that promised tactics likely to disrupt black incarceration. Even if House Bill 436 represented an unreasonable means of slowing minority imprisonment in Missouri, in other words, the mere fact that rural conservatives flaunted the police suggests a potential paradigm shift in the politics of crime control in America. According to Alexander, conservatives and police bonded for much of the post-*Brown* era, jointly celebrating the War on Drugs.¹⁷⁶ However, that bond seems to have come unglued as conservative fears of government overreaching provide new rhetorical possibilities for curtailing criminal justice excess. Here, the rhetoric of freedom and firearms provides a new frame, perhaps a more

¹⁶⁹ *St Louis Police Chiefs, Mo. Police Union Oppose Gun Law Veto Override*, Sept. 5, 2013. Retrieved Oct. 18, 2013 from <http://stlouis.cbslocal.com/2013/09/05/in-letter-to-house-speaker-chief-fitch-opposes-gun-law-veto/>

¹⁷⁰ Sam Dotson, Darryl Forté and Chuck Wexler, *Local/Federal Partnerships Work in Reducing Gun Violence*, ST. LOUIS POST-DISPATCH, Sept. 4, 2013.

¹⁷¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 223 (2010).

¹⁷² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40-58 (2010).

¹⁷³ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting) citing Eda Katharine Tinto, *Undercover Policing, Overstated Culpability* 34 *CARDOZO LAW REV.* ___ (2013).

¹⁷⁴ *U.S. v. Kindle*, 698 F.3d 401 (2012).

¹⁷⁵ *U.S. v. Kindle*, 698 F.3d 401 (2012) (Posner, J. concurring and dissenting) citing Eda Katharine Tinto, *Undercover Policing, Overstated Culpability* 34 *CARDOZO LAW REV.* ___ (2013).

¹⁷⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40-58 (2010).

powerful frame, than Alexander's emphasis on the need to develop "an ethic of genuine care, compassion, and concern for every human being."¹⁷⁷ Precisely such rhetoric was invoked in Missouri to kill House Bill 436, even as the ATF proffered its irresistible stash house schemes.¹⁷⁸

V. CONCLUSION

That liberals endorsed both federal gun control and the War on Drugs is not something Michelle Alexander pays sufficient attention to in *The New Jim Crow*.¹⁷⁹ Yet, liberal zeal for incarceration goes to the heart of her book, undermining her thesis that harsh sentences derive almost entirely from conservative efforts to divide the working class along racial lines; a thesis that she extends to the rise of racial segregation, or Jim Crow. Why Alexander focuses almost exclusively on conservative efforts to "bribe" poor whites deserves some comment, if for no other reason than to place her theory within a broader, intellectual context.¹⁸⁰ Mildly reminiscent of Marxian "false consciousness," Alexander's notion of a false working class "consensus" coincides with a long tradition of American historiography placing "class and economic divisions" at the center of politics.¹⁸¹ To such historians, including C. Vann Woodward, race remains primarily an "instrumental" device employed by elites to manipulate the poor.¹⁸² As historian John Cell puts it, "[r]acism is indeed what Lenin called false consciousness."¹⁸³

¹⁷⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 258 (2010).

¹⁷⁸ According to the Police Executive Research Forum, for example, "the number one strategy that police chiefs consider most effective in preventing gun violence is submitting cases to the U.S. attorney for prosecution. Police chiefs wish that federal prosecutors could handle more gun violence cases resulting from partnerships between local police and federal agents." Dotson also referenced federal sentencing policy, arguing that "Federal criminal sentences for gun violence are usually more certain than those provided under state law," and "[a]nd federal agencies provide important resources in personnel, equipment, and intelligence about violent criminals." Sam Dotson, Darryl Forté and Chuck Wexler, *Local/Federal Partnerships Work in Reducing Gun Violence*, ST. LOUIS POST-DISPATCH, Sept. 4, 2013.

¹⁷⁹ See *supra* §III.

¹⁸⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 34 (2010).

¹⁸¹ EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 488 n.11 (1992).

¹⁸² For a concise discussion of the relationship between class and race in southern historiography, see EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 488 n.11 (1992). See also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3rd ed. 1974); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); JOHN W. CELL, *THE HIGHEST FORM OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 117 (1982).

¹⁸³ JOHN W. CELL, *THE HIGHEST FORM OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 117 (1982).

Yet, recent historians have begun to move away from Leninist takes on the origins of Jim Crow, suggesting that segregation and disfranchisement stemmed not simply from elite efforts to divide the poor, but more complex interactions between middle and upper class southerners, including progressive efforts to advance black interests. As Section I of this article sought to demonstrate, many of the early supporters of racial segregation, or Jim Crow, were progressives, individuals who argued that separating the races promised to reduce racial violence and help African Americans establish their own institutions and traditions free from white interference and control.¹⁸⁴

That Jim Crow proved an evil system is worth underscoring, precisely because it demonstrates the manner in which aspirational politics can yield unanticipated, negative effects. Section II provides another example of this, noting how liberal reforms in criminal procedure also contributed to mass incarceration. Not long after the Supreme Court's liberal ruling in *Mapp v. Ohio*, for example, reports began to emerge that the decision had actually wreaked unanticipated negative effects on the streets, prompting police to develop intrusive, violent methods of evidence gathering.¹⁸⁵ As moderates sought to curb police procedure, they advanced a structured model of "stop and frisk" aimed at curbing police abuses.¹⁸⁶ However, this model proved to have its own perverse effects, greatly facilitating the extent to which police could peacefully stop and apprehend black suspects on the street.¹⁸⁷ As Alexander herself notes, the rise of stop and frisk provided the first vital "step" in the larger process of achieving "racially discriminatory results" in American criminal justice.¹⁸⁸

The ultimate manifestation of racial discrimination in criminal justice, concludes Alexander, is the War on Drugs, a campaign that she attributes to conservative wedge politics aimed at dividing America's working class. Yet, as Section III of this Article illustrates, liberal aspirations contributed to the war as well. Not only did well-known democrats like Joe Biden and Gary Hart endorse harsher drug sentences out of an interest in helping rid black communities of drugs, but Democrats worked closely with Republicans on developing new punishment schemes, including sentencing guidelines aimed at reducing judicial corruption, albeit with devastating results.¹⁸⁹

Finally, current liberal enthusiasm for federal gun regulations, a sympathetic project in the wake of tragedies like Sandy Hook, also bears examination as a potential contributor to black incarceration. As recent ATF stings across the Midwest reveal, federal gun laws tend to target the

¹⁸⁴ See *supra* §I.

¹⁸⁵ See *supra* §II.

¹⁸⁶ See *supra* §II.

¹⁸⁷ See *supra* §II.

¹⁸⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 103 (2010).

¹⁸⁹ See *supra* §III.

very same minorities netted in drug prosecutions, even eliciting complaints of predatory policing and entrapment.

Throughout, the history of race and policy in America points not simply to the persistence of prejudice, but the unanticipated pitfalls of reform. Alexander's reluctance to acknowledge this uncomfortable truth weakens her otherwise compelling analogy between mass incarceration and Jim Crow, pressing her into embracing an overly simplistic historical narrative of how systems of oppression evolve. For example, Alexander concludes her case by underscoring the importance of enlisting "compassion" in the hearts of white voters sufficient to counter the "indifference" that has marked white attitudes towards blacks since the 1890s.¹⁹⁰ Yet, indifference and lack of compassion are arguably not the root causes of racial inequality in America, as this Article has sought to demonstrate. Though generally associated with repression and discrimination, both Jim Crow and mass incarceration owe their existence in part to enlightened reforms aimed at promoting black interests, albeit with perverse results. Recognizing the aspirational origins of systematic discrimination marks an important facet of comprehending the persistence of racial inequality in the United States.¹⁹¹

¹⁹⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 203, 241, 242 (2010).

¹⁹¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 233, 234, 245, 260 (2010).