

THE UNDER-POLICED

I. Bennett Capers*

INTRODUCTION

The problem of mass incarceration, decades in the making, has finally become part of the national conversation. One has only to watch the presidential candidates' eagerness to take on the issue to see that this is the case. Democratic Party presidential nominee Hillary Clinton calls for an end to our "era of mass incarceration."¹ During the presidential primaries, Bernie Sanders was equally blunt, stating "We have a criminal justice system which is broken. Who in America is satisfied that we have more people in jail than any other country on Earth, including China?"² Even several of the candidates for the Republican Party nomination, long associated with being tough on crime, insisted that something must be done about mass incarceration, though perhaps their motivations were as much about fiscal concerns as anything else.³ The *Washington Post* summed up this state of affairs nicely: "Criminal justice reform is the one issue that just about everyone seems to agree on right now."⁴ A national survey indicated that an overwhelming consensus

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1. Sam Frizell, *Hillary Clinton Calls for an End to "Mass Incarceration,"* TIME, <http://time.com/3839892/hillary-clinton-calls-for-an-end-to-mass-incarceration/> (last updated Apr. 29, 2015, 4:39 PM).

2. Ben Norton, *Dem Debate*, SALON (Jan. 17, 2016, 10:25 PM), http://www.salon.com/2016/01/18/dem_debate_sanders_blasts_mass_incarceration_asks_why_millions_of_black_americans_are_in_prison_but_not_wall_street_ceos/.

3. See, e.g., Bill Keller, *Prison Revolt*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt>. A notable exception to the conservative handwagon for reducing mass incarceration is the Republican Party presidential nominee Donald Trump. See Tierney Sneed, *How Donald Trump Threatens to Blow Up Bipartisan Criminal Justice Reform*, TALKINGPOINTSMEMO.COM (Sept. 10, 2015, 6:00 AM), <http://talkingpointsmemo.com/livewire/criminal-justice-reform-gop-primary>.

4. Radley Balko, *Here's What Presidential Candidates' Websites Say About Criminal Justice Reform*, WASH. POST (Aug. 6, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/08/06/heres-what-presidential-candidates-websites-say-about-criminal-justice-reform/>.

of Americans are in support of criminal justice reform.⁵ In California, voters approved Proposition 47, a ballot initiative to reduce penalties for low-level crimes.⁶ Nationwide polling shows that Americans now favor treatment, rather than punishment, for many drug offenses.⁷ Even as far back as 2011–12, when Newt Gingrich staged a viable run to be the Republican Party's nominee for the presidency, it was acceptable for an avowed conservative to have a policy that did not favor more incarceration.⁸ Gingrich, recall, helped to establish Right on Crime, a conservative advocacy group in favor of de-incarceration.⁹ In short, we are a far cry from the days when three-strike laws were sweeping the nation and from President Bill Clinton's 1994 omnibus crime bill. We are a far cry, too, from the days when the way to successfully rally voters was to show a political advertisement depicting a prison revolving door and Willie Horton.¹⁰

5. See *ACLU Nationwide Poll on Criminal Justice Reform*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/aclu-nationwide-poll-criminal-justice-reform> (last visited Aug. 15, 2016).

6. *Voters Approve Proposition 47, Reducing Penalty for Low-Level Crime*, CBS LOC. MEDIA (Nov. 4, 2014, 11:09 PM), <http://sanfrancisco.cbslocal.com/2014/11/04/proposition-47-non-violent-crime-penalty-results/>.

7. See *America's New Drug Policy Landscape*, PEW RES. CTR. (Apr. 2, 2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/>. For more polling data, see Michael Tonry, *Remodeling American Sentencing*, 13 CRIMINOLOGY & PUB. POL'Y 503, 509 (2014).

8. See David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY (Nov./Dec. 2012), <http://washingtonmonthly.com/magazine/novdec-2012/the-conservative-war-on-prisons/>.

9. In announcing the formation of Right on Crime, Gingrich wrote, "There is an urgent need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential. . . . We can no longer afford business as usual with prisons. The criminal justice system is broken, and conservatives must lead the way in fixing it." Newt Gingrich & Pat Nolan, Opinion, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>. For more on this bipartisan movement, see Kara Gotsch, *Bipartisan Justice*, 22 AM. PROSPECT, Jan./Feb. 2011, at A22–A23.

10. In his race against Massachusetts Governor Dukakis, George Bush ran ads depicting Willie Horton, a black convicted killer who, while on a Massachusetts furlough program, raped a white woman. As Regina Austin put it, "Willie Horton symbolized the threat that black males, aided by white liberal politicians, pose to innocent whites. Playing on racial fears, the ads' signifying was not limited to the criminal element; every black man was a potential Willie Horton, rapist, and murderer." See Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1024 (1995). To date, Republican presidential nominee Donald Trump's efforts to rally support by invoking the specter of Mexican rapists and urban unrest has not translated into higher poll numbers. See Kurtis Lee, *Donald Trump's Call for Poll Watchers Brings Back Fears of 1988 Santa Ana*, L.A. TIMES (Aug. 19, 2016, 10:30 AM), <http://www.latimes.com/politics/la-na-pol-orange-county-voting-guards-20160816-snap-story.html>.

Certainly, much of this conversation is attributable to the numbers. We live in a country that, between 1970 and 2005, increased its prison population by 628%, where one in every one hundred persons is behind bars, and where our prisons and jails now hold about 2.2 million individuals.¹¹ This is more than the individual populations of New Hampshire, Wyoming, and Vermont.¹² Indeed, we are now at a point where approximately 30% of all adults have a criminal record.¹³ Part of this increase is attributable to the war on drugs, to be sure, but part is also attributable to our turn to longer and longer sentences, including life without parole (“LWOP”) and de facto life.¹⁴ Consider more numbers. Between 1992 and 2009, the number of prisoners serving LWOP sentences increased more than 300%.¹⁵ The number of prisoners serving life sentences is more staggering. As of 2013, one in every nine prisoners was serving a life sentence.¹⁶ Those are the direct human costs of mass incarceration, which says nothing of the indirect costs to families and communities,¹⁷ or the costs resulting from the most perverse effect of mass incarceration: increased crime.¹⁸ The direct financial costs are also significant. Our current state of incarceration costs approximately fifty-two billion dollars

11. I. Bennett Capers, *Defending Life, in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 167, 179 (Charles Ogletree, Jr. & Austin Sarat eds., 2012); SENTENCING PROJECT, TRENDS IN U.S. CORECTIONS 2 (2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

12. Capers, *supra* note 11, at 179.

13. U.S. DEPT' OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006), www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

14. Capers, *supra* note 11, at 179.

15. *Id.*

16. SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

17. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1277 (2004). The children of inmates are but one consequence. By at least one estimate, over twenty-five million children have experienced parental incarceration. ERNEST DRUCKER, A PLAGUE OF PRISONS 44 (2011).

18. As Todd Clear has recently demonstrated, when the state incarcerates a large percentage of a community, it creates a perverse effect: by removing individuals, the state also weakens internal constraints of family and community, thus leading to higher law breaking. See TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 5–6 (2007).

annually.¹⁹ This figure only begins to get at the indirect financial costs.

The distribution of incarceration presents another problem. I noted that we currently incarcerate approximately one in every one hundred persons,²⁰ but those numbers do not begin to reflect how incarceration is distributed along lines of gender, race, age, class, and mental health. Our prison population is overwhelmingly male.²¹ And while one in every seventeen white males can expect to go to prison in his lifetime, that likelihood increases to one in every six Hispanic males, and one in every three African American males.²² The numbers become more dismal when compared to age. Although young minority men make up only about 3% of the United States population, they constitute about 30% of the defendants.²³ With respect to class, according to one study, over half of all prisoners lived in poverty the year before their arrest.²⁴ With respect to mental health, the numbers are similarly disheartening. The rate of mental illness is estimated to be between 14%–25% of all prisoners.²⁵ In other words, as many as 375,000 individuals with serious mental illness are held in jails and prisons on any given day.²⁶

While there is much to be said about the problem of mass incarceration and strategies for de-incarceration, the goal of this Essay is to bring two things to the conversation. The first is misdemeanors. Of the 2.2 million individuals incarcerated, approximately one-third are held in jails rather than prisons, suggesting that a significant number are being held for misdemeanors.²⁷ Even this obscures the full impact of misdemeanors on mass incarceration. As Alexandra Natapoff reminds us, misdemeanors, in fact, make up the vast bulk of our criminal justice system and “fuel[] some of its most pressing

19. *Center on Sentencing and Corrections*, VERA INST. JUST., <https://www.leg.state.nv.us/interim/77th2013/Committee/StatCom/ACAJ/Other/27-January-2014/VERAoverviewcsc.pdf> (last visited Aug. 15, 2016).

20. Capers, *supra* note 11, at 179.

21. See PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

22. SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

23. DRUCKER, *supra* note 17, at 37.

24. Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration 2* (Ctr. for Soc. Dev., Working Paper No. 14-31, 2014), <https://csd.wustl.edu/Publications/Documents/WP14-31.pdf>.

25. *Id.*

26. *Id.*

27. See SENTENCING PROJECT, *supra* note 11, at 2.

problems.”²⁸ In fact, “[m]ost Americans experience criminal justice via the petty offense process; the ten million misdemeanor cases filed annually comprise around eighty percent of state dockets.”²⁹ Quite simply, the “misdemeanor machinery is a major source of overcriminalization.”³⁰

The second thing that must be brought to the table—with respect to mass incarceration as a whole but also with respect to misdemeanors—is race, but not in the usual way. Usually, when we think of race and criminal justice, we think of racialized policing and the overrepresentation of racial minorities in jails and prisons. Certainly, my own writing has focused on those issues.³¹ But in this Essay I want to ask, what happens when we consider criminal justice not only as an issue of overcriminalization and overenforcement vis-à-vis racial minorities, but also as an issue of undercriminalization and underenforcement vis-à-vis non-minorities? Put differently, in this time when we are again discussing white privilege and telling each other, “Check your privilege,” and at this time when the hashtag #Crimingwhilewhite has become a phenomenon,³² are there advantages to talking about white privilege—or more generally, privilege—and criminal justice? Is there an assumed “racial pass”? Are there advantages to talking about the under-policed? Finally, how might those conversations impact the issue du jour, mass incarceration?

What follows is a brief exploration of these issues. Part I begins the conversation by directing a light on the role misdemeanors play in mass incarceration. Part II then adds race and white privilege to the discussion. In keeping with the topic of this Symposium, *Implementing De-Incarceration Strategies: Policies and Practices to Reduce Crime and Mass Incarceration*, Part III offers some suggestions for reducing mass incarceration.

28. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015).

29. *Id.*

30. *Id.*

31. See, e.g., I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835 (2008); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. (forthcoming 2016); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011).

32. See Marc Santora & Gabriel Fisher, *At Princeton, Privilege Is: (a) Commonplace, (b) Misunderstood, or (c) Frowned Upon*, N.Y. TIMES (May 2, 2014), <http://www.nytimes.com/2014/05/03/nyregion/at-princeton-privilege-is-a-commonplace-b-misunderstood-or-c-frowned-upon.html>; Zachary A. Goldfarb, #Crimingwhilewhite: White People Are Confessing on Twitter to Crimes They Got Away with, WASH. POST: WONKBLOG (Dec. 4, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/12/04/crimingwhilewhite-white-people-are-confessing-on-twitter-to-crimes-they-got-away-with/>.

I. ON MISDEMEANORS AND MASS INCARCERATION

It may seem strange to focus on misdemeanors in an essay on mass incarceration. But the simple fact is that misdemeanors play an integral role in mass incarceration. Scholars such as Jenny Roberts are right to argue that there “is a misdemeanor crisis in the United States.”³³ And Alexandra Natapoff is right to point out that

our criminal system is mostly about misdemeanors. . . . Rarely recognized as such, the misdemeanor is in fact the paradigmatic U.S. criminal case: most cases are misdemeanors, most of what the system does is generate minor convictions, and most Americans who experience the criminal system do so via the petty offense process.³⁴

Just consider that each year, American prosecutors file approximately 2.3 million felony cases.³⁵ The number for misdemeanor cases is nearly four times that amount: ten million.³⁶ An analysis of seventeen state courts reveals that misdemeanors comprise 77.5% of the caseload in those courts;³⁷ the estimate nationwide is closer to 80%.³⁸

Nor is this a matter of little consequence. Indeed, we should be concerned with misdemeanors *qua* misdemeanors. As Jonathan Simon reminds us, misdemeanors are “adjudicated (if you can call it that) at the lowest level of courts, with little or no lawyering, few rules, and lots of scope for nasty prejudice.”³⁹ But misdemeanors are also troubling in terms of raw numbers. Consider the opening of a recent nationwide study of jails, where many misdemeanor defendants are held:

Though there is hardly a town without one or a big city without several, jails are rarely on the radar of most Americans. There are more than 3,000 jails in the United States, holding 731,000 people on any given day—more than the population of Detroit and nearly as many people as live in San Francisco. This number, high as it may be, is only a one-day snapshot. In the course of a typical year, there are nearly 12 million jail admissions—equivalent to the populations of

33. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013).

34. Natapoff, *supra* note 28, at 1063.

35. *Id.*

36. *Id.*

37. ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), http://www.courtstatistics.org/otherpages/~media/microsites/files/csp/data%20pdf/csp_dec.ashx.

38. Natapoff, *supra* note 28, at 1063.

39. Jonathan Simon, *Misdemeanor Injustice and the Crisis of Mass Incarceration*, 85 S. CAL. L. REV. 113, 113 (2012).

Los Angeles and New York City combined and nearly 19 times the annual admissions to state and federal prisons.⁴⁰

While the foregoing speaks of jails in general, it also speaks to misdemeanors. In fact, nearly 75% of the population of both sentenced offenders and pretrial detainees are in jail for offenses that are essentially misdemeanors: traffic offenses, and nonviolent property, drug, and public order offenses.⁴¹ In New York, for example, nearly 50% of cases resulting in jail time involved misdemeanors.⁴² Another way of thinking about this is thinking about the number of misdemeanor arrests in New York. New York City police officers made 221,851 misdemeanor arrests in 2014 and 227,378 in 2013, according to New York State Division of Criminal Justice Services data.⁴³

To the extent some of these misdemeanors are for marijuana offenses, the numbers continue to trouble. For example, in 2010 alone, the New York Police Department made 50,383 arrests for misdemeanor marijuana possession.⁴⁴ As the *New York Times* put it, misdemeanor marijuana arrests amounted to about “140 arrests a day, making marijuana possession the leading reason for arrest in the city.”⁴⁵ The racial distribution of these marijuana arrests is also significant. Non-whites accounted for 85.7% of all individuals arrested in New York City for misdemeanor marijuana offenses in 2014.⁴⁶ In 2013, the percentage was even higher: 87%.⁴⁷ Between 2013 and 2014, African Americans and Latinos accounted for 86% of misdemeanor marijuana possession charges.⁴⁸

There is another point to be made about misdemeanor marijuana arrests and race. It is not just that the criminalization of marijuana, originally criminalized to target Mexicans, has been racially inflected since its inception.⁴⁹ It is also that the

40. RAM SUBRAMANIAN ET AL, VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf.

41. *Id.* at 5.

42. *Id.*

43. Victoria Bekiempis, *Why Do NYC's Minorities Still Face So Many Misdemeanor Arrests?*, NEWSWEEK (Feb. 28, 2015, 12:11 PM), <http://www.newsweek.com/nypd-race-arrest-numbers-309686>.

44. Alice Speri, *2010 Marijuana Arrests Top 1978-96 Total*, N.Y. TIMES: CITY ROOM (Feb. 11, 2011, 12:11 PM), http://cityroom.blogs.nytimes.com/2011/02/11/marijuana-arrests-increase-in-new-york-city/?_r=0.

45. *Id.*

46. Bekiempis, *supra* note 43.

47. *Id.*

48. *Id.*

49. See *The Racial History of Weed*, NPR, (Apr. 15, 2016, 3:17 PM), <http://www.npr.org/2016/04/15/474392530/the-racial-history-of-weed>; see also Brent Staples, Opinion, *The Federal Marijuana Ban is Rooted in Myth and Xenophobia*, N.Y. TIMES (July 29, 2014), <http://www.nytimes.com/2014/07/30/opinion/high-time-federal-marijuana-ban-is-rooted-in-myth.html?ref=opinion>

enforcement of marijuana laws, which can swing like a pendulum, continues to evidence racialized policing. In 1994, New York City implemented “broken windows” policing, i.e., focusing on low-level offenses, purportedly to reduce serious crime.⁵⁰ At the time, the number of misdemeanor marijuana arrests was under 2000 per year.⁵¹ Within six years, the number of misdemeanor marijuana arrests per year had increased to more than 50,000, a 2760% increase.⁵² The burden of these arrests largely fell on minorities.⁵³ The burden still falls on minorities, even after New York liberalized its marijuana laws.⁵⁴ Recently asked why minorities still comprise most misdemeanor arrests, especially drug charges, an NYPD spokesperson offered a non-answer: “Arrests are based on officers’ observation and criminal complaints.”⁵⁵

All of this has consequences. Misdemeanors function as a gateway to both felony convictions and longer sentences for those convictions. As a researcher with The Sentencing Project observed, “[A misdemeanor conviction] sends people down a route that limits their life chances and sets up conditions that can lead them to commit additional crime.”⁵⁶ The researcher added, “It makes it hard for people to have stability in their life. It’s not good crime policy and it doesn’t help to promote public safety.”⁵⁷ For a prosecutor, the existence of a misdemeanor on a defendant’s criminal record can be a deciding factor in whether, and how much, to charge that individual for subsequent offenses.⁵⁸ Furthermore, the existence of a misdemeanor conviction is a factor at any subsequent sentencing. All things being equal, a defendant with a prior misdemeanor conviction, however trivial, is likely to receive a harsher sentence than a defendant without such a conviction.⁵⁹

Even without subsequent offenses, misdemeanors contribute to our current problem of mass incarceration. Again, numbers from

& r=2 (explaining that legislation that made marijuana possession a crime was rooted in prejudices against Mexican immigrants).

50. SUBRAMANIAN ET AL., *supra* note 40, at 21.

51. *Id.*

52. *Id.*

53. *Id.* at 22.

54. See *Data Shows NYPC Bias Continues*, POLICE REFORM ORGANIZING PROJECT (Nov. 4, 2015), <http://www.policereformorganizingproject.org/data-shows-nypd-bias-continues/>.

55. Bekiempis, *supra* note 43.

56. Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014), <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/>.

57. *Id.*

58. See Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 482–83 (2014).

59. See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1138 (2010).

New York City are revealing. A 2013 examination of New York City jail data revealed that more than 50% of the inmates awaiting the disposition of their cases were in jail simply because they could not afford bail of \$2500 or less.⁶⁰ Indeed, 41% of inmates were awaiting disposition on misdemeanor or violation charges.⁶¹

Quite simply, jails and misdemeanors play a complex role in “compounding the manifold negative consequences of mass incarceration in America,”⁶² and if we care about reducing mass incarceration, we would do well to attend to jails and misdemeanors.

This leads me to the notion of privilege and criminal justice.

II. ON “PRIVILEGE” AND CRIMINAL JUSTICE

Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on . . . subordination and domination.⁶³

Recently, I have been thinking about a clip from the comedian Dave Chappelle. In it, Chappelle, who is black, describes an experience being “lost and high and shit” with his white friend Chip.⁶⁴ It is their interaction with the police that prompts laughter. So much turns on Chappelle’s facial expressions, mimicry, and delivery that my recitation here barely does it justice. Still, in a nutshell, Chappelle’s monologue goes something like this:

Now, I was hanging out with a friend of mine. He’s a white guy, you know. We were just hanging out, and we were lost in the city. You know, we were smoking a joint. Now, I don’t know if it was a coincidence that we were lost and high and shit, but my white buddy—he was smoking a joint.

“Dave, Dave. It’s the goddamn cops! I’m gonna ask him for directions.”

I said, “Chip, no! Chip! Don’t do it!”

It was too late. He was walking over there. This man was high as shit.

60. SUBRAMANIAN ET AL., *supra* note 40, at 32.

61. *Id.*

62. *Id.* at 5.

63. Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 709 n.51 (1996).

64. SP H, *Dave Chappelle and His White Friend Chip*, YOUTUBE (Nov. 17, 2008), <https://www.youtube.com/watch?v=JJ3dk6KAvQM>.

"Excuse me. Excuse me, sir! Excuse me! I need some information. Uh, so I confess something I shouldn't confess. I'm a little high. All I wanna know, which way is Third Street?"

The cop was like, "Hey! TAKE IT EASY. You're on Third Street. You better be careful. Go ahead, move it. MOVE IT!"

That's all that happened. That's the end of the story.

Now I know that's not amazing to some of you, but you ask one of these black fellas, that shit is fucking incredible, isn't it? . . . That's how it is. But at the time, I didn't think there was anything racial about it. I was like, "Man, Chip. You got fucking lucky. You better be careful."⁶⁵

But as Chappelle intimates, this is not really the end of the story. Chappelle goes on to describe another experience with Chip.⁶⁶ This time they are in a car.

Now I'm not driving. Chip is driving, and he's driving a little crazy. He's been drinking. Now I don't like to let my friends drive drunk, but, you know, I was smoking a joint. I couldn't really say shit to the guy. Then we get at a red light. We stopped at a red light, and a car pulls up next to us, and I'll never forget it. Chip looks at me, he's all drunk and he's like: "Dave, I'm gonna race him."

I knew it was a bad idea, but I was high. . . .

Man. That light turned green, and Chip took off! Zig-zagging and shit so no one could pass him. The other car didn't know he was racing. Then the police seen us and pulled us over. Now you gotta understand, I'm scared as shit. I mean, come on: the car smells like weed, we've been speeding, this man is fucking drunk. I'm scared. Chip was not scared at all. It was weird. He didn't even turn his radio down. Isn't that weird a little bit? I mean, if you get pulled over, wouldn't you turn your radio down? Nobody wants to get their ass beat to a soundtrack and shit. You know what I'm saying? Chip had the music blasting: "We're not gonna take it!"

[I look] over at him. He says: "Dave, just relax. Close your butt cheeks! Just relax. Let me do the talking."

You wanna know what he said? This was almost exactly what he said. I couldn't believe it. He says: "Oh, oh. Sorry officer. I, I didn't know I couldn't do that."

65. *Id.*

66. *Id.*

I was fucking shocked! The cop said, “Well now you know! Just get outta here. Just get the fuck outta here!”

Chip said, “Okay, I will, sir. Thank you. What? What’s wrong with you, Dave?”

“I didn’t know I couldn’t do that?”

[Chip] said, “That was good, wasn’t it? Because I *did* know I couldn’t do that! Hahahaha.”⁶⁷

I have used this clip before—indeed, I start my seminar *Race, Gender, and Crime* with it—in part because it illustrates how different groups may have different expectations of citizen-police interactions, reflecting different “pools of knowledge,”⁶⁸ and in part to remind students that artists too—think N.W.A., Kendrick Lamar, Spike Lee, Toni Morrison, Bob Dylan, and Gil Scott Heron—can engage in “demosprudence.”⁶⁹ And of course I use it for humor.

But what interests me here is how it also illustrates a point that I think is crucial to any conversation about mass incarceration, or for that matter de-incarceration. When we think of mass incarceration, we tend to think of overcriminalization and over-policing, especially along lines of race. But to me this only raises a question. If mass incarceration is partially attributable to over-policing, especially the over-policing of those who are black and brown, if there exists what Randall Kennedy calls a “racial tax,”⁷⁰ are there benefits to also asking who gets a “racial pass”? If race marks who is over-policed, does it also mark who is under-policed? In other words, are there benefits to talking about white privilege and criminal justice?

Allow me to recount another anecdote, this one from a white colleague who told me about his son’s interaction with the police in the rather tony neighborhood where my colleague and I both live. The colleague’s college-age son was literally smoking a joint as he walked through the neighborhood. His experience when he

67. *Id.*

68. See David R. Maines, *Information Pools and Racialized Narrative Structures*, 40 SOC. Q. 317, 317–20 (1999) (noting that information is often race based, with blacks being privy to certain information that is largely unknown by whites, and vice versa); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120 (2008).

69. See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2750 (2014) (embracing the term demosprudence to describe action, instigated by “ordinary people,” to change “the people who make the law and the landscape in which that law is made”).

70. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997); see also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM* 13–14 (1997) (describing the price blacks pay in their encounters with whites because of black stereotypes as the “black tax”).

encountered an officer was similar to the experience of Chappelle's friend Chip. The officer waved the kid over and told him to put out the joint. There was no threat of arrest for smoking marijuana in public. There was not even discourtesy or disrespect, at least not from the officer. Only after my colleague's son started mouthing off at the officer did the officer threaten to issue him a ticket, and even that threat was an empty one; the officer never followed through on it. Instead, the officer essentially told my colleague's son, "Just get outta here."

To be sure, this may seem like anecdotal evidence, and I likely too viewed it as such when I first heard it. But my perspective changed soon after I became a commissioner on New York City's Civilian Complaint Review Board ("CCRB"). As one of thirteen commissioners, I reviewed about one hundred fully investigated complaints each month. Allow me to recount just a sampling of the kinds of cases I encountered.

- Complainant was sitting on a stoop outside of his public housing building. He begins eating a sandwich he bought, resting the wax paper from the sandwich next to him while he eats. An officer uses littering as a basis for a forcible stop, and when the complainant protests, the officer issues him a summons for littering, which is a violation of the New York City Code.⁷¹ The officer, claiming that he had earlier observed a few residents walk around the complainant, also issued the complainant a summons for obstructing pedestrian traffic.⁷² The stop, and both summonses, are valid under the Fourth Amendment and New York law.⁷³
- Complainant was observed on the sidewalk at 10:00 p.m. smoking a cigarette. When officers observed complainant discard his cigarette butt on the sidewalk, officers conducted a stop based on the offense of littering and used the stop to check his identification and run a warrant check. The stop and questioning are valid under the Fourth Amendment and New York law.⁷⁴
- Complainant was one of four teenagers stopped and questioned by officers as he stood conversing with his

71. N.Y.C. ADMIN. CODE § 16-118 (2016).

72. N.Y. PENAL LAW § 240.20(5) (McKinney 2016).

73. See *People v. Ward*, 673 N.Y.S.2d 297, 299 (N.Y. Sup. Ct. 1998) (indicating that because littering is a violation of New York law, there was a valid stop by police); *infra* notes 82-89 and accompanying text.

74. See *People v. Ward*, 673 N.Y.S.2d 297, 299 (N.Y. Sup. Ct. 1998) (indicating that because littering is a violation of New York law, there was a valid stop by police); *infra* notes 82-89 and accompanying text.

friends. The stop was justified because, according to the officers, they observed at least one pedestrian walk around the teenagers. Per the officers, the teenagers were stopped and questioned for obstructing pedestrian traffic, which in New York is a violation.⁷⁵ Again, the stop and questioning are valid under the Fourth Amendment and New York law.⁷⁶

- Three complainants were stopped, questioned, and issued summonses after officers observed them in a park drinking alcohol, in violation of a law prohibiting the public consumption of alcohol.⁷⁷ The officers ran warrant checks as well. Again, everything was lawful under the Fourth Amendment and New York Law.⁷⁸

Each of these incidents involved black or brown men. And while they may seem atypical, they, in fact, reflect a broader pattern I encountered every month of using petty offenses to police racial minorities. Largely as a result of aggressive stop-and-frisk policing, and broken-windows policing, racial minorities were policed for conduct that likely would have gone unpoliced if committed by a nonminority. Indeed, these minorities were being roped into the criminal justice machinery for the same conduct that I routinely see in the almost all white neighborhood where I live, and yet there it rarely raises a police eyebrow. Indeed, because these minorities sometimes could not pay the summonses they were issued, they would have open warrants, further entangling them in the criminal justice system.⁷⁹ Is there a reason why three black or brown youth pausing to exchange greetings on a public sidewalk are “obstructing pedestrian traffic,” and yet three white youth (or business men in suits, or mothers with strollers) pausing to do the same in my neighborhood are not? Is there a reason why black or brown people drinking during a barbeque in a park in Park Slope violates an “open container” law, but white people drinking wine from a picnic hamper on the lawn in Central Park does not? In short, public order offenses, mostly misdemeanors, “have become the new frontier of American policing, which has little to do with fighting crime.”⁸⁰ And it is not only the enforcement that seems racially coded. Sometimes,

75. *Id.*

76. *See* *People v. Ward*, 673 N.Y.S.2d 297, 299 (N.Y. Sup. Ct. 1998) (indicating that because littering is a violation of New York law, there was a valid stop by police); *infra* notes 82–89 and accompanying text.

77. N.Y.C. ADMIN. CODE § 10-125 (2016).

78. *See* *People v. Ward*, 673 N.Y.S.2d 297, 299 (N.Y. Sup. Ct. 1998) (indicating that because littering is a violation of New York law, there was a valid stop by police); *infra* notes 82–89 and accompanying text.

79. *See* ACLU, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* 10 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf.

80. KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 123 (2016).

it is the rules themselves. For example, the city's transit authority prohibits the consumption of alcohol in the New York City subway system, and yet permits it on Metro-North, the train system that services commuters from the largely white suburbs.⁸¹

What makes this type of low-level racialized policing all the more jarring is that so much of this is perfectly acceptable under Fourth Amendment jurisprudence, and its interplay with substantive criminal law facilitates such disparate treatment. The Supreme Court's decision in *Terry v. Ohio*⁸² watered down the emphasis on probable cause in the Fourth Amendment and gave its blessing to forcible stops based on "articulable, reasonable suspicion" to believe that "criminal activity may be afoot."⁸³ In *United States v. Mendenhall*,⁸⁴ the Court took other stops out of the purview of the Fourth Amendment entirely, creating the fiction that if a reasonable person would feel free to "end the conversation . . . and proceed on her way," regardless of whether she has been advised of her right to leave, then no stop has occurred at all.⁸⁵ Instead, what may look like a stop, and to the suspect feel like a stop, is in fact by law not a stop at all. Or consider *Whren v. United States*,⁸⁶ in which the Court held that so long as there is a legal basis for the stop, the subjective intent of the officer, *even if race-based*,⁸⁷ is irrelevant under the Fourth Amendment.⁸⁸ Indeed, after the Court's recent decision in *Heien v. North Carolina*,⁸⁹ there need not even be a legal basis for the stop, so long as the officer reasonably believed there was a legal

81. The rule, of course, is written in a race-neutral way. See *Rules of Conduct & Fines*, METROPOLITAN TRANSP. AUTHORITY, <http://web.mta.info/nyct/rules/rules.htm> (last visited Aug. 19, 2016). But its racial impact is obvious and has not gone unnoticed. See Denis Hamill, *Unfair to Pour!*, N.Y. DAILY NEWS (Apr. 26, 2012, 4:00 AM), <http://www.nydailynews.com/new-york/unfair-pour-article-1.1067696>.

82. 392 U.S. 1 (1968).

83. *Id.* at 21, 30.

84. 446 U.S. 544 (1980).

85. *Id.* at 555.

86. 517 U.S. 806 (1996).

87. The Court suggested that racial animus or discrimination, irrelevant to a Fourth Amendment claim, might be relevant to a claim based on the Equal Protection Clause. *Id.* at 813. However, given the hurdles the Court has erected to frustrate equal protection claims, including a discovery hurdle erected the same term as *Whren*, this alternative route is practically impassable. See *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (requiring that defendants seeking discovery to show a pattern of racial discrimination first provide actual evidence consistent with race-based decision making); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1860–61 (2004).

88. *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

89. 135 S. Ct. 530 (2014).

basis for the stop.⁹⁰ Speaking of a reasonable basis for the stop, substantive law in the form of petty crimes and offenses gives police officers a panoply of laws to choose from, from jaywalking to spitting on the sidewalk.⁹¹ Perhaps the ultimate legal fiction, however, is that the Court pretends disparate policing does not exist, or does not matter. I can think of no better testament to this than the Court's decision in *United States v. Armstrong*,⁹² in which two African American men asserted that they were targeted for arrest because of their race and sought discovery from the prosecutor to prove their case.⁹³ Faced with this selective prosecution claim, the Court engaged in what Roy Brooks refers to as "juridical subordination."⁹⁴ The Court held that in order to be entitled to discovery to make a claim of discriminatory prosecution, the petitioner must first produce evidence of discriminatory prosecution, i.e., that similarly situated individuals of a different race were not prosecuted.⁹⁵ As an initial matter, demanding a counterfactual when it comes to race is conceptually unsound, as Issa Kohler-Hausmann persuasively argues.⁹⁶ Beyond this critique, even if such evidence existed, it would invariably be in the hands of the prosecution, rendering this hurdle nearly insurmountable. In short, the Court fashioned a test that conveniently allowed it to turn a blind eye to the existence of racialized policing and prosecutions.

All of this makes me wonder whether, when talking about criminal justice and mass incarceration, or for that matter de-

90. *Id.* at 534; see also Sarah A. Ricciardi, Note, *Do You Know Why I Stopped You?: The Future of Traffic Stops in a Post-Heien World*, 47 CONN. L. REV. 1075, 1095–97 (2015). As Richard McAdams cogently observes, "Heien is a riches of embarrassment." See Richard H. McAdams, *Close Enough for Government Work? Heien's Less-than-Reasonable Mistake of the Rule of Law 1* (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper, Paper No. 572, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749272.

91. Several courts have held that an officer may conduct a *Terry* stop even when the suspected criminal activity is only a misdemeanor. See, e.g., *United States v. Trogdon*, 789 F.3d 907, 913 (8th Cir. 2015); *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 (6th Cir. 2004). For more on how legislatures expand the Fourth Amendment authority of officers to make stops and arrests by expanding substantive criminal law, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997).

92. See 517 U.S. at 458 (requiring that defendants seeking discovery to show a pattern of racial discrimination first provide actual evidence consistent with race-based decision making).

93. *Id.* at 459.

94. ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 188 (2d ed. 2005).

95. *Armstrong*, 517 U.S. at 465.

96. Issa Kohler-Hausmann, *Detecting Discrimination in Policing (Or, the Dangers of Counterfactual Causal Thinking...)*, BALKINIZATION (Aug. 13, 2015), <http://balkin.blogspot.com/2015/08/detecting-discrimination-in-policing-or.html>.

incarceration, we need to also talk about white privilege,⁹⁷ or perhaps privilege more generally. It brings to mind the experience of Joshua Solomon, a white college student who used a derivative of the drug Psoralen to darken his skin so that he would appear black.⁹⁸ In doing so, Solomon hoped to replicate a similar experiment done by white journalist John Howard Griffin in the late 1950s, which Griffin documented in his well-known book *Black Like Me*.⁹⁹ But Solomon had another motivation as well. Notwithstanding his progressive politics, Solomon suspected that “many black people used racism as a crutch, an excuse.”¹⁰⁰ Solomon, taking a break from his studies at University of Maryland, worked with a dermatologist at Yale to increase the melanin in his skin and then recorded his experience in the *Washington Post*.¹⁰¹ For

97. By now, most students of law are familiar with Peggy McIntosh’s examination of her own white privilege. McIntosh defines white privilege as “an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.” Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33. McIntosh went on to list fifty privileges she enjoys by reason of her white skin, including:

1. I can, if I wish, arrange to be in the company of people of my race most of the time. . . .

10. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability. . . .

12. I can swear, or dress in second-hand clothes, or not answer letters, without having people attribute these choices to the bad morals, the poverty or the illiteracy of my race. . . .

15. I am never asked to speak for all people of my racial group.

Id. at 34. McIntosh’s list includes only one privilege directly relating to criminal law—which itself may suggest a type of privilege.

19. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven’t been singled out because of my race.

Id. For an interesting update on this knapsack metaphor, this time imagining it as a tree that protected, among others, Olympic swimmer Ryan Lochte, who falsely claimed he was robbed at gunpoint during the 2016 Rio Olympics, and convicted rapist Brock Allen Turner, a Stanford student who was sentenced to a mere six months in jail, see Alexandra Petri, Opinion, *Ryan Lochte and the Privilege Tree*, WASH. POST: COMPOST (Aug. 19, 2016), https://www.washingtonpost.com/blogs/compost/wp/2016/08/19/ryan-lochte-and-the-privilege-tree/?utm_term=.331a94806c27.

98. Joshua Solomon, *Skin Deep*, WASH. POST, Oct. 30, 1994, at C1.

99. JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1960).

100. Solomon, *supra* note 98, at C1.

101. *Id.*

Solomon, the difference in how people interacted with him was immediate.¹⁰² In particular, he describes the experience of being suddenly under surveillance, both by private citizens and public actors.¹⁰³ His experience with a police officer is particularly telling:

A few blocks farther a police car passed, made a U-turn, stopped directly in my path. The cop waved me over. I walked to the car, put my hand on the roof his cruiser.

“Get your hands off my cruiser,” he said.

I put them in my pockets.

“You don’t want to do that either.”

I folded my fingers in front of my chest like a choirboy. He regarded me a moment.

“You’re new in town, aren’t you?” he asked. His breath stank. “Well, we’ve had plenty of trouble down here. I hope you don’t have any more in mind.”

“No way. No, sir,” I assured him.¹⁰⁴

The point here is that it is not enough to recognize that we hold stereotypes¹⁰⁵ and have implicit biases¹⁰⁶ when it comes to associations between black and brown skin, on one side, and criminality on the other. We must also recognize that we hold stereotypes¹⁰⁷ and have implicit biases that associate whiteness with law abidingness and honesty. Equally significant, we hold to these

102. *Id.* at C4.

103. *See id.*

104. *Id.*

105. *See, e.g.,* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 739 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995).

106. *See, e.g.,* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881 (2004) (finding that participants who saw a black face were quicker to identify “crime-relevant objects” than those who saw none); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490–95 (2005); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2038–39 (2011).

107. *See, e.g.,* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1006–07 (1995); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 3 (1990).

stereotypes and biases even in the face of glaring evidence that should make us think differently.¹⁰⁸

There is black criminality to be sure. Homicide rates among black men are way too high,¹⁰⁹ as are the rates for violent crime more generally,¹¹⁰ though recent evidence suggests that some of these high homicide rates may be attributable to a few repeat actors or drivers.¹¹¹ But do we really think there is that much unequal offending in other areas? That black and brown people are more likely to, say, discard their cigarette butts on sidewalks than whites, or than police officers themselves, for that matter?¹¹² Do we really think that, across the board, there exists the same presumption of innocence and guilt? If there is a “racial tax” that functions as “incarceration’s front door,”¹¹³ then shouldn’t we also attend to who is receiving a “racial pass?”

108. Social cognitionist Joshua Correll’s gun study is a case in point. In the study, Correll and his colleagues asked participants to play a videogame in which they were tasked with determining whether a suspect was holding a gun or an innocuous object. See Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002). The participants received points for shooting (in self-defense) the suspects brandishing guns; they lost points for shooting suspects who were unarmed. *Id.* at 1316–17. The point usually taken from the study is that participants were more likely to shoot unarmed suspects who were black. *Id.* at 1317–1319. But another finding is equally deserving of attention: that participants were less likely to recognize white suspects as being armed, and thus less likely to shoot armed suspects who were white. *Id.*

109. By at least one estimate, blacks comprised 52% of all murderers and 47% of all murder victims between 1980 and 2008. See ALEXIA COOPER & ERICA L. SMITH, U.S. DEPT OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 12–13 (2011), <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

110. Victims of violent crime, who are disproportionately black, are more likely to identify their attackers as black. Victims report black attackers 22.8% of the time. See U.S. DEPT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbls.5 & 40 (2011), <http://www.bjs.gov/content/pub/pdf/cvus08.pdf>. As others have observed, part of this disparity may be explainable by feedback loops. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1268 n.54 (2012).

111. For example, a study of homicides in Chicago suggests that in neighborhoods with high homicide rates, the homicides are largely driven by a small number of offenders and comprise less than 1% of the neighborhood’s population. See TRACEY MEARES ET AL., HOMICIDE AND GUN VIOLENCE IN CHICAGO: EVALUATION AND SUMMARY OF THE PROJECT SAFE NEIGHBORHOODS PROGRAM 1–2 (2009), http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf; see also Andrew V. Papachristos et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 241–43 (2007).

112. The day I was writing this paragraph, I observed a police officer discard his cigarette butt on the sidewalk.

113. This is a reference to the title of the Vera Institute of Justice study. See SUBRAMANIAN ET AL., *supra* note 40.

Some years ago, Paul Butler authored what is perhaps one of the most well-known law review articles of the last twenty-five years, “Racially Based Jury Nullification.”¹¹⁴ In the article, Butler argued that black jurors should, in cases involving black defendants, vote to nullify in certain situations.¹¹⁵ To say the article engendered pushback and continues to be controversial¹¹⁶ is an understatement. But in fact, Butler’s suggestion for what black and brown jurors should do on the back end of a criminal case, the conviction stage, is little different from what law enforcement officers engage in every day on the front end of a criminal case.¹¹⁷ Law enforcement officers are giving many people a pass based on race. It is that simple.

III. RETHINKING DE-INCARCERATION

All of this may seem far afield from strategies for reducing mass incarceration. I hope not. That is not to say that I am shying away from specific strategies we should consider. In addition to the strategies that are mentioned frequently in discussions of de-incarceration—decriminalization, community courts, and harnessing technology¹¹⁸—allow me to briefly mention a few more.

Prebooking Diversion. Although diversion at all stages, including postconviction, is important, there are particular benefits to diversion at prebooking. Quite simply, many individuals should not be formally charged at all. To be sure, this involves complicated choices. The current state of affairs we are in with respect to domestic violence is but one example. In many jurisdictions, we have responded to our historic inaction with respect to domestic violence by going to the other extreme: mandatory arrests and mandatory prosecutions.¹¹⁹ Increasingly, however, we are seeing evidence that many domestic violence victims call the police not to begin a criminal process, but rather call the police in their caregiving function.¹²⁰ They want their partners to receive help, not

114. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

115. *See id.* at 715–16.

116. Butler’s article was included for “conversation” in *Criminal Law Conversations*, a book in which scholars were invited to engage with cutting edge and influential articles. *See* CRIMINAL LAW CONVERSATIONS 561, 569–84 (Paul H. Robinson et al. eds., 2009).

117. *See* Butler, *supra* note 114, at 692; *see also* Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 292–93 (2015).

118. For discussions about how technology can be used to reduce mass incarceration, *see* Andrew Guthrie Ferguson, *Predictive Prosecutions*, 51 WAKE FOREST L. REV. 705 (2016); *see also* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. (forthcoming 2016).

119. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 534 (1996).

120. *See* “I Don’t Know What You’ve Done With My Husband, But He’s A Changed Man” *Full Transcript*, FREAKONOMICS (Sept. 17, 2015),

incarceration.¹²¹ But we respond with incarceration. Domestic violence is just one area where we should engage more seriously with prebooking diversion.

Cognitive Behavioral Therapy. We also need to consider Cognitive Behavior Therapy (“CBT”), short-duration interventions that help individuals recognize and reduce errors in judgment and decision making that lead to problematic conduct.¹²² For example, CBT has been successfully used in a study of high-risk youth in Chicago.¹²³ In the Chicago study, approximately 2740 students were randomly selected to participate in a program called “Becoming a Man.”¹²⁴ Exposure to this CBT led to a 44% reduction in violent-crime arrests relative to a control group of youth who did not receive CBT.¹²⁵ A team in England has achieved similar results using CBT to reduce domestic violence reoffending.¹²⁶ Other scholars working in Chicago have achieved impressive results through a program called Project Safe Neighborhoods, which works with high-risk individuals to increase perceptions of legitimacy and consequences.¹²⁷

Risk Assessments. To be sure, mass incarceration can also be reduced by engaging in better risk assessments, as the Justice Reinvestment project of the Council of State Governments Justice Center advocates.¹²⁸ The Justice Reinvestment project calls for a “data-driven approach to reduce corrections spending and reinvest savings in strategies that can decrease crime and strengthen neighborhoods.”¹²⁹ While this type of risk assessment is important, the risk assessment I have in mind is of a different nature. We need to be wise about accepting individual risk. We cannot reduce mass

<http://freakonomics.com/2015/09/17/i-dont-know-what-youve-done-with-my-husband-but-hes-a-changed-man-full-transcript/> (reporting that only about 28% of domestic victims wanted the offenders arrested and two-thirds, in fact, wanted help for their partners).

121. *Id.*

122. Sara Heller et al., *Preventing Youth Violence and Dropout: A Randomized Field Experiment 5* (Nat’l Bureau of Econ. Research, Working Paper No. 19014, 2013), <http://www.nber.org/papers/w19014.pdf>.

123. *See id.* at 4–5; FREAKONOMICS, *supra* note 120.

124. Heller et al., *supra* note 122, at 4–5.

125. *Id.* at 5.

126. *See* PowerPoint Presentation, Heather Strang et al., Project CARA Domestic Violence Statistics (2014), <http://www.crim.cam.ac.uk/events/conferences/ebp/2014/slides/112%20-%20TUES%20-%20Project%20CARA%20-%20Hampshire.pdf>.

127. *See* MEARES ET AL., *supra* note 111, at 2–3.

128. *See* MARSHALL CLEMENT ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT AND PUBLIC SAFETY: ADDRESSING RECIDIVISM, CRIME, AND CORRECTIONS SPENDING 8 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/JR_Summit_Report_Final.pdf.

129. *About the Justice Center*, COUNCIL ST. GOV’TS JUST. CTR., <https://csgjusticecenter.org/about-jc/> (last visited Aug. 19, 2016).

incarceration unless we are willing to accept some risk of crime. To put this differently, just as we are willing to accept the risk of accident when we drive, we must accept the risk of some crime victimization. None of us are inviolable, nor should we be.

Mental Treatment and Safety Nets. Our prisons have become our safety nets, especially for those who are mentally ill and their families.¹³⁰ As Bernard Harcourt has observed, one step to reducing mass incarceration is certainly transinstitutionalization.¹³¹ Mass incarceration can also be reduced by increasing the use of prescribed medications, such as Thorazine, to address conduct disorders and mental health treatment programs for those who are mentally ill.¹³²

All of these are strategies worth pursuing. None of these strategies is likely to be a silver bullet, or absolutely perfect. But given our incarceration rates, how interconnected and networked¹³³ every aspect of our criminal justice system is, and the growing realization that we are doing more harm than good, this is hardly the time to let the perfect be the enemy of the good.

In this brief Essay, I have attempted to add two things to the conversation about mass incarceration: misdemeanors and privilege. I have also offered a few strategies for de-incarceration.

In the end, the larger point is this: As we think about strategies for de-incarceration, we must keep in mind that to understand mass incarceration, we must not only understand overcriminalization and overenforcement in minority communities. We must also understand the role played by underenforcement, and privilege, in nonminority communities. The larger point, too, is this: Maybe, just maybe, by recognizing how privilege informs who and what is policed, we can disrupt “the illusion of a colorblind, postracial United States”¹³⁴ and form new alliances between the over-policed and the under-policed. Maybe we can have an honest and fruitful conversation about what should function as the front door to mass incarceration, and what should not. And maybe, we can finally move closer to “mak[ing] America what America must become”¹³⁵—

130. See Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV'T L. REV. 405, 409–17 (2015).

131. Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 56 (2011).

132. See *id.* at 65–75.

133. For a discussion of network theory, see Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 468 (2011).

134. TAYLOR, *supra* note 80, at 10.

135. JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1963) (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).

"fair, egalitarian, [and] responsive to the needs of all of its citizens, and truly democratic in all respects, including its policing."¹³⁶

136. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 880 (2008).