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

by Anders Walker*

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 twenty and thirty-four 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”; it condemns 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

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2. Alexander, supra note 1, at 17, 190–200; Pew Center on the States, supra note 1, at 6; Forman, Jr., supra note 1, at 22; Steiker, supra note 1, at 1–2; Loïc Wacquant, From Slavery to Mass Incarceration, 13 New Left Rev. 41 (2002); Ira Glasser, American Drug Laws: The New Jim Crow, 63 Alb. L. Rev. 703, 723 (2000).

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.”

Others disagree. According to civil rights scholar James Forman Jr., the Jim Crow analogy “oversimplifies the origins of mass incarceration,” meanwhile “diminishing our understanding of the particular harms associated with the Old Jim Crow.” Forman explains how African Americans themselves endorsed “punitive” anti-crime measures in the 1970s and 1980s, how violent crime played a role in the incarceration story, and how black imprisonment disproportionately impacts the black poor. Further, Forman notes that analogies between mass incarceration and Jim Crow tend to de-emphasize the “brutal, unremitting violence upon which Jim Crow depended.”

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 demonstrates, both Jim Crow and mass incarceration emerged not simply out of a tendency towards “unremitting violence,” racial extremism, or conservative “backlash,” but rather, progressive politics. To demonstrate, this Article proceeds 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 lay the foundation 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

4. Id. at 22.
5. Forman, Jr., supra note 1, at 23.
6. Id. at 56, 57–58.
7. Id.
8. Id.; ALEXANDER, supra note 1, at 22.
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, such as 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, 1970s, and 1980s—i.e., political actors who acted out of a genuine interest in helping the dispossessed, meanwhile failing to anticipate the evils of their policy decisions. Recognizing these unintended consequences this is important, both for understanding the rise of "racialized systems of social control," and for comprehending racism itself. 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: for example, the rich dividing the poor along racial lines, or whites simply legislating their prejudice into law. Sadly, the reality is more complex. As this Article demonstrates, 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. 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." 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. Indeed, 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

10. ALEXANDER, supra note 1, at 173.
11. Id. at 16.
12. Id. at 203.
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 HARV. L. REV. 518 (1980).
collective good—is critical to understanding “how racial oppression actually works.”

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 “racialized” systems of “social control” that in turn foster 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.” 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.” 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


15. ALEXANDER, supra note 1, at 12, 203.

16. Id. at 192–93, 197.
each year only to “enter a hidden underworld of legalized discrimination and permanent social exclusion.”

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. To demonstrate, Part I places Alexander’s thesis within the larger context of Jim Crow historiography, showing how it would be better served by paying more nuanced attention to both historian C. Vann Woodward and 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.

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. 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. Rather than “bribe” poor whites, those elites “bought” and “intimidated” black voters into supporting them, undercutting populist hopes of interracial reform. As populism collapsed, argues Woodward, conservatives worked diligently to rework Southern politics. They called for “disfranchisement of the Negro” to assuage radical anger at their own manipulation of black votes—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.

This last point is significant. Though Woodward places ultimate responsibility for the rise of Jim Crow on the shoulders of extremists,

17. Id. at 13.
19. ALEXANDER, supra note 1, at 34. For the Woodward thesis, see WOODWARD, supra note 14, at 50.
20. WOODWARD, supra note 14, at 75–76.
21. Id. at 45, 91. 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.” Id. at 62–63.
22. Id. at 79.
23. Id. at 83.
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. As Woodward
explains it, "the typical progressive reformer rode to power in the
South on a disfranchising or white-supremacy movement." This was
true in Georgia, North Carolina, Virginia, and other states to the
extent that "[r]acism was conceived by some as the very foundation of
southern progressivism." That racism could be progressive sounds alien to us today. However, the racism that moved white voters to endorse Jim Crow in the 1890s South was deeply intertwined with aspirational ideals, including not just clean government but other noble goals like fighting crime. No historian demonstrates this more starkly than Glenda Elizabeth Gilmore. 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 government corruption, but also by emphasizing "safety of the home." One such progressive, North 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. 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. 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). And Aycock did not stop there. In a move that was even more "progressive," he endorsed segregation as a means not of

24. Id.
25. Id. at 91.
26. Id.
27. See generally GILMORE, supra note 14.
28. Id. at 66, 85, 93.
29. Id. at 83.
30. Gilmore discusses the evidentiary problems with the propaganda warning of a rape scare. Id. at 86–88, 94.
31. C. Vann Woodward substantiates this point. See, e.g., WOODWARD, supra note 14, at 91–92.
subordinating blacks, but rather preserving for them a base level of social services, including education. 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 termed “exclusion.” 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, and even genocide. 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.” 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 where African Americans could “work out their own destiny.” Popular author Thomas Dixon agreed, pushing for blacks’ colonization back to Africa.

Even if removal and genocide were not likely outcomes, an increasing number of historians have located the rise of Jim Crow in policy initiatives having 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. 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

32. C. Vann Woodward substantiates this point. See id.
34. CELL, supra note 33, at 175.
37. Crowe, supra note 35, at 245. For more on Dixon and the brand of extremist politics that he endorsed, see GILMORE, supra note 14, at 66–70; WOODWARD, supra note 14, at 93–94.
38. GILMORE, supra note 14, at 15.
white man who had "insulted and struck" one of his female friends.\textsuperscript{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 describes as African-American challenges to white preconceptions of "place."\textsuperscript{40}

Perhaps nowhere was the concept of "place" more contested than on trains.\textsuperscript{41} Historian Edward Ayers notes that "[a]s the number of railroads" in the South "proliferated" in the 1880s, they created new unregulated spaces that forced whites and blacks to mix in uncomfortably close quarters.\textsuperscript{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.\textsuperscript{43} However, the rise of trains threw blacks and whites together in close quarters. This problem 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.\textsuperscript{44} On train after train, altercations between flustered white elites and "assertive" black elites exploded, leading to "overt conflict" and "violence."\textsuperscript{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.\textsuperscript{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

\textsuperscript{39} \textit{Id.} at 74.
\textsuperscript{40} \textit{Id.} at 3, 75.
\textsuperscript{41} \textsc{Edward Ayers, The Promise of the New South: Life After Reconstruction} 137, 140 (1992).
\textsuperscript{42} \textit{Id.} at 140.
\textsuperscript{44} \textit{Ayers, supra} note 41, at 140.
\textsuperscript{45} \textit{Id.} at 139.
\textsuperscript{46} \textit{Id.} at 145.
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 South’s “first legislative attempt at statewide segregation” 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 announcing 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, 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 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

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47. Id. at 142.
48. Id.
49. Id.
50. Id. at 143. See also Woodward, supra note 14, at 97.
51. Ayers, supra note 41, at 143–44.
52. Id. See also Howard N. Rabinowitz, Race, Ethnicity, and Urbanization: Selected Essays 155–56 (1994) [hereinafter Rabinowitz, Race, Ethnicity, and Urbanization].
53. Ayers, supra note 41, at 143–44.
54. Id. at 413–14.
55. Id. at 414.
conquer the poor, but also to regulate the rich.\textsuperscript{56} Indeed, if the southern middle class wanted anything, it was to curb both “greedy monopolies” and also “unruly citizens.”\textsuperscript{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.\textsuperscript{58}

Recovering the origins of segregation on trains helps to demonstrate the manner in which progressive goals had 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 both to police their own ranks and to protect the peace and tranquility of first class passengers, both white and black.\textsuperscript{59}

That racial segregation may have been a modern, even progressive, solution to problems of racial strife is a point conceded by C. Vann Woodward in \textit{Strange Career}, and elaborated upon by subsequent historians.\textsuperscript{60} For example, both John W. Cell and Howard Rabinowitz argue that segregation was a moderate alternative to even harsher policies of racial exclusion.\textsuperscript{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 “moderate men” who “sought civility, peace, and harmony.”\textsuperscript{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 healthcare.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} \textit{Id.} at 145.
  \item \textsuperscript{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. See ALEXANDER, \textit{supra} note 1, at 183.
  \item \textsuperscript{60} \textit{WOODWARD, supra note 14}, at 91.
  \item \textsuperscript{61} \textit{Rabinowitz, From Exclusion to Segregation, supra note 18}, at 325.
  \item \textsuperscript{62} \textit{CELL, supra note 33}, at 180.
  \item \textsuperscript{63} \textit{RABINOWITZ, RACE, ETHNICITY, AND URBANIZATION, supra note at 52}, at 1138–40.
\end{itemize}
Alexander, that new systems of racial control are often rationalized in progressive, forward-looking terms, and 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 Jim Crow has been echoed by mass incarceration. The next Part demonstrates how moderate, even liberal reform led to a similar pattern at midcentury, as exemplified by the rise of formalized rules sanctioning police stop and frisks—a technique 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, and 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 Part II demonstrates, the Court’s effort in 1961 to curb police abuses against blacks in Mapp had an unanticipated effect and worsened 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 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 Part makes two points. First, the origins of policies that increased rates of

64. ALEXANDER, supra note 1, at 22.
65. Id. at 77, 103, 124–25.
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 Part suggests a more fractured narrative: one where liberals and conservatives alike tolerated expansions of private liberty so long as such expansions did not threaten public violence.68

The facts leading up to Mapp v. Ohio began when police discovered obscene material in Cleveland resident Dollree Mapp’s home 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 to both “shock the conscience” and violate the Constitution.71 Just as unconstitutional, argued Mapp’s counsel, was Ohio’s obscenity law—a relatively recent measure that expanded criminal liability from manufacturers and sellers of pornography to private citizens.72

Ultimately, however, it was the “racist police abuse” in Mapp that “convinced” the Supreme Court “to extend federal supervision


70. LONG, supra note 69, at 25.


72. LONG, supra note 69, at 26.
to state criminal justice.” 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. 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. According to Richard Kuh, Secretary of the New York State District Attorney’s Association, police became more serious about acquiring warrants before conducting searches of private homes following the ruling. Prior to Mapp, claimed Kuh, officers rarely requested a warrant before searching an individual’s private “apartment, home, flat, [or] loft.” “All this has changed,” he argued in September of 1962, noting that tendencies toward ignoring warrant requirements “changed overnight.”

Mapp, however, 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. Convictions for “narcotics misdemeanor offenses” also dropped, along with convictions for “contraband—possession of weapons, [and] obscene prints.” Such declines, declared law enforcement, stemmed from officer confusion over whether they could lawfully search suspects who were not officially under arrest.

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, with many officers testifying that suspects simply “removed” objects from their pockets and “threw” them to the


74. LONG, supra note 69, at 26.


77. Id.

78. Id.

79. Id. See also Policy Prosecutions Here Cut by Curb on Evidence: Decision Limits City Policy Cases, N.Y. TIMES, July 16, 1962, at 1.

80. Kuh, supra note 76. See also Policy Prosecutions Here Cut by Curb on Evidence, supra note 79.

ground, thereby dispensing with the need for a search.\textsuperscript{82} Meanwhile, police that searched private homes began increasingly to claim that they had been “invited” in by defendants, again precluding the need for a warrant.\textsuperscript{83} Not only did \textit{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.\textsuperscript{84}

In a study of almost 4,000 arrests, New York Legal Services offered hard data that \textit{Mapp} negatively impacted police testimony, pushing officers to claim that suspects mysteriously “dropped” contraband before being approached and searched.\textsuperscript{85} The New York Police Department (“NYPD”) reported a 71.8\% spike in such “dropsies” during the year immediately following \textit{Mapp}.\textsuperscript{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.\textsuperscript{87}

One NYPD officer provided a clue into the new dynamics of post-\textit{Mapp} evidence recovery during an illegal search trial in New York City on September 12, 1962.\textsuperscript{88} Charged with unlawfully searching a suspect, the officer claimed that he “frisked” suspects but did not actually search them.\textsuperscript{89} The officer then demonstrated a standard frisk before the court—a relatively violent maneuver that


\textsuperscript{83} Ryan, \textit{supra} note 81.

\textsuperscript{84} Kuh, \textit{supra} note 76, at 1 n.2.

\textsuperscript{85} Barlow, \textit{supra} note 82, at 556. 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, \textit{Studying the Exclusionary Rule in Search and Seizure}, \textit{37 U. CHI. L. REV.} 655, 699–700 n.90 (1970).

\textsuperscript{86} Id.

\textsuperscript{87} Legal Services distinguished uniformed officers from plainclothes officers and members of New York’s specialized Narcotic Bureau. Barlow, \textit{supra} note 82, at 556.


\textsuperscript{89} Id.
aimed to shake evidence to the ground. 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. As a cigarette lighter and pair of eyeglasses “fell” from the suspect to the floor, the manner in which a frisk might generate a drop suddenly became apparent, leaving open the question of whether Mapp’s prohibition on searches also applied to frisks—even forceful ones like the one demonstrated by the officer.

Even if officers decided against frisks, police developed other means of procuring evidence from suspects without resorting to a search. In Cincinnati, for example, patrolmen “rush[ed]” suspects, “hoping to produce a panic” that would then lead them to “visibly discard” evidence. 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.

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. 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 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.” Following the ruling, however, police

90. Id.
91. Id.
92. Id.
94. Id. at 699 n.90.
95. Id.
96. Evidence of Mapp’s detrimental effect was substantiated by a presidential commission appointed by Lyndon Johnson to investigate urban unrest in the 1960s, which 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 Urb. 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).
97. Barlow, supra note 82, at 570.
reported lower numbers of arrests in unexplained rooms, dropping them from 26% to 17.6%, meanwhile increasing arrests in “hallways,” “roof landings,” and “basements.”

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. Rather than simply improve police professionalism, in other words, the decision also influenced the contours of police corruption, moving it from private homes to public areas (streets, hallways, roof landings, and basements), where police could then shake down suspects for evidence. 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.” 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. 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.

98. *Id.*
100. Barlow, *supra* note 82, at 570.
101. *Id.*
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 point. For example, Capers argues that race animated the opinion. Bennett Capers,
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. To rectify matters, Rockefeller endorsed a statute authorizing officers "to search and question a person" suspected of committing a crime "without making an arrest." The law allowed for patdown searches in cases where police possessed a reasonable suspicion that the suspect might be armed—solving one of Mapp's primary ambiguities.

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." At the time, the "highest concentration" of arrests in New York occurred in predominantly black neighborhoods, most notably Harlem. 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.'" 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.

While black fears proved prescient, the Supreme Court of the United States implicitly approved of the Empire State's law in a 1968 case, 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

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106. Id.


108. Barlow, supra note 82, at 579.


110. Id.
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. 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.”

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,” such as in *Terry v. Ohio*.

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. It marked a convergence of conservative and liberal interests that contributed to mass incarceration. As the next Part demonstrates, 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
As James Forman, Jr. shows, even “black activists” requested such penalties—a point that Michelle Alexander downplays by 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.” Though conservatives did seek working and lower-middle class votes, the War on Drugs proved more complicated than Alexander implies—a point this Part demonstrates by focusing on liberal support for heightened penalties that would, by the end of the twentieth century, contribute greatly to mass incarceration in the United States.

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. 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. 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. Though “well intended,” such guidelines turned out to have a negative impact on blacks, partly because of

117. ALEXANDER, supra note 1 at 47; Forman, Jr., supra note 1, at 36.
118. ALEXANDER, supra note 1, at 49. Alexander focuses heavily on the 1970s and 1980s, particularly the War on Drugs. For example, Chapter 3 of her book continues by showing how even as police tactics targeted minority communities in the 1980s and 1990s, 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.” Id. at 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.
120. GEST, supra note 119, at 47.
121. Id. at 58.
poor planning. 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 “fingering higher-ups,” while lower level dealers, who tended to be black, “had no such bargaining chips [and] ended up getting higher sentences.”

Just as sentencing guidelines emerged out of a series of poorly planned, unintentional, yet frequently well-intentioned initiatives, so too did liberals endorse the decision to increase penalties for crack cocaine in 1986—a move that Alexander argues “greatly exacerbated racial disparities in incarceration rates.” “Lacking detailed information,” officials on all sides of the political spectrum began to call for increased penalties for crack cocaine in 1985, after a series of news stories linking the drug to violence made national headlines. Early proponents of such a move included popular liberals like Democratic Senator Gary Hart, who claimed that crack caused “raging paranoia” and “senseless deaths.” Democratic Senator Lawton Chiles of Florida declared that crack turned users into “slaves” while black congressman 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.” Though Republican Senator Bob Dole recommended a mandatory minimum sentence for selling crack “twenty times higher” than for powder cocaine, it was Democrats who proposed a 100 to 1 ratio in the hopes of doing “something to save the black community.” 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, which established substantially different penalties for crack versus powder cocaine.

122. Id. at 61.
123. Id.
125. GEST, supra note 119, at 118.
128. GEST, supra note 119, at 119–21.
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 deemphasis on Colombian 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 contributed 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

130. ALEXANDER, supra note 1, at 5.
131. Id.
132. GEST, supra note 119, at 121.
134. Dilulio, Jr., supra note 124.
135. ALEXANDER, supra note 1, at 123.
criminal justice system creates an "undercaste" of ex-convicts, it actually does much more than that. 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. Cursed with inferior schools, limited opportunities, and no money, the isolated poor rely heavily on crime, whether prostitution or drugs, to escape deprivation. 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 often hinge on resorting to some kind of illegal activity (or, "dirty hustle"). "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."

If Alexander placed more emphasis on Hamer's rationalization of the hustle—i.e., the idea that crime provides an important, available escape from caste—she could bolster her own argument about the "many parallels" between mass incarceration and Jim Crow—another system that criminalized black efforts to transcend their plight. However, emphasizing the 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. Some of these forces undoubtedly stem from conservative politics, while others involve minority efforts to rise out

136. Id. at 13.
138. HAMER, supra note 137.
139. Id. at 105.
140. Id.
141. ALEXANDER, supra note 1, at 17.
142. Id. at 34.
of poverty, not to mention liberal efforts to help minorities that have
gone horribly awry and engendered 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.\textsuperscript{143} She
posits that one problem has been an overemphasis on litigation as a
means of social change, together with a growing rift between civil
rights lawyers and black defendants.\textsuperscript{144} Missing, however, is sufficient
acknowledgment of the bipartisan zeal for punishment that swept the
nation in the 1980s and 1990s, spurred by conservatives and liberals
alike who believed that imprisonment might actually help the poor.\textsuperscript{145}

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: winning support for dismantling the American
prison state. For example, Alexander might be able to attract
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.”\textsuperscript{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
acknowledgment of the evils wrought by liberal reform.\textsuperscript{147} As the next
Part demonstrates, a similar argument could be brought to bear on
the question of guns.

\begin{tabular}{l}
143. Id. at 223. \\
144. Id. at 225. \\
145. Id. at 229. \\
146. Id. at 230, 232. \\
147. Id. at 49. \\
\end{tabular}
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: federal gun regulation. Sections 922(g) and 924(c) of Title 18 of the United States Code provide that individuals may face punishment if found in possession of firearms: (1) after having previously been found guilty of a felony; or (2) during and in relation to a drug trafficking offense.\(^{148}\)

The way in which gun regulations such as these contribute to mass incarceration was recently evidenced in several Midwestern states when federal agents staged elaborate stings to net defendants suspected of drug distribution. In one example, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) joined local police agencies in St. Louis, Missouri in a four month joint operation in spring 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 example, “court records and interviews” revealed that the ATF had relied on three primary strategies for apprehending suspects in the St. Louis operation: (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 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

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151. Id.
152. Id.
ring." 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." Once the unwitting robber acquired a weapon to conduct the imagined federal scheme, "[a]gents and police" would "swoop" down and arrest them. 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.

Defense attorneys in St. Louis criticized several 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.

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." 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 precisely because it involved large money inducements. 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." In the Chicago case, United States v. Kindle, one of the defendants "had never robbed a stash house," nor had he ever "been convicted of a drug offense." 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

153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
160. Id. at 413.
161. Id. at 414.
had criminal associates and getting a legal job.”

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.” 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” the defendant had ever seen. 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.”

Put simply, ATF stash house schemes amounted to a “disreputable tactic” employed by law enforcement to “increase the amount of drugs that can be attributed to the persons stung” in order to “jack up their sentences.”

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. The measure, House Bill 436, represented 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. However, even as liberals across the state lamented the bill, few recognized the law as a 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. 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

162. Id.
163. Id.
164. Id.
165. Id.
166. Id. (citing Eda Katharine Tinto, Undercover Policing, Overstated Culpability, 34 CARDozo L. REV. 1401 (2013)).
167. Dotson et al., supra note 149.
168. Id.
169. Id.
intelligence about violent criminals." Dotson's public protest revealed an arguably bizarre synergy between robust endorsements of the Second Amendment and the curtailment of mass incarceration in America. While Alexander focuses her critique of mass incarceration on conservative social policies stemming from the War on Drugs, the St. Louis story suggests a more complicated scenario. 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. 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.

Lifting such regulations garnered little support from the left. 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, the mere fact that rural conservatives flouted the police suggested 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. However, that bond seemed to have come unglued as conservative fears of government overreaching provided new rhetorical possibilities for curtailing criminal justice excess. Here, the rhetoric of freedom and firearms provides a new (and perhaps more powerful) frame than Alexander's emphasis on the need to develop "an ethic of genuine care, compassion, and concern for every human being." Precisely

170. Id.
171. ALEXANDER, supra note 1, at 223.
172. Id. at 40–58.
173. See United States v. Kindle, 698 F.3d 401, 413 (7th Cir. 2012) (Posner, J., concurring and dissenting) (citing Eda Katharine Tinto, Undercover Policing, Overstated Culpability, 34 CARDOZO L. REV. 1401 (2013)).
174. See id.
175. Id. at 413 (Posner, J., concurring and dissenting) (citing Eda Katharine Tinto, Undercover Policing, Overstated Culpability, 34 CARDOZO L. REV. 1401 (2013)).
176. ALEXANDER, supra note 1, at 40–58.
177. Id. at 258.
such rhetoric was invoked in Missouri to kill House Bill 436, even as the ATF proffered its irresistible stash house schemes. 178

Conclusion

That liberals endorsed both federal gun control and the War on Drugs is not something to which Michelle Alexander pays sufficient attention 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

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.

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 “[f]ederal 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.” Dotson et al., supra note 149.

179. See supra Part III.

180. ALEXANDER, supra note 1, at 34.

181. AYERS, supra note 41, at 488 n.11.


183. CELL, supra note 33, at 117.
As Part I of this Article demonstrates, 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.\textsuperscript{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. Part 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 \textit{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.\textsuperscript{185} As moderates sought to curb police procedure, they advanced a structured model of “stop and frisk” aimed at curbing police abuses.\textsuperscript{186} This model, however, proved to have its own perverse effects, greatly increasing police harassment of black suspects on the street.\textsuperscript{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.\textsuperscript{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 Part III of this Article illustrates, liberal aspirations contributed to the War as well. Not only did well-known Democrats like Joseph 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.\textsuperscript{189}

Finally, current liberal enthusiasm for federal gun regulation, 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

\textsuperscript{184} \textit{See supra} Part I.
\textsuperscript{185} \textit{See supra} Part II.
\textsuperscript{186} \textit{See supra} Part II.
\textsuperscript{187} \textit{See supra} Part II.
\textsuperscript{188} \textit{ALEXANDER, supra} note 1, at 103.
\textsuperscript{189} \textit{See supra} Part III.
tend to target the very same minorities netted in drug prosecutions, even eliciting complaints of predatory policing and entrapment.

Put simply, the history of race and policy in America points not simply to the persistence of prejudice, but also to 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 demonstrates. 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. ALEXANDER, supra note 1, at 203, 241–42.
191. Id. at 233–34, 245, 260.