

A Discursive Construct of Race in America: The Jim Crow Analogy and the Study of Mass Incarceration

OAKLEY RAMPRASHAD

Abstract: A very specific racial discourse defined the Jim Crow era in the United States. Many believed that overturning the laws of segregation and oppression that defined the Jim Crow era through court decisions and legislation would fundamentally change racial discourse in the United States. However, in the 1990s and 2000s, scholarship on the mass incarceration of black American men emerged which invoked the Jim Crow analogy. This scholarship claimed that the racial caste system that had defined the Jim Crow era had simply evolved and was as present as ever. The utilization of the Jim Crow analogy suggests that as a society, the United States has maintained the same racial realities since the turn of the 20th century. Scholars have set up opposing camps in favour of and against the use of the Jim Crow analogy. This paper attempts to explore the divide that has emerged in the study of mass incarceration.

“Jim Crow” is a highly evocative and loaded term, primarily used to describe the systematic segregation and disenfranchisement of black Americans in the era between the United States Supreme Court’s 1896 decision in *Plessy v. Ferguson* (henceforth referred to as *Plessy*) and its 1964 decision in *Brown v. the Board of Education of Topeka* (henceforth referred to as *Brown*).¹ Fearful of the possibility of black American political influence in the post-Slavery era, white Americans maintained an oppressive and rigid racial hierarchy in the United States following the Civil War. In the five years after the *Plessy* decision, for example, an average of 101 black Americans were lynched every year. Not only were black Americans the victims of physical oppression, they were also overwhelmingly disenfranchised, and segregation continued to be rampant under the auspices of ‘separate but equal’ treatment under the law.² However, with the *Brown* decision came hope; the Court held that

¹ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford, UK: Oxford University Press, 2006), 4. In *Plessy* the court ruled that separate but equal was a legitimate stance when it came to services, facilities, opportunities etc. offered to black and white Americans. In *Brown* the court overturned this ruling stating that separate but equal could never in fact be equal.

² Ibid. See also the works of scholars such as Michelle Alexander, James Forman Jr., Richard Wormser, and Jerrold Packard.

‘separate but equal’ would no longer satisfy the equal protections Amendment of the Constitution; and, coupled with the Civil Rights Act of 1964, segregation and discrimination on the basis of race became illegal.³ With the implementation of *Brown* and the Civil Rights Act, many believed the *formal* Jim Crow era to be over, but recent scholarship has called this idea into question.

In the 1990s, the term “Jim Crow” was reintroduced into mainstream scholarship and media to describe the continued marginalization and discrimination black Americans faced in the United States. In 1999, in a piece entitled “Challenging Racial Profiles: Attacking Jim Crow on the Interstate,” William Buckman and John Lamberth argued:

Jim Crow is alive on America's highways, trains and in its airports. Minorities are suspect when they appear in public, especially when they exercise the most basic and fundamental freedom of travel. In an uncanny likeness to the supposedly dead Jim Crow of old, law enforcement finds cause for suspicion in the mere fact that certain minorities are in transit. But the Jim Crow of today is more troubling: despite overwhelming evidence of its vitality, law enforcement denies its existence, hides the evidence of its perpetration and criticizes those who even dare to complain.⁴

Although there is some debate as to the origins of the more modern use of the term “Jim Crow” to describe the legal and normative frameworks of persistent discrimination, scholars like James Forman Jr. cite Buckman and Lamberth’s article as one of the first modern usages of it.⁵ As quickly

³ In the *Brown* decision, Justice Earl Warren noted that, “in the field of public education, the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.” Equally significant, 10 years later, the Civil Rights Act of 1964 stated (among other things), “It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.” Found in *Brown v. Board of Education*, 347 U.S. 495 (1954) and “Civil Rights Act of 1964.” *Title VII, Equal Employment Opportunities* (1964).

⁴ William H. Buckman and John Lamberth, “Challenging racial profiles: attacking Jim Crow on the interstate,” *Rutgers Race & L. Rev.* 3 (2001): 83.

⁵ This paper focuses on two scholars. Professor Forman is one of them; the other is Michelle Alexander. See James Forman’s citation of Buckman and Lamberth’s, “Challenging racial profiles: attacking Jim Crow on the interstate,” 83, in his article, ““Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,” *NYUL Rev.* 87 (2012): 105 as one of the first contemporary usages of the analogy.

as it had vanished from national discourse, the term had returned and scholars began to equate the modern criminal justice system with “Jim Crow.” The term quickly garnered national attention in the United States. Books about Jim Crow became best sellers and Oscar-nominated documentaries were made.⁶ One of the most famous among these best sellers was Michelle Alexander’s book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, which explored the mass incarceration of black American men since the 1980s.⁷

Despite the book’s overwhelming success, however, some scholars have attempted to problematize the equation of the mass incarceration of black men as the new Jim Crow. As a result, two ‘camps’ emerged regarding the use of the Jim Crow analogy in scholarly writing. The first—best exemplified by Michelle Alexander—identifies policing practices and law as the chief causes of mass incarceration and, in turn, portrays mass incarceration as a new form of Jim Crow. The second camp—best exemplified by James Forman Jr.—argues that while policing practices and law have created the conditions for mass incarceration, it does not follow that we find ourselves in a “Jim Crow Era.”

This paper will examine the two historical accounts of modern mass incarceration offered by Alexander and Forman in an effort to move the collective conversation forward. I hope to show that these accounts are not mutually exclusive, but rather tell different parts of the same story. Perhaps more importantly, the accounts are complimentary in crucial ways. They draw on similar theories and might be described as symbiotic rather than opposing or contrary. By deconstructing the divide between these two accounts of modern mass incarceration, this paper aims to unify the academic discourse and thus advance the collective conversation on this topic to new and pressing areas of analysis.

Before proceeding further, it is important to situate Michelle Alexander, James Forman Jr., and myself to the subject matter of this paper. While I am a man of colour and have spent over half my life in the United States, I am not black. Both Michelle Alexander and James Forman Jr., however, are black Americans. Alexander is a civil rights lawyer, activist, and scholar. She worked with the American Civil Liberties Union (ACLU) early in her career. Previously a law professor, she resigned from that position in order to pursue “publicly accessible writing” in 2016. Her

⁶ *The New Jim Crow* by Michelle Alexander was on the New York Times bestseller list for over a year, and the Netflix documentary the 13th was nominated for an Academy Award.

⁷ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, NY: The New Press, 2012).

social justice work on behalf of the ACLU and others continues to inform and define her activism and writing.⁸ Forman—who is now a law professor at Yale University—spent the beginning of his career as a public defender in Washington, D.C., for both juvenile and adult offenders.⁹ This may in part explain his views on the complexity of crime and violence in low-income racialized neighbourhoods and the ways in which it presents challenges to Alexander's theses.

The New Jim Crow?

Michelle Alexander's book *The New Jim Crow* was met with wide acclaim when it was published in 2010. It quickly became one of the seminal texts for anyone studying mass incarceration, the War on Drugs policies of the 1980s, and the Violent Crime Control and Law Enforcement Act in the 1994.¹⁰ Even James Forman Jr. recognized Alexander's "contribution to the literature [as] the most comprehensive and persuasive to date."¹¹

Alexander's analysis centers around two realities of the American criminal justice system that were derived from two significant and racially coded pieces (or series of) legislation and laws passed during the administrations of Ronald Reagan and Bill Clinton.¹² First, a series of policing practices and techniques arose in the 1980s as a result of legislation put in place under the guise of the Reagan administration's War on Drugs. Increasing numbers of black Americans fell victim to predatory practices, like stop and frisk, that allowed police to target them on the basis of race. The federal government put mandates and policies into place to allow and encourage racist policing practices. One of the more infamous examples of this came to be known as Operation Pipeline, which was launched in 1984:

⁸ For more on Michelle Alexander, see "About the Author," *The New Jim Crow*, <http://newjimcrow.com/about-the-author> (accessed November 24, 2018).

⁹ See "James Forman Jr.," Yale Law School, <https://law.yale.edu/james-forman-jr> (accessed November 24, 2018).

¹⁰ In this paper, I simply use "mass incarceration" to refer to the staggering numbers of black American men put in prisons in the United States since the 1980s. The increase has been astounding with the United States prison population growing by 500% since 1980, from 300,000 to nearly two million by 2016. See, "Key Statistics: Prisoners," Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=488> (accessed August 8, 2019).

¹¹ James Forman Jr., "'Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,'" *NYUL Rev.* 87 (2012): 104.

¹² Alexander, *The New Jim Crow*, 5, 55.

The federal program, administered by over three hundred state and local law enforcement agencies, trains state and local law enforcement officers to use pretextual traffic stops and consent searches on a large scale for drug interdiction. Officers learn, among other things, how to use a minor traffic violation as a pretext to stop someone, how to lengthen a routine traffic stop and leverage it into a search for drugs, how to obtain consent from a reluctant motorist, and how to use drug-sniffing dogs to obtain probable cause.¹³

This operation allowed for a massive number of stops and searches that previously would have been ruled unconstitutional under the Fourth Amendment of the U.S. Constitution. This breach of constitutional protections was, as Alexander argues, reminiscent of the Jim Crow era. As a result of policies put in place under the guise of Reagan's War on Drugs, incarceration rates reached an unprecedented level.¹⁴

The second component of Alexander's argument centers on the conditions faced by convicted felons once reintroduced into society. African Americans are disproportionately overrepresented in the prison system; in fact, the United States incarcerates a larger percentage of its black population than South Africa did at the height of Apartheid.¹⁵ For this significant group of convicted African American felons, Alexander explains that "the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal."¹⁶ In other words, a black man who is an ex-felon in the United States today has as few rights as a black man living in the Southern United States at the height of Jim Crow. According to Alexander, the United States has "not ended racial caste in America; [it has] merely redesigned it."¹⁷

Forman does not take issue with Alexander's premises; he sees the same policies as having contributed to the phenomenon of mass incarceration; he agrees that policing practices are racist and that the treatment of felons is unconstitutional; and he sees mass incarceration as detrimental to the black population. His overarching criticism centers on the usage of the analogy or discourse of Jim Crow and how that discourse has coloured Alexander's analysis. In his view, the analogy is flawed in

¹³ *Ibid.*, 69.

¹⁴ *Ibid.*, 6.

¹⁵ *Ibid.*, 6.

¹⁶ *Ibid.*, 2.

¹⁷ *Ibid.*, 2.

six ways. First, Forman suggests that the use of this analogy to draw attention to the role of politicians who sought “to exploit racial fears while minimizing other social factors” is an oversimplification of mass incarceration’s origins. Second, the analogy (and Alexander’s analysis in general) does not adequately address the attitudes of African Americans towards harsher punishment for crime; as Forman points out, significant portions of the black community supported many of the policies. Third, he claims that Alexander’s narrow focus on the War on Drugs pulls attention away from “violent crime [in black communities]—a troubling oversight given that violence destroys so many lives in low-income black communities and that violent offenders make up a plurality of the prison population.” Fourth, Alexander’s *The New Jim Crow* applies the analogy across the entire black American population, when it is low-income and poorly educated black Americans who are most affected by mass incarceration. Fifth, the analogy suggests that mass incarceration is a phenomenon limited to black Americans when all American demographics were/are incarcerated at rates that were not only anomalous by any American metric but by any global metric as well. Finally, the use of the analogy is reductive of the dangers associated with the ‘Old Jim Crow’.¹⁸ That is to say (in Forman’s eyes), while the era of mass incarceration and the Jim Crow era share many similarities, to say the external dangers the black body had to endure during the Jim Crow era are akin to that of the era of mass incarceration is an incomplete and oversimplified understanding of the Jim Crow era.

Of these critiques, Forman identifies two as the most significant: the role of black Americans in mass incarceration and the ways in which poor black Americans are disproportionately affected by mass incarceration.¹⁹ While not explicitly naming Alexander—after all, Alexander is not alone in using the term “Jim Crow” to refer to the mass incarceration apparatus—his most recent book, *Locking Up Our Own: Crime and Punishment in Black America*, argues that the Jim Crow analogy

fail[s] to appreciate the role that blacks have played in shaping criminal justice policy over the past forty years. African-Americans performed this role as citizens, voter, mayors,

¹⁸ Forman Jr., “Racial Critiques of Mass Incarceration,” 103.

¹⁹ For examples of the significance these factors have, see James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York, NY: Farrar, Straus and Giroux, 2017) and James Forman Jr., “The Black Poor, Black Elites, and America’s Prisons,” *Cardozo L. Rev.* 32 (2010): 791-806.

legislators, prosecutors, police officers, police chiefs, corrections officials, and community activists...[a]nd to a significant extent, the new black leaders and their constituents supported tough-on-crime measures.²⁰

Forman's book tells the history of the heroin epidemic (and drug epidemic more broadly) in Washington, D.C., from the 1960s to the 1990s. In so doing, Forman highlights the degree to which African Americans called for, and participated in, harsher punishment for drug offenders, and, more importantly, for violent crime offenders. He also highlights the significance of violent crime within African American communities. Forman's critiques can and should be viewed as an elaboration of Alexander's work instead of a denunciation.

Theory

While these authors differ in their conceptions of the history and/or effects of mass incarceration, they both—due to the nature and subject of their work—engage with and work within similar theoretical frameworks. At the same time, it is where these frameworks diverge that we see the logic behind their differing analyses.

Both Forman and Alexander work within the frameworks of Critical Legal Theory and Critical Race Theory. Critical Legal Theory (or Critical Legal Studies) became prominent in the 1980s and 1990s and has remained an important facet of legal scholarship on race.²¹ Critical Legal Theory (CLT) has its foundations in the early neo-Marxist critiques of the "orthodoxies of legal culture."²² More specifically, it draws its roots from Antonio Gramsci's ideas of law as an ideology that can be used as an instrument of hegemony.²³ Once the field became established, it started to treat law and legal writings as a discourse that:

function so as to portray existing constellations of rights, powers, privileges, and immunities recognized by the legal system as if they were natural and inevitable...and as close to being good as they could be...[b]y such means the law 'reifies' and thus helps to freeze in place scripted social roles[.]²⁴

²⁰ Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America*, 10.

²¹ Robert W. Gordon, "Critical Legal Studies," *International Encyclopedia of the Social & Behavioral Sciences*, no. 5 (2001): 251.

²² *Ibid.*, 251.

²³ *Ibid.*, 251.

²⁴ *Ibid.*, 252.

While CLT originated out of Marxist ideas of class critique and replication, it evolved to include all “subordinated groups, using historical examples to show how ruling groups had used neutral- and equal-sounding legal doctrines to extend and justify their rule.”²⁵

Both Alexander and Forman are lawyers and CLT scholars who discuss the law’s relationship to race at the core black American history. More specifically, both draw extensively on specific laws put in place that disproportionately targeted and affected the black community. For example, mandatory minimum sentencing lies at the center of both their arguments (as one of the primary reasons for prison population growth) and the discussion of it arises repeatedly throughout their texts.²⁶ Perhaps the most infamous example of the racially coded nature of the law in the context of mass incarceration is the Anti-Drug Abuse Act of 1986, signed into law during the Reagan Administration. Mandatory minimum sentencing was implemented for all drug offences dealing with the distribution of cocaine, although the punishment would be significantly more severe for the distribution of crack (a form of cocaine). As Alexander shows, the drug typically associated with black people (crack) was punished more severely than the drug that was more expensive and typically associated with white people (cocaine).²⁷ Through this and other examples, it is clear that both Alexander and Forman take a critical stance towards the so-called neutrality of law.²⁸

Out of Critical Legal Theory emerged Critical Race Theory (CRT), which, as the name suggests, focuses more explicitly on the role of law “in the construction and maintenance of social domination and subordination” of African Americans.²⁹ CRT maintains that, “racism is ordinary and normal in contemporary society, indeed perhaps integral to social practices and institutions.”³⁰ Both Alexander and Forman ascribe to this view and use CRT in their work. This framework within which Alexander and Forman operate might be best described as that of Critical Theory with a focus or emphasis on Race and Law (or perhaps its evolution into the discursive nature of Race and Law). As Max

²⁵ *Ibid.*, 253.

²⁶ See Alexander, *The New Jim Crow*, 14, 52-53, 86-91 and Forman Jr., *Locking Up Our Own*, 114, 119-150, 236.

²⁷ Alexander, *The New Jim Crow*, 52.

²⁸ Gordon, “Critical Legal Studies,” 251.

²⁹ Kimberlé Crenshaw et al., eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York, NY: New Press, 1995), xi.

³⁰ Angela P. Harris, “Critical Race Theory,” *International Encyclopedia of the Social & Behavioral Sciences* (2012): 5.

Horkheimer, the father of Critical Theory described it, Critical Theory seeks human “emancipation from slavery” through liberation from the historical discourses and structures that claimed neutrality and apoliticalness but were in fact oppressive and subordinating.³¹

While both Alexander and Forman draw on Critical Legal Studies and Critical Race Theory, their use of these fields differ in significant ways that lend insight into their opposing views on whether mass incarceration should be likened to something we might call the new Jim Crow. The first significant difference centers on Forman’s use of Michael B. Katz, Mark J. Stern, and Jamie J. Fader’s concept of ‘differentiation.’³² Katz, Stern, and Fader use this term in the context of their quantitative history of African American inequality in order to argue for the relevance of particularized or differentiated African American experience to understanding inequality at a more fundamental level:

Differentiation is a more precise and objective way to talk about the change than to cast it as the emergence of a black middle class—a common trope in discussions of recent trends in black social structure but one lacking precise features and difficult to track over time. Differentiation underscores the importance of disaggregating blacks experience by gender and class. Only through disaggregation is it possible to pinpoint what has persisted and what has changed in African Americans’ history of work, income, education, poverty, and mobility.³³

Forman critiques Alexander’s treatment of black Americans as a homogenous group whose experience of mass incarceration and its policies is the same across class and gender. For example, Alexander has said that mass incarceration, like Jim Crow, has “served to define the meaning and significance of race in America.”³⁴ She goes on to say:

Indeed, a primary function of any racial caste system is to define the meaning of race in its time. Slavery defined what it meant to be black (a slave), and Jim Crow defined what it meant to be black (a second-class citizen). Today mass incarceration defines

³¹ Max Horkheimer, *Critical Theory* (New York, NY: Continuum, 1982), 246.

³² Michael B. Katz, Mark J. Stern, and Jamie J. Fader, "The New African American Inequality," *The Journal of American History* 92, no. 1 (2005): 105.

³³ *Ibid.*, 105.

³⁴ Alexander, *The New Jim Crow*, 192.

the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be black.³⁵

Forman sees this claim as highly problematic because the criminal justice system does not affect all black Americans equally. For example, he explains that “we must be specific about the fact that prison has become the province of the poor and uneducated, even within the black community.”³⁶ He argues that it does not make sense, and that it is in fact disingenuous for the history of mass incarceration, to refer to “black people” as a singular group without differentiating along lines of class, gender, disability, and so on. Similarly, the effects of mass incarceration are not uniformly felt throughout the entire black American community, as Alexander implicitly suggests.³⁷ This critique of a lack of differentiation is very much rooted in Foucauldian ideas of discourse. To Forman, the Jim Crow analogy (or discourse) presents a reductionist view of mass incarceration. What discourse does, is not only “[rule] in way[s] to talk, write, or conduct oneself, so also by definition, it rules out, limits and restricts other ways of talking, of conducting ourselves in relation to the top or constructing knowledge about it.”³⁸ The equation of mass incarceration with Jim Crow, in Forman’s view, limits the way we talk and think about it. According to this argument, we are compelled to ignore the differences between mass incarceration and Jim Crow if we allow the discourse of Jim Crow to be replicated in the discourse of mass incarceration.

Alexander incorporates other theories (or perhaps different understandings of similar theories) into her framework that differ from Forman, and that demonstrate why she frames her argument as she does. Alexander’s argument that racial castes define the meaning of race in any particular time, speaks very strongly to her racial formation theorist roots. Racial Formation Theory (RFT) comes from sociologists Michael Omi and Howard Winant and holds that:

through changing racial formations, US society has shifted from one defined by a racial dictatorship (slavery, segregation) to a much less Draconian society defined by a ‘racial democracy’ whose structures and practices are rooted in significant consent

³⁵ *Ibid.*, 192.

³⁶ Forman Jr., "The Black Poor, Black Elites, and America's Prisons," 794.

³⁷ *Ibid.*, 794.

³⁸ Stuart Hall, "Foucault: Power, knowledge and discourse," in *Discourse theory and practice: A reader*, ed. Margaret Wetherell, Stephanie Taylor and Simeon J. Yates (London, UK: Sage, 2001): 72.

from less-powerful racial groups and hegemonic control over those groups by powerful racial groups. For Omi and Winant, through political power struggles of racial groups within the USA, the concepts and formations of race have shifted very significantly, and in the course of sociohistorical transformations the politics of ‘racial totalitarianism’ has been replaced by a politics of ‘racial democracy.’³⁹

Alexander’s understanding of the reproduction of racial structures and systems since Jim Crow as reminiscent of and reproducing similar inequalities is very much founded in this theory. Alexander diverges from RFT in critical ways—Omi and Winant would explicitly argue that this new structure of racial relationships and discourse is different from Jim Crow. The replication and evolution of racial structures is a foundational part of Alexander’s argument and could be used to explain why she excludes the role of violent crime in the prison population increase and the role of black politicians, community leaders, and citizens in facilitating mass incarceration.⁴⁰ While those realities are markedly different than Jim Crow, they are part of the new formation of a familiar racial caste system and for Alexander, it is perhaps more important to shed light on the system itself and not necessarily the particulars within it.

The “reductionist” nature of the Jim Crow discourse that Forman takes issue with is also, in Alexander’s view, crucial to the framing of mass incarceration. The Racial Formation Theoretical framework, within which Alexander’s analysis can be situated, draws on an amalgamation of Foucauldian and Gramscian ideas. Alexander sees the similarities of the discursive construction of a race in the eras of Jim Crow and of mass incarceration as evidence of a surviving and persistent hegemonic racial discourse in the United States. Perhaps a result of her CLT roots and its neo-Marxist foundations, Alexander’s writing and juxtaposing of the black population (a racialized proletariat) against the racist white population and policy makers (a racist bourgeoisie) could, to an extent, be interpreted as her own version of a Marxist Manifesto. In *The New Jim Crow*, she makes calculated choices to create a narrative that the mass incarceration of black Americans between 1980 and the present is the result of racialized policies and policing practices that were created to target the black population, and that much of these policies and practices

³⁹ Joe Feagin and Sean Elias, “Rethinking racial formation theory: a systemic racism critique,” *Ethnic and Racial Studies* 36, no. 6 (2013): 934-935.

⁴⁰ *Ibid.*, 934-935.

centered around drug offences.⁴¹ Though the forceful and perhaps reductionist narrative that Alexander puts forth is controversial, it is not without its value. While statistics suggest the greatest factor in mass incarceration is violent crime, and not drug offences, her omission of these statistics is done to create a dialectic.⁴² The whole text of the Communist Manifesto builds up to a Marxist call for revolution:

They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win.⁴³

While perhaps tamer in her wording, Alexander wants to inspire a revolutionary movement with her text. She argues that “nothing short of a major social movement can successfully dismantle the new caste system” and what is needed is a “radical restructuring of society” and a “radical restructuring of our approach to racial justice advocacy.” She urges her audience “to be emboldened...by the fierce urgency of now.”⁴⁴

It is not ultimately necessary to choose a side between Alexander and Forman. They bring different and necessary analyses to bear on the question of mass incarceration and are speaking—at least in part—to different audiences. I do not want to minimize or ignore their differences, of course, but to suggest a way of embracing their contributions as equally valid and valuable. The lack of discussion of intra-racial violence that Forman sees as an oversight in Alexander’s work, is a legitimate critique of her scholarship. In addition, black Americans played a much larger role in creating and enforcing mass incarceration policies than Alexander

⁴¹ Alexander, *The New Jim Crow*, 99. For more on the narrativizing or moralizing of history, see Hayden White, “The Value of Narrativity in the Representation of Reality,” *Critical inquiry* 7, no. 1 (1980): 17-18.

⁴² “According to the Bureau of Justice Statistics, in 2006 there were 1.3 million prisoners in state prisons, 760,000 in local jails, and 190,000 in federal prisons. Among the state prisoners, 50% were serving time for violent offenses, 21% for property offenses, 20% for drug offenses, and 8% for public order offenses.” Forman Jr., “Racial Critiques of Mass Incarceration,” 125-126.

⁴³ Karl Marx and Friedrich Engels, *The Communist Manifesto* (London, UK: Penguin Classics, [1848] 2002), 34.

⁴⁴ Alexander, *The New Jim Crow*, 247. See also pages 18-19.

⁴⁴ I would be remiss if I did not mention that intra-racial violence is a pervasive problem across the United States. According to 2017 FBI crime statistics, the vast majority of homicides committed against white Americans are committed by white perpetrators and

admits in her writing.⁴⁵ But to suggest that black Americans need to accept and acknowledge the role they have played in mass incarceration also seems to be an insufficient framing of the discussion. As Alexander explains, white Americans created an environment, through policy and exploitation of systemic racism, where disproportionate numbers of black Americans were and are forced out of the mainstream economy through incarceration and into an economy that involves drug sales. As a result of this, Forman explains, violent crime rose in low-income black neighbourhoods as fights over territory spread through the inner cities; to combat this, black citizens, politicians, community leaders, and police fought for stricter punitive laws. But in an attempt to gain control over their bodies and, in a sense, ‘join white culture’ due to the continuation of, and more overt reemergence of a racial caste system, black Americans killed other black Americans, and put black Americans in prison for it.

Together, Forman’s attention to intra-racial violence among black Americans, and Alexander’s emphasis on the white oppression of the black community provide a valuable picture of the phenomenon of mass incarceration. Ta-Nehisi Coates makes clear in his text, *Between the World and Me*, the inadvertent “attempts to be white” through “white” actions *did* result in intra-community violence and support for mass incarceration, but the blame cannot be set at the feet of black people themselves. Coates states that what has historically defined ‘whiteness’ in America is, “the flaying of backs; the chaining of limbs; the strangling of dissidents; [and] the destruction of families” and that the, “[d]ream of acting white, of talking white, [and] of being white” has led to so much violence being perpetrated by black Americans against black Americans.⁴⁶ However, he (Coates) makes it emphatically clear that to ignore the role of white Americans in the creation of this violence inducing environment would be naïve, negligent, and case of historical malpractice. Their social conditions have been structured in large part by white oppression, policy, and practice.

the vast majority of homicides committed against black Americans are committed by black American perpetrators. That is to say intra-racial violence, while endemic in the African American community, is not unique to the black American community. See, Federal Bureau of Investigation, "Expanded Homicide Date Table 6," 2017 Crime in the United States, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-6.xls> (accessed August 8, 2019).

⁴⁶ Ta-Nehisi Coates, *Between the World and Me* (New York: Spiegel & Grau, 2015), 8, 110.

Bibliography

- "About the Author." The New Jim Crow. <http://newjimcrow.com/about-the-author> (accessed November 24, 2018).
- Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, NY: The New Press, 2012.
- Brown v. Board of Education. 347 U.S. 495, 1954.
- Buckman, William H., and John Lamberth. "Challenging racial profiles: attacking Jim Crow on the interstate." *Rutgers Race & L. Rev.* 3 (2001): 83-115.
- "Civil Rights Act of 1964." Public Law 88, 1964.
- Coates, Ta-Nehisi. *Between the World and Me*. First edition. New York: Spiegel & Grau, 2015.
- Crenshaw, Kimberlé, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. *Critical Race Theory: The Key Writings That Formed the Movement*. New York, NY: New Press, 1995.
- Feagin, Joe, and Sean Elias. "Rethinking Racial Formation Theory: A Systemic Racism Critique." *Ethnic and Racial Studies* 36, no. 6 (2013): 931-960.
- Federal Bureau of Investigation. "Expanded Homicide Data Table 6." 2017 Crime in the United States. <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-6.xls> (accessed August 8, 2019).
- Forman Jr., James. "The Black Poor, Black Elites, and America's Prisons." *Cardozo L. Rev.* 32 (2010): 791-806.
- Forman Jr., James. "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow." *NYUL Rev.* 87 (2012): 101-146.
- Forman Jr., James. *Locking Up Our Own: Crime and Punishment in Black America*. New York, NY: Farrar, Straus and Giroux, 2017.
- Gordon, Robert W., "Critical Legal Studies," *International Encyclopedia of the Social & Behavioral Sciences*, no. 5 (2001): 251-254.
- Hall, Stuart. "Foucault: Power, knowledge and discourse." In *Discourse theory and practice: A reader*, edited by Margaret Wetherell, Stephanie Taylor and Simeon J. Yates, 72-81. London, UK: Sage, 2001.

- Harris, Angela P. "Critical Race Theory." *International Encyclopedia of the Social & Behavioral Sciences* (2012).
- Horkheimer, Max. *Critical Theory*. New York, NY: Continuum, 1982.
- "James Forman Jr." Yale Law School. <https://law.yale.edu/james-forman-jr> (accessed November 24, 2018).
- Katz, Michael B., Mark J. Stern, and Jamie J. Fader. "The New African American Inequality." *The Journal of American History* 92, no. 1 (2005): 75-108.
- Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. Oxford, UK: Oxford University Press, 2006.
- Legal Information Institute: Cornell Law School. "Brown v. Board of Education of Topeka." Cornell Law School. www.law.cornell.edu/supremecourt/text/347/483 (accessed December 2, 2018).
- Legal Information Institute: Cornell Law School. "Plessy v. Ferguson." Cornell Law School. <https://www.law.cornell.edu/supremecourt/text/163/537> (accessed December 2, 2018).
- Marx, Karl, and Friedrich Engels. *The Communist Manifesto*. London, UK: Penguin Classics, [1848] 2002.
- Wormser, Richard. *The Rise and Fall of Jim Crow*. Macmillan, 2004.
- Packard, Jerrold M. *American Nightmare: The History of Jim Crow*. London, UK: Macmillan, 2002.
- White, Hayden. "The Value of Narrativity in the Representation of Reality." *Critical Inquiry* 7, no. 1 (1980): 5-27.