

**THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS** by Michelle Alexander. New York: The New Press, 2010. 290 pp. \$27.95 hardback.

A nearly 600 percent rise in incarceration rates has characterized the past four decades<sup>1</sup> such that, today, more than two million Americans are incarcerated in local, state, or federal penitentiaries.<sup>2</sup> In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Stanford law professor Michelle Alexander posits that this dramatic rise in incarceration rates represents a backlash to the civil gains of black men. Indeed, mass incarceration, she argues, is “a stunningly comprehensive and well-disguised system of racialized social control” that has created a functionally identical “segregated, second-class citizenship” for black men (pp. 5, 21).

While Alexander focuses on the racial dimension of mass incarceration, it is also fundamentally gendered. It is black men, almost exclusively, who are disproportionately imprisoned and, consequently, who are widely perceived by the public as more violent and criminal than other demographics.<sup>3</sup> In major American cities, up to eighty percent of black male youth have criminal records that will subject them to legal civil disenfranchisement for the rest of their adult lives: denial of access to employment, housing, public benefits, and the revocation of voting rights (p. 7).<sup>4</sup> Moreover, it is estimated that fully sixty-eight percent of the black males who were born in the late 1970s will be imprisoned at least once during their lives if they did not complete high school.<sup>5</sup> Indeed, more black men are under the control of the correctional system today than were enslaved in 1850 (p. 175).

Even for a reader familiar with the disturbing trends of the American criminal justice system, this analysis is jarring. Yet, as Alexander point out, there is no broad-based movement to end or reform mass incarceration that approaches

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1. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1, available at [http://www.nytimes.com/2008/04/23/us/23prison.html?\\_r=2&ref=american\\_exception](http://www.nytimes.com/2008/04/23/us/23prison.html?_r=2&ref=american_exception).
  2. Sasha Abramsky, *Toxic Persons*, SLATE MAG. (Oct. 8, 2010, 7:34 AM), <http://www.slate.com/id/2270328/>.
  3. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCHOL. 876, 876-877 (2004).
  4. PAUL STREET, CHICAGO URBAN LEAGUE, THE VICIOUS CYCLE: RACE, PRISON, JOBS, AND COMMUNITY IN CHICAGO, ILLINOIS, AND THE NATION 4 (2002), available at <http://www.prisonpolicy.org/scans/theviciouscircle.pdf>.
  5. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 3, 8-11 (2010).

the scale of other racial equality efforts (p. 11). Rather, there are pervasive popular myths about racial progress, most obviously accompanied by the election of President Barack Obama (p. 15). In response, *The New Jim Crow* is an effort to stimulate popular dialogue about the criminal justice system as a tool that creates and perpetuates racial hierarchy in the United States (p. 16).

### THE NEW JIM CROW

While Jim Crow legislation has been legally dismantled, Alexander argues, the legalized racial caste system that led to the civil disenfranchisement of blacks has simply taken a different form. Like Jim Crow, mass incarceration functions to lock black men into an inferior position through purportedly race-neutral legal processes (p. 2). Black men, she points out, are disproportionately policed and arrested, physically segregated in prisons and jails, and legally disenfranchised thereafter (p. 17). Because of convictions, approximately thirty percent of black men cannot serve on a jury (p. 119). It is estimated that almost thirty percent of the next generation of African-American men can expect to lose the right to vote at some point in their lifetimes.<sup>6</sup> A felony conviction costs an individual the right to public housing assistance for at least five years (p. 141). Many inmates are required to labor during their incarceration, and can earn as little as 25 cents an hour (p. 152). On release from prison, former inmates are automatically disqualified from voting (p. 154). As such, while Jim Crow legislation has been legally dismantled, Alexander posits that the racial caste system in the United States has simply taken a different form through incarceration.

Documentation of the of the criminal justice system as a mechanism for racialized social control is extensive,<sup>7</sup> and Alexander follows in its vein. In the wake of Emancipation, she notes, nine Southern states adopted vagrancy laws that criminalized unemployment then applied the laws almost exclusively to blacks (p. 28). Similarly, states constructed convict-lease systems that allowed the (mostly black) prisoners to be leased out to plantations and private companies for labor (p. 28). Even after the passage of the Thirteenth Amendment, enslavement remained a legal punishment for crime (p. 31).<sup>8</sup> While Jim Crow was at least substantially dismantled by *Brown v. Board of Education of Topeka*,<sup>9</sup> the Civil Rights Act of 1964, and the Voting Rights Act of 1964, Alexander points out that in the years after its dismantling, the convict population became young-

6. Erika Wood, *Restoring the Right to Vote*, 2008 BRENNAN CENTER FOR JUST. 1, 7, available at [http://www.brennancenter.org/content/resource/restoring\\_the\\_right\\_to\\_vote/](http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/).

7. See, e.g., DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1997); DOUGLAS A. BLACKMAN, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008).

8. U.S. CONST. amend. XIII.

9. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

er, blacker, and grew ten times faster than the general population (p. 32). At the height of the Civil Rights Movement, the “southern strategy” employed by President Richard Nixon functioned to exploit racial hostility and mobilize white opposition to the Civil Rights Movement through a “law and order” campaign that culminated in the “War on Drugs.” (p. 40) Today, Alexander argues that this “War” is the primary mechanism through which mass incarceration functions to civilly disenfranchise black men (p. 40). As a result, between 1980 and 2005, the amount of drug arrests tripled (p. 71). While empirical studies throughout the last decade have consistently found that other demographics use and sell illegal drugs at similar<sup>10</sup> or higher rates<sup>11</sup>, seventy-five percent of drug offenders who are incarcerated are black men (p. 97). Black men are admitted to prison on drug charges at rates twenty to fifty times higher than white men (p. 7). In *McCleskey v. Kemp*,<sup>12</sup> however, the Supreme Court essentially immunized the criminal justice system from legal claims about this extraordinary discrepancy through finding that racial bias in sentencing may not be challenged in the absence of a conscious and clear discriminatory intent in the specific case (p. 108). This standard has proved impossible to meet: not one successful challenge has ever been made to racial bias in sentencing under *McCleskey* (p. 108).

#### A READER'S PERSPECTIVE

Certainly, Alexander is correct that a conversation about the impact and implications of mass incarceration is needed, and her analogy to Jim Crow is striking and powerful. If she can be faulted, however, it is for a lack of focus concerning her targeted audience. Indeed, she would have been well-advised of a central tenant of persuasive writing: pick an audience and stick with it. Alexander targeted this piece at readers who “care deeply about racial justice” but who are not yet entirely fluent in the magnitude of the crisis for communities of color (Preface). Throughout the work, however, she seems to shift her gaze to different audiences. In her opening pages, for instance, Alexander asserts that most people get their information about the criminal justice system from *Law & Order* (p.

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10. See, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., SUMMARY OF FINDINGS FROM THE 2000 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (2001) (finding that 6.4 percent of whites, 6.4 percent of blacks, and 5.3 percent of Hispanics were self-admitted users of illegal drugs in 2000); U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (2003) (finding only a single-percentage-point difference between illegal drug use rates among whites and blacks); U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (2007) (finding again only a single-percentage-point difference between drug use rates of blacks and whites).
  11. See, e.g., HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 70 (2006) (finding that white youth are more likely than black youth to sell illegal drugs).
  12. 481 U.S. 279 (1987).

21). She then points out that way the criminal justice system functions, in fact, “bears little resemblance to what happens on television or movies.” (p. 58) Alexander alleges that any contention about a racial caste system is met with a “standard reply” of “[j]ust look at Barack Obama! Just look at Oprah Winfrey!” (p. 21) To a sympathetic audience—to those who picked up Alexander’s book out of interest in her premise and those to whom she allegedly writes—this is an aggravating tone that rears its head at several points. Whoever this straw man is, it is certainly not Alexander’s intended reader, and it is disconcerting to be presented with an indictment that one is part of a simpleton pop culture with no deeper power of analysis than to point to wealthy African-American celebrities and politicians as proof of the lack of racism in society. In addition, she spends many pages convincing a fluent audience of the narrative with which they likely already agree: that Reagan and Nixon exploited racial tensions, that the post-industrial economy was unkind to the employment rates of historically disenfranchised African Americans, and that communities of color are selectively policed (p. 40-47). While this historical overview is informed, it is often too cursory to be of interest to a reader who already views the War on Drugs and the criminal justice system with a critical eye.

Alexander’s also argues that the continued function of the racial caste system is at least partially built on “the racism and vulnerability of lower-class whites, a group of people who are understandably eager to ensure that they never find themselves trapped” at the bottom of the totem pole (p. 22). She fails to adequately analyze, however, the dynamics of impoverished, often rural lower-class whites, who have themselves been historically disenfranchised, particularly in the South.<sup>13</sup> While Alexander acknowledges that her work often “paints with a broad brush” and lacks a full treatment of the impact of mass incarceration on demographics other than black males, this is somewhat of an unsatisfactory disclaimer (p. 15). Indeed, how one characterizes racial bias has important implications for identifying the correct response to it, and it seems a more supported, and more workable, truth that the reproduction of racial hierarchy is at least partially a function of unconscious bias. There is much research, for instance, to suggest that racial profiling by police functions on an unconscious level, and that better training could greatly mitigate its effect.<sup>14</sup> There is similar empirical support that suggests that contemporary racist attitudes among whites are produced by a lack of contact with other racial groups within a peer context, rather than outright hostility.<sup>15</sup> While Alexander acknowledges this vein of research (p. 103-

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13. See, e.g., Jamie Winders, *White in All the Wrong Places: White Rural Poverty in the Postbelum U.S. South*, 10 *CULTURAL GEOGRAPHIES* 45 (2003).

14. Lorie Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, in *RACIAL DIVIDE: RACE, ETHNICITY AND CRIMINAL JUSTICE* 39-59 (Lorie A. Fridell, et al. eds., 2008).

15. See B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers’ Automatic and Controlled Race-Based Responses Criminal Suspects*, 28 *BASIC AND APPLIED SOC. PSYCHOL.* 193, 193-199 (2006).

5), she often still makes reference to “those who are most committed to racial hierarchy” and “the most ardent proponents of racial hierarchy” as the architects of the mass incarceration realities she notes (pp. 21-22). The language is not particularly helpful or persuasive a reader who does not share Alexander’s perspective on the criminal justice system or who may otherwise be open to an examination of his or her unconscious biases.

While is certainly difficult to concentrate on an audience with precision, this critique of her work stems from the fear that seems to plague similar efforts: when a work is too radical for skeptical audiences and too condescending or simplistic for sympathetic audiences, it is deaf to both. For many advocates of racial and gender justice, it is often difficult to discern to what audience our work should be directed, and, as a result, we neglect to tailor our message appropriately. The perfect should not be the enemy of the good, however. Regardless, Alexander’s work is brimming with current data and a digestible narrative of legal developments that will be of aid to any advocate of racial justice.

### MOVING FORWARD

The failure of mass incarceration is evident in California, where Alexander is based, and may be the tailor of its downfall. The recidivism rate in California is sixty-seven percent, the highest in the nation,<sup>16</sup> and, in light of a fiscal crisis that threatens the very viability of the state, the system is an \$8 billion drain that presently seems untenable to maintain.<sup>17</sup> In May 2011, the United States Supreme Court upheld the decision of federal district court ordering a reduction in the prison population so as to remedy unconstitutional conditions.<sup>18</sup> Their decision, and the way that next decade unfolds in the California Department of Corrections and Rehabilitation, may prove a watermark for the future and makes Alexander’s work particularly prescient.

Indeed, the rise of mass incarceration since the 1970’s is particularly fascinating because it lies at the intersection of so many contemporary social ills. It takes a dramatic toll on the dynamic of American families and communities; fifty-two percent of state inmates and sixty-three percent of federal inmates are parents of minor children, and an estimated 1.7 million children have an incarcerated parent.<sup>19</sup> In addition, a recent study linked the growing income inequality

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16. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA PRISONS AND PAROLEES ANNUAL REPORT (2009), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Offender\\_Information\\_Reports.html](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Offender_Information_Reports.html) (Housing a prisoner costs the state an average of \$47,000 per year.).

17. Randal C Archibold. *California, in Financial Crisis, Opens Prison Doors*, N.Y. TIMES (March 23, 2010), <http://www.nytimes.com/2010/03/24/us/24calprisons.html?hpwprison%20problems>.

18. *Brown v. Plata*, No. 09-1233 (U.S. May 23, 2011).

19. LAUREN E. GLAZE & LAURA M. MARUSCHAK, UNITED STATES DEPARTMENT OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN, 2 (2008).

in the United States to the widespread use of prisons and jails, particularly because the earning power of a former inmate is limited for decades after their release.<sup>20</sup> Despite the growing mass of research in this vein, there is not popular recognition of the destructive impact of mass incarceration. *The New Jim Crow* is a reminder of this, as well as the subtle, essential fiber of privilege and disadvantage that continue to shape the lived experience of differentially policed racial demographics in the United States. The ever-growing confluence of data and legal challenges to mass incarceration practices, as well as the impotence of the War on Drugs, are a devastating commentary on the injustice that characterizes mass incarceration and its function as a contemporary racial caste structure. As Alexander rightly points out, however, there is no centralized movement or language to combat this reality, nor is awareness of the problem sufficiently imbedded in the popular consciousness (p. 12). Her effort to create the “new consensus” amongst the polity about the character of mass incarceration, then, is a worthy one (p. 15). Despite my somewhat trivial quibbles with Alexander’s focus, her message is a prescient and desperately timely challenge to the status quo, particularly because she seems to be among a very small group of scholars promoting the analogy to Jim Crow in popular forums. Indeed, as Alexander notes, “no task is more urgent for racial justice advocates today than ensuring that America’s current racial caste system is its last.” (p. 19)

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<http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

20. Western & Pettit, *supra* note 5, at 8-19.