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2008

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### Recommended Citation

Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 *Tex. L. Rev.* 2097 (2006)

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# Criminal Law and the Pursuit of Equality

Donald Braman\*

Much of the debate over criminal justice in America derives from the fact that many low-income and minority Americans feel neither equal under nor protected by our criminal laws. The effects of underenforcement are devastating: Many people living in our nation's inner cities no longer feel safe walking through their own neighborhoods.<sup>1</sup> The effects of mass incarceration are more devastating still, draining already impoverished communities of capital, further straining and often breaking fragile families, and stigmatizing not only offenders, their families, and their communities, but also hardening racial divides in the process.<sup>2</sup>

Repeated attempts to remedy this situation through the courts have, to put it mildly, failed. Expansive readings of the rights of criminal suspects, defendants, convicts, and prisoners have not only failed to stem the massive institutionalization of those in disadvantaged communities, they have made those who litigate to enforce those rights appear to be pro-criminal.<sup>3</sup> Worse still, as some commentators have noted, these tactics may well interfere with communities' self-policing capabilities.<sup>4</sup> The result has been a confused movement towards longer sentences out of an indeterminate blend of

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\* Assistant Professor, George Washington University School of Law. I thank Kenworthy Bilz, Richard Brooks, Dennis Curtis, Daniel Freed, Nancy Gertner, Dana Goldblatt, Ryan Goodman, Derek Jinks, Dan Kahan, and Tracey Meares. Special thanks to Tahlia Townsend, whose ideas and insights run throughout.

1. See Michael A. Fletcher, *Study Tracks Blacks' Crime Concerns: African Americans Show Less Confidence in System, Favor Stiff Penalties*, WASH. POST, Apr. 21, 1996, at A11 (reporting that 52% of black Americans are "afraid to walk alone at night" near their own homes).

2. See generally DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (recounting the experiences of the families of prisoners); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) (presenting a collection of essays arguing against America's current system of "mass imprisonment," noting that a disproportionate number of American criminals are people of color and investigating the social and material impact on the families and communities of these criminals).

3. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 375 (1997) (advising progressives to pay as much attention to the interests of those "who must share space on streets and in buildings with crack traffickers" as they do to the interests of crack traffickers); Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong*, in *URGENT TIMES* 3, 3-4 (Joshua Cohen & Joel Rogers eds., 1999) (describing how the building search policy of the Chicago Housing Authority was declared unconstitutional over the objections of the community residents whose constitutional rights were supposedly being "protected").

4. See, e.g., Meares & Kahan, *supra* note 3, at 6-22 (arguing that libertarian conceptions of civil rights pursued by the ACLU and enforced by federal judges have disabled community anti-crime measures advocated by residents in low-income housing projects).

political calculations and warring conceptions of what balance of liberties and sanctions will genuinely serve those in disadvantaged communities.

Equal protection litigation, too, has failed fairly convincingly. This is partly a result of the Supreme Court's invidious intent standard, which forces litigators to go beyond claims that state policies inadvertently contribute to the subordination of disadvantaged populations and assert that the state acted with discriminatory intent.<sup>5</sup> Labeling government actors as racists has alienated not only legislators and members of the executive branch, but also, increasingly, the general population who view many of the laws as motivated by and justifiable in terms of neutral principles.<sup>6</sup>

But if the intent-based standard has many failings, the most commonly considered alternative—court-mandated remedies derived from an effects-based standard—has problems that may be equally as serious. Even if courts were willing to undertake broad enforcement in principle, they would remain poorly equipped to administer broad effects-based remedies in practice.<sup>7</sup>

Perhaps even more importantly, courts are poorly positioned politically to manage such broad normative undertakings. Indeed, where activists have pitted the courts against the legislature and the executive branch on sensitive social issues—particularly in the criminal law—they have often provoked resistance and backlash with harms outweighing the benefit of the initial judicial intervention.<sup>8</sup>

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5. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131–35 (1997) (chronicling the emergence of the discriminatory purpose doctrine).

6. See, e.g., KENNEDY, *supra* note 3, at 375 (explaining how laws enhancing penalties for dealing crack that apply to “anyone” caught dealing were misinterpreted as imposing a racially discriminatory burden on blacks); Meares & Kahan, *supra* note 3, at 4, 16 (explaining how the ACLU effectively defeated Chicago laws that gave police the right to conduct mass building searches and that prohibited gang loitering despite the fact that many residents wanted these laws to protect against gunfire outbursts, fighting, and drug dealing).

7. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1255 (1978) [hereinafter Sager, *Fair Measure*] (citing possible institutional boundaries to broad state enforcement of “underenforced federal constitutional norms”); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 411–12 (1993) [hereinafter Sager, *Justice*] (discussing the possible political and legislative ramifications of selectively enforcing certain equal protection principles).

8. See, e.g., Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1447–49 (2003) (citing political and legislative reform of juvenile courts from institutions that were “nominally rehabilitative social welfare agenc[ies]” to “formal legal institutions”); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1018–19 (1995) [hereinafter Stuntz, *Privacy’s Problem*] (discussing how criminal procedural rules are used to encroach on the Fourth and Fifth Amendment privacy rights); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) [hereinafter Stuntz, *Uneasy Relationship*] (asserting that there is an information deficiency among the authors of the criminal procedural rules that prevents these rules from properly defining defendants’ rights).

In this Article I argue that, to make their vision of justice a reality, egalitarians will need to change both their focus and their tactics with respect to criminal law.<sup>9</sup> The tragedy of contemporary criminal justice is not that individual rights are too narrowly construed, but that those living in disadvantaged communities are injured *both* by crime and counter-productive law enforcement. The remedies that egalitarians have historically looked to—remedies articulated within the framework of individual rights—are poorly suited to address the systematic reproduction of inequality that results.

First, as a matter of effective politics, egalitarians will need to shift their focus from the racially motivated harms directed at individual criminal offenders and defendants to the collateral and often unintentional harms borne by non-criminals in their communities.<sup>10</sup> To give just two examples of these harms: (1) the fact that the vast majority of those convicted of drug offenses are not required to complete drug treatment programs as part of their sentence has devastating effects on the vulnerable families and communities to which they return;<sup>11</sup> and (2) the fact that fathers who are incarcerated are prevented from supporting their children not only harms a broad class of non-criminals, but has far-reaching normative effects on family formation and father absence, which create serious inter-generational harms.<sup>12</sup>

Second, as a matter of pragmatic reform, egalitarians should shift their focus from the doctrine of individual liberties to more modest policy reforms aimed at increasing the influence that citizens in disadvantaged communities exercise over the form of justice itself.<sup>13</sup> For too long, these communities have been asked to choose between expansive readings of criminal rights or oppressively harsh criminal sanctions—either choice making them a party to their own subordination.

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9. The principle of antisubordination best captures this deeper conception of justice. See, e.g., Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, 2004, at 3–4, <http://www.bepress.com/cgi/viewcontent.cgi?article=1051&context=ils> (discussing antisubordination as it relates to racial antidiscrimination law); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108–17, 147–70 (1976) (describing the “antidiscrimination” and the “group-disadvantaging” principles). As will become clear, though, I disagree with Fiss’s privileging of the judiciary in pursuing this conception of justice.

10. This would be a return to what Tracey Meares describes as “public-regarding” concerns in criminal procedure. Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 216 (2003).

11. See BRAMAN, *supra* note 2, at 54–57 (detailing these consequences and reviewing the literature).

12. See *id.* at 89–96, 154–63 (discussing the effects of incarceration on family structure and economic well-being).

13. Adriaan Lanni has described why juries are particularly promising places to look with respect to community empowerment. See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 394–95 (2005) (discussing how juries can be a useful cross-section that adequately displays overall community views on charging, sentencing, and policy-making judicial practices).

There are, of course, complaints that can be leveled against this strategy. It certainly does not offer the sweeping and certain justice that some imagine the Constitution guarantees and courts will deliver.<sup>14</sup> Perhaps some will see it as diminishing the principle of equality under the law to the level of mere politics. But effective reform—reform that is likely to last—requires an attention to popular sentiment and social consequence that has eluded doctrinal remedies and libertarian principles to date. It requires both a partnership with and the empowerment of those the Court seeks to protect.

I develop my argument in three parts. In Part I, I review the co-evolution of criminal law and equality concerns through the lens of twentieth century constitutional doctrine. Much of the terrain is familiar, but placing criminal law and equal protection doctrine side by side produces insights into the mismatched objectives and methods of egalitarian reformers of criminal law, the results of which are a source of trenchant iniquity today. In particular, I describe how, in the context of rising crime rates and cultural conflict, the Warren Court and an increasingly conservative state created dysfunctional competition for control over the power of the criminal law to harm and protect disadvantaged communities—particularly black communities suffering from the legacies of American racial inequality.

In Part II, I describe the current predicament of the criminal law. By way of example, I show how disparities in crack cocaine sentencing moved egalitarians to undertake two unsuccessful and, in retrospect, counterproductive strategies. In the first, egalitarians attempted to use constitutional constraints on criminal procedure to increase the costs of criminal law enforcement in disadvantaged communities, thereby reducing the harms of overincarceration. In the second, egalitarians made claims of hidden or unconscious racism to meet the increasingly obscure doctrinal standard of invidious intent. Both strategies have earned egalitarian litigators the scorn of not only conservatives, but also many in the disadvantaged communities the litigators are attempting to assist. Moreover, it has left egalitarians with little in the way of a political agenda for addressing the subordinating harms of crime and mass incarceration.

Part III lays out an alternative approach. There I argue for an approach coordinated across the political branches, an approach that seeks to make both criminals and the criminal justice system more responsive to the practical concerns of the citizenry. I review empirical data indicating that the public is eager for reforms that do both, and I outline a modest reform to leverage this popular preference: jury polling. Jury polling elicits information about the popular preferences as a regular part of criminal jury trials, forcing greater information about how disadvantaged communities feel

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<sup>14</sup> Owen Fiss is the most notable advocate of this conception of court-centered justice. See, e.g., *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

about alternative regimes of criminal sanctions. Jury polling, I argue, would systematically (and respectfully) elicit greater information about and draw attention to the complex needs of those living in our nation's most vulnerable neighborhoods.

## I. The Second Reconstruction and the Criminal Rights Revolution

I base my argument on an uncontroversial premise: The same concerns about racial inequality that underwrote the Second Reconstruction<sup>15</sup> also underwrote the criminal rights revolution.<sup>16</sup> The crucial difference, however, is that unlike the mainstream aspects of the Second Reconstruction—the marches, legislation, executive orders, and litigation, which embodied what many now describe as “popular” or coordinated constitutionalism—the criminal rights revolution was largely court-focused, uncoordinated, and unpopular. In this Part, drawing on existing analyses of the Second Reconstruction and the revolution in criminal rights,<sup>17</sup> I lay out this claim and

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15. I refer to the “Second Reconstruction” rather than the “Warren Court Era” not only because my timeline extends beyond the Warren Court, but also because the latter phrase places undue weight on the Supreme Court’s role in guiding constitutional politics.

16. See, e.g., David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1060 (1999) (“The entire field is of significance today only because of a particular historic concern about racial discrimination.”); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 7 (1995) (describing *Miranda* as an “equal justice” case); Meares & Kahan, *supra* note 3, at 8 (arguing that the criminal rights revolution is “best understood contextually, as a program to counteract the distorting influence of institutionalized racism on America’s criminal justice system and, more generally, on American democracy”); Stuntz, *Uneasy Relationship*, *supra* note 8, at 5 (“The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.”); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 97 (1980) (characterizing the Fourteenth Amendment “as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment”).

17. My account of equal protection history draws principally on the work of Robert Post, Reva Siegel, and Jack Balkin. See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, 2003, <http://www.bepress.com/ils/iss2/art11> (challenging the conventional wisdom that the anticlassification principle triumphed over the antisubordination principle and arguing instead that American civil rights jurisprudence vindicates both principles); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 446 (2000) (arguing that recent Supreme Court decisions “[r]estricting the participation of the representative branches in enforcing the Equal Protection Clause” represent a “fundamental break with the forms of interaction that the Warren and Burger Courts cultivated with Congress”). My account of criminal procedure draws primarily on the work of Akhil Amar, Dan Kahan, Tracey Meares, and Bill Stuntz. See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997) (analyzing the Fourth, Fifth, and Sixth Amendments in light of the text, history, and structure of the Constitution); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (analyzing the tension between an emerging doctrine of criminal procedure based on discretionary law enforcement and the existing constitutional framework that seeks to limit such discretion); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J.

establish the point of departure for the more controversial claims of Part II and the novel proposals of Part III.

A. *The Second Reconstruction and the Hope of Equality*

The last century witnessed the rise and fall of the Second Reconstruction.<sup>18</sup> The rise—embodied in the freedom marches in Birmingham, Selma, Washington, and across the South;<sup>19</sup> in escalating executive orders for desegregation;<sup>20</sup> in the passage of the Civil Rights Acts and the Voting Rights Act; in the enforcement of those laws by the Civil Rights Division of the Attorney General’s Office; and in court decisions leading up to and following in the spirit of *Brown v. Board of Education*<sup>21</sup>—spoke to the American promise of equality and the “withering injustice”<sup>22</sup> of racial subordination despite that promise. It was a broad movement with a

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393 (1995) (recounting the historical progression of the Fourth and Fifth Amendments); Stuntz, *Uneasy Relationship*, *supra* note 8 (arguing that the constitutionalization of criminal procedure has substantial unappreciated costs and that constitutional regulation of the criminal justice system would be better served by focusing on criminal substance and the funding of defense counsel). My account of the empirical analyses regarding the effects of these reforms draws principally from Gerald Rosenberg and Brad Canon. *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE* 304–35 (1991) (arguing that the Supreme Court’s criminal rights revolution failed to achieve its goals because political support as well as the conditions necessary for change were both lacking); Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 *AM. POL. Q.* 57 (1977) (noting the differential impact between federal and state exclusionary rules on illegal searches and seizures).

18. *See* MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990*, at 3–4 (1982) (describing the Second Reconstruction as that period of American history between approximately 1954 and 1968 when mass protests spurred executive, legislative, and judicial actions that dismantled much of the formal legal apparatus of the Jim Crow system). For the purposes of this Article, I adopt the somewhat broader conception extending into the mid-1990s.

19. *See generally* CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1996) (describing the intensive community organizing that supported the civil rights movement); *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S* (Henry Hampton & Steve Fayer eds., 1991) (discussing citizens’ descriptions of their participation in freedom marches).

20. Growing concern about the subordination of blacks in the United States had moved both the Truman and Eisenhower Administrations to establish commissions and make executive orders to end segregated facilities where possible. *See, e.g.*, Exec. Order No. 10,730, 3 C.F.R. 389 (1954–1958) (ordering military forces to oversee compliance with desegregation standards in various school systems); Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948) (ordering desegregation in the Armed Forces).

21. 347 U.S. 483 (1954). The Judiciary had also begun to remove barriers to equality in other areas of life by redefining state action and by striking down racially restrictive covenants, *Shelley v. Kraemer*, 334 U.S. 1 (1948), voting requirements, *Smith v. Allwright*, 321 U.S. 649 (1944), and limits on union membership, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

22. Martin Luther King Jr., *I Have a Dream*, Address to the March on Washington for Jobs and Freedom (Aug. 28, 1963), available at [http://www.stanford.edu/group/King/publications/speeches/address\\_at\\_march\\_on\\_washington.pdf](http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf).

deep conception of equality—a justice that extended beyond individual concerns to the problems of group conflict and social subordination.<sup>23</sup>

The language of *Brown* certainly speaks to this conception of justice. Where the *Plessy* Court had dismissed the harms of segregation as the fictive “construction”<sup>24</sup> of overly sensitive blacks, the *Brown* Court found that same harm to be real, deep, and unacceptable. Even where educational facilities were equal in every “tangible” respect,<sup>25</sup> the Court reasoned, the harm done by school segregation was still unacceptable where it created “a feeling of inferiority” that frustrated the education of black children.<sup>26</sup>

*Brown* is often described as an embrace of Harlan’s dissent in *Plessy*.<sup>27</sup> In some respects, this may misapprehend the way those engaged in the First

23. See Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 AM. POL. SCI. REV. 665, 674 (1958) (arguing that this broad movement was an appropriate response to a new and “contemporary” understanding of equal protection under the law). This was one of the main concerns that conservatives had with *Brown* at the time. See, e.g., Albert A. Mavrinac, *From Lochner to Brown v. Topeka: The Court and Conflicting Concepts of the Political Process*, 52 AM. POL. SCI. REV. 641, 642–43 (1958) (asserting that the Court had abandoned the individualist conception of justice embodied in *Lochner* for a group-based conception in *Brown*).

24. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

25. There were, of course material disadvantages that blacks in the dual school system faced. Black schools, on average, had lower quality facilities, fewer teachers, larger class sizes, older books, and other material disadvantages. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 632–33 (1950) (“The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school’s alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation’s ranking law schools. [In contrast,] [t]he law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation.”). But these arguably could have been remedied without integration.

26. *Brown*, 347 U.S. at 494. This links *Brown* with *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), in which the Court suggested that the exclusion of blacks from juries was “practically a brand upon them . . . an assertion of their inferiority.”

27. See, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 29–30 (1999) (opining that Harlan’s dissent in *Plessy* became famous because it was vindicated by *Brown*); Paul Finkleman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 996 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)) (noting that Justice Harlan’s dissents “pave[d] the way” for *Brown*); Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243, 251 (2000) (using *Brown* as an example of an instance when Chief Justice Warren chose not to cite important dissents in controversial opinions, because “despite the fact that *Brown* essentially

Reconstruction understood their struggle for equality under the law.<sup>28</sup> But in at least one respect it does seem right. The *Brown* Court was doing more than objecting to segregation for segregation's sake; it was attempting to make good on Harlan's claim that "there is in this country no superior, dominant, ruling class of citizens," that, as he put it, "[t]here is no caste here."<sup>29</sup> In *Brown*, the American racial caste system had reached what many hoped would be the beginning of its end.

But the *Brown* Court was not alone in its fight against racial stratification in civil and private life; in fact the Court was both responding to and encouraging the activism of the public, the Legislature, and, perhaps most directly, the Executive Branch.<sup>30</sup>

President Truman had spoken forcefully on the issue of racial discrimination,<sup>31</sup> and it was under Truman that Attorney General McGranery asked the Court to discard segregation once and for all "as a negation of rights secured by the Constitution."<sup>32</sup> Responding to public demand and the unanimous *Brown* decision, when the Governor of Arkansas used the National Guard to bar black students from attending Little Rock Central High School in 1957, the NAACP obtained an order barring the use of the Guard for that purpose, and President Eisenhower immediately sent the 101st Airborne to protect the black students as they attended their new school.<sup>33</sup> In 1960, when segregationists threatened the six-year-old Ruby Bridges for planning to attend a formerly all-white school in New Orleans, President Eisenhower again responded, this time sending federal marshals as escorts.<sup>34</sup>

Congress also played an active role in the Second Reconstruction. Under intense pressure from an increasingly active public and a determined President Johnson, Congress passed the Civil Rights Act of 1964,<sup>35</sup> which prohibited discrimination in employment, established the Equal Employment Opportunity Commission, and banned discrimination in public

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vindicated and adopted Harlan's position," Warren did not cite Harlan's dissent in *Plessy* anywhere in the *Brown* opinion).

28. See Siegel, *supra* note 5, at 1121 (noting the distinction between "civil" and "social" rights at the time of the *Plessy* decision).

29. *Plessy*, 163 U.S. at 559.

30. See *infra* notes 31–32 and accompanying text.

31. See Brief for the United States as Amicus Curiae Supporting Appellants, *Brown v. Board of Education*, 347 U.S. 483 (1954) (No. 8) (quoting from President Truman's addresses to Congress), available at <http://curiae.law.yale.edu/pdf/347-483/022.pdf>.

32. *Id.* at 25.

33. Sadly, they were not fully protected. The "Little Rock Nine," as they were known, were beaten, spat on, and cursed at throughout their attendance. See JUAN WILLIAMS, *EYES ON THE PRIZE* 92–119 (1987). Melba Patillo Beals, a member of the "Nine" was beaten, stabbed, and had acid thrown in her eyes. See MELBA PATILLO BEALS, *WARRIORS DON'T CRY* 173–74 (1995).

34. See Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2224–25 (2004) (relating Ruby Bridge's predicament).

35. Pub. L. No. 88-352, 78 Stat. 241.

accommodations connected with interstate commerce.<sup>36</sup> That act and the Civil Rights Act of 1968,<sup>37</sup> which extended these guarantees to housing and real estate, did not aim to remove race from the language of the law; they described practical efforts that could be made in furtherance of a society in which the law no longer contributed to racial injustice. The Voting Rights Act of 1965<sup>38</sup> was another part of this broad attack on legal and political maintenance of inequality.<sup>39</sup>

Ordinary citizens, too, were active reconstructors. Across the country, they took to the streets and the voting booths in increasingly large numbers and pushed for the elimination not only of segregation but of the more subtle forms of discrimination that sustained racial inequality. In bus boycotts, freedom rides, lunch counter sit-ins, and perhaps most famously, the marches on Birmingham, Washington, and Selma, Americans demanded a deep and abiding justice that included the unmet promise of true equality of opportunity. When private citizen Martin Luther King Jr. declared, “No, no, we are not satisfied and we will not be satisfied until ‘justice rolls down like waters and righteousness like a mighty stream,’”<sup>40</sup> he not only voiced his opposition to segregation but also described the greater aspiration and demand of the movement—true equality in the economic, political, and social life of the nation.

Throughout the 1960s—under pressure from the public, the Executive Branch, and Congress—the Court extended its holding in *Brown* to other areas of segregation.<sup>41</sup> And, in *Heart of Atlanta Motel v. United States*,<sup>42</sup>

36. President Kennedy, in proposing the Act, gave voice to the broad principle it embodied, declaring that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” H.R. DOC. NO. 124, at 12 (1963), as reprinted in 1963 U.S.C.C.A.N. 1526, 1534.

37. Pub. L. No. 90-284, 82 Stat. 73.

38. Pub. L. No. 89-110, 79 Stat. 437.

39. President Johnson, speaking to Congress in advance of their vote on the Act, made the case in terms of what he described as a “constitutional promise”:

Our mission is at once the oldest and the most basic of this country: to right wrong, to do justice, to serve man. . . . Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. . . . In such a case our duty must be clear to all of us. The Constitution says that no person shall be kept from voting because of his race or his color. We have all sworn an oath before God to support and to defend that Constitution. We must now act in obedience to that oath.

Special Message to the Congress: The American Promise, 65 PUB. PAPERS 281, 281–83 (Mar. 15, 1965). President Johnson was reminding Congress that the Constitution was not the purview of the courts alone. While seeing the promise of equality as a constitutional promise, Johnson recognized that the obligation to defend and uphold the Constitution extended to all Americans.

40. King, *supra* note 22 (quoting *Amos* 5:24).

41. *See, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (holding that police enforcement of a local custom requiring the separation of races in eating establishments violated the Fourteenth Amendment guarantee to equal protection).

42. 379 U.S. 241, 261 (1964) (upholding Title VII of the Civil Rights Act of 1964).

*South Carolina v. Katzenbach*,<sup>43</sup> and *Oregon v. Mitchell*,<sup>44</sup> the Court upheld various aspects of the Civil Rights and Voting Rights Acts. And finally, in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>45</sup> and *Griggs v. Duke Power Co.*,<sup>46</sup> the Court extinguished any ambiguity about the scope of the Second Reconstruction's aspirations, holding that the appearance of neutrality was not enough and that race-based remedies, where necessary, were required.<sup>47</sup>

### B. Equality and the Criminal Rights Revolution

The Court's sweeping reform of the criminal justice system—and the Court's reforms are indeed sweeping<sup>48</sup>—were related, if not integral, to the Second Reconstruction. Robert Cover mapped the early stages of the Court's pursuit of equality through criminal procedure,<sup>49</sup> describing the extension of Fourteenth Amendment concerns into the heartland of criminal procedure in cases like *Moore v. Dempsey*,<sup>50</sup> *Powell v. Alabama*,<sup>51</sup> and *Brown v.*

43. 383 U.S. 301, 327–28 (1966) (upholding the Voting Rights Act of 1965).

44. 400 U.S. 112, 118 (1970) (upholding the 1970 amendments to the Voting Rights Act).

45. See 402 U.S. 1, 22–31 (1971) (holding that a district court equitable order was constitutional where it included the use of mathematical ratios of racial composition as a guide for desegregation efforts, majority-to-minority transfer and transportation provisions, alteration of school attendance zones on the basis of race, and mandatory busing of minorities).

46. See 401 U.S. 424, 429–36 (1971) (explaining that Title VII requires more than neutrality with respect to employment requirements when they “‘freeze’ the status quo” and “invidiously discriminate on the basis of racial . . . classification,” and that employers bear the burden of showing that such requirements are tied to job performance).

47. In *Swann*, the Court noted that simply removing racial categories from the law did not reach the intent of *Brown*, finding that “an assignment plan is not acceptable simply because it appears to be neutral,” *Swann*, 402 U.S. at 28, and that “[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy.” *Id.* at 25. The Court also held that otherwise legitimate material concerns were not compelling enough to allow a district to avoid integration. *Id.* at 23–31. The “district judge or school authorities,” the Court wrote, “should make every effort to achieve the greatest possible degree of actual desegregation.” *Id.* at 26 (emphasis added). The holding of the Court was clear: the Constitution “warrants a presumption against schools that are substantially disproportionate in their racial composition.” *Id.* The *Swann* Court thus not only required state actors to carefully attend to race, but when school administrators failed to include sufficiently representative numbers of black students in their schools, the Court found that the Constitution placed an affirmative burden on them to justify their failure to do so. *Id.* at 22–27. In *Griggs*, the Court held that even when supported by a legitimate business practice, Title VII prohibited any practices that disqualified a disproportionate number of blacks not justified by a “business necessity,” 401 U.S. at 431, including practices that were “neutral on their face, and even neutral in terms of intent.” *Id.* at 430.

48. See *supra* note 16.

49. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305–09 (1982).

50. 261 U.S. 86, 87–92 (1923) (overturning a mob-dominated conviction on due process grounds).

51. 287 U.S. 45, 65–73 (1932) (discussing how the federal constitutional right to counsel applies to states in some circumstances).

*Mississippi*.<sup>52</sup> It was in these cases that the federal oversight of criminal procedure became closely associated with restraining racial hierarchy.

But it was during the 1960s and '70s that the Court was most active. Operating under "the assumption that communities could not be trusted to police their own police because of the distorting influence of racism,"<sup>53</sup> the Court "erected a dense network of rules to delimit the permissible bounds of discretionary law-enforcement authority."<sup>54</sup> *Mapp v. Ohio*<sup>55</sup> expanded the Court's understanding of criminal suspects' and criminal defendants' rights, an understanding that was soon further expanded by *Gideon v. Wainwright*<sup>56</sup> and *Miranda v. Arizona*.<sup>57</sup> Juvenile criminal defendants were also granted greater constitutional standing under *In re Gault*.<sup>58</sup>

Perhaps the most dramatic expansion of federal judicial power into the criminal justice system occurred in the Court's prison cases. Federal involvement in the quality of incarceration was most dramatically expanded in 1964 when the Supreme Court read the Civil Rights Act of 1871 as granting inmates the right to bring legal action against prison officials in *Cooper v. Pate*.<sup>59</sup>

Since *Cooper*, prisoners and their advocates have, through the courts, successfully reduced restrictions on inmates providing one another with legal assistance,<sup>60</sup> increased prisoner's access to mail,<sup>61</sup> required that administrators provide equal opportunity for inmates to pursue minority faiths,<sup>62</sup> gained inmates standing to sue for unnecessary punishment,<sup>63</sup>

52. 297 U.S. 278, 286–87 (1936) (requiring, via the Fourteenth Amendment, exclusion of coerced confessions by states). The defendant had been whipped, but, in the words of the deputy sheriff, "[n]ot too much for a negro." *Id.* at 284.

53. Kahan & Meares, *supra* note 17, at 1153.

54. *Id.*

55. 367 U.S. 643, 654–60 (1961) (discussing the application of the Fourth and Fifth Amendments to the states with respect to the "exclusionary rule" and the right to privacy).

56. 372 U.S. 335, 344 (1963) (guaranteeing the right to assistance of counsel).

57. 384 U.S. 436, 492 (1966) (providing procedural safeguards for the privilege against self-incrimination).

58. 387 U.S. 1, 25–31 (1967) (holding that juvenile delinquency proceedings that may lead to commitment must satisfy the requirements of due process and fair treatment).

59. 378 U.S. 546 (1964) (per curiam) (ruling that 42 U.S.C. § 1983 and § 1979 of the Revised Statutes provided a prisoner with a cause of action to sue the warden); James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, in *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 33, 36–37 (James B. Jacobs ed., 1983).

60. *Johnson v. Avery*, 393 U.S. 483, 490 (1969) ("[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners.").

61. *Procunier v. Martinez*, 416 U.S. 396, 417 (1974) (holding that "the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards").

62. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (holding that the prison officials' refusal to allow Buddhist religious services was a violation of the First and Fourteenth Amendments).

increased inmate access to medical care,<sup>64</sup> subjected severe forms of isolation to heightened levels of constitutional scrutiny,<sup>65</sup> and even found entire state prison systems unconstitutional.<sup>66</sup> Over the course of two decades, the number of cases brought by prisoners went from a dozen to hundreds to tens of thousands.<sup>67</sup>

The motivation behind reforms in criminal procedure and prisoners' rights were unquestionably linked with equality-seeking reforms in laws governing education, the workplace, and voting rights.<sup>68</sup> As the arrests of civil rights protestors across the South indicated, the police power of the state was a considerable tool for advancing the interests of the white men who held positions of power and openly sought the subordination of black Americans. States, as many egalitarians realized, could not be trusted with the protection of minority citizens. The tenor of court rulings, as a result, began emphasizing contemporary considerations of the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>69</sup>

But the criminal rights reforms of this period were also *different* from broader civil rights reforms in important ways. While the court reforms of criminal rights were reluctantly tolerated by the executive and legislative branches in some states, in most they were openly opposed. More importantly, they were neither demanded nor supported by the public at large. Indeed, many complained that civil rights activists were employing the courts to restrict state police powers not in service of innocents in the community, but in service of criminal rights and in the teeth of public opposition.<sup>70</sup>

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63. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (overturning dismissal of a pro se plaintiff's complaint against prison officials).

64. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (maintaining that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment") (citation omitted).

65. *Hutto v. Finney*, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.").

66. *Holt v. Sarver*, 309 F. Supp. 362, 365 (E.D. Ark. 1970).

67. By the late 1970s, at the request of the federal Judiciary and other federal officials, most state prisons were prodded to implement some formal mechanism to address inmate complaints outside of the courts. See COMPTROLLER GEN. OF THE U.S., REPORT ON THE GRIEVANCE MECHANISMS IN STATE CORRECTIONAL INSTITUTIONS AND LARGE-CITY JAILS app. I, at 1-4 (1977) (discussing essential features of grievance mechanisms and reporting on the number of states that used mechanisms and on the various types of mechanisms used); Donald P. Lay, *Corrections and the Courts: A Plea for Understanding and Implementation*, 1 RESOL. CORRECTIONAL PROBS. & ISSUES 1, 10 (1974) (advocating the creation of an administrative grievance adjustment policy within the prison system to lighten court dockets swollen by prisoner complaints).

68. See *supra* notes 15-17.

69. *Hutto*, 437 U.S. at 685 (citations omitted).

70. See *Kamisar*, *supra* note 16, at 44 ("It is hard to think of a single significant ruling against the police by any Supreme Court that has not evoked strong criticism."). *Gideon* is an interesting exception to this sentiment. See *id.* at 43 (describing *Gideon* as "the only Warren Court criminal procedure decision in favor of the defense that was greeted by widespread applause"). Public

### C. *The War on Crime and the Retreat from Anti-Subordination*

Soaring crime rates throughout the 1960s and 1970s, Martin Luther King Jr.'s and Robert F. Kennedy's assassinations, and Johnson's withdrawal from the presidential ticket threw the left into disarray. Republicans in the 1968 election ran their campaigns largely against the expansion of rights for criminal suspects, defendants, and convicts. Americans, they argued, wanted "an end to government that acts out of a spirit of neutrality or beneficence or indulgence towards criminals."<sup>71</sup> In particular, the courts that had "approve[d] and often underwrit[ten] the very things our individual integrity rejects"<sup>72</sup> needed to be reigned in. Nixon's call for a "militant crusade against crime"<sup>73</sup> was the centerpiece of his campaign and the issue that distinguished him most sharply from Humphrey and to which Humphrey tried vainly to respond. Nixon repeatedly returned to the changes in criminal procedure, complaining that the criminal justice system, undermined by the Warren Court and the Johnson administration, had "crumbled before the rising tide of crime."<sup>74</sup>

Republican candidates explicitly linked the battle against crime with their understanding of equality. The presidential candidate and Governor of California, Ronald Reagan, reframed the Supreme Court's expanded

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support for the principle behind *Gideon* notwithstanding, the Court has very nearly gutted that as well, a move that has provoked little protest. See generally William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995) (arguing that the Supreme Court's decision in *Strickland v. Washington* has undermined the right to counsel). The lack of protest for a once popular principle can be read as further evidence that the public has been alienated by the other progressive reforms in criminal procedure doctrine.

Evidence drawn from recent experimental studies suggest that my reading of public opinion—supportive of anti-racist interventions, but adamantly opposed to broad libertarian readings—remains correct. In a study in which participants were exposed either to a racist search or just a search that clearly violated current Fourth Amendment doctrinal requirements but was not motivated by racism, participants consistently supported exclusion in the former case and objected to exclusion in the latter. Kenworthy Bilz, *Values or Consequences? The Psychology of the Exclusionary Rule* (unpublished manuscript, on file with author). When asked why, participants stated that the racist search "contaminated" not only the evidence, but the entire criminal justice system, the integrity of which they wanted to protect. *Id.* But a non-racist search that violated the Fourth Amendment principles didn't contaminate the evidence, and participants refused to exclude the evidence in order to punish the police. *Id.* In the words of Kenworthy Bilz, the investigator, the difference derives from the "cherished American value" of equal protection under the law: "This value dictates that so long as we are doing nothing to provoke suspicion, we should all be equally likely to have to undergo a search by the police. When evidence is instead discovered as the product of a *benevolently* motivated search (say, good-hearted zealotry to catch crooks), no taint occurs." *Id.*

71. John W. Finney, *Nixon and Reagan Ask War on Crime*, N.Y. TIMES, Aug. 1, 1968, at 1 (printing excerpts from Richard M. Nixon's statements on crime and violence made to the Republican Party's Committee on Resolutions).

72. *G.O.P. Testimony on Violence*, N.Y. TIMES, Aug. 1, 1968, at 20 (quoting Reagan).

73. *Id.* (quoting Nixon).

74. *Id.* (quoting Nixon).

interpretation of the constitutional rights of suspects, defendants, and convicted criminals as related to a misapprehension of how best to do justice to the disadvantaged:

It is time to restore the American precept that each individual is accountable for his actions . . . . We need a new recognition in this country—that a mugging in the ghetto is as serious a crime as a mugging on Main Street. There can be no color line between black murderer and white murderer, between black safety and white safety. We need not only equal enforcement of the law—but also equal protection of the law.<sup>75</sup>

Nixon echoed Reagan's equal protection analogies in his own campaign on law and order: "We must return to a single standard of justice for all Americans, and justice must be made blind again to race and color and creed and position along an economic or social line."<sup>76</sup>

Nixon's election and subsequent appointment of four Supreme Court Justices in the space of three years effectively removed the support of the Executive and Judicial Branches from the movement towards a more thorough investigation into the social roots of inequality and the concern for the potentially subordinating effects of facially neutral policies.<sup>77</sup> In *Washington v. Davis*,<sup>78</sup> the transformed Court began what would become a nearly unbroken three-decade retreat from the aspects of *Brown* that looked to effects.

Just as many early criminal procedure cases can be read as equal protection cases, *Washington v. Davis*, although ostensibly an equal protection case, can also be read as reaching the heart of criminal procedure. In *Davis*, the plaintiffs challenged a race-neutral testing program for the District of Columbia police force that failed significantly more blacks than whites.<sup>79</sup> In rejecting their challenge, the Court stated that the fundamental principle of equal protection is "that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>80</sup> In subsequent cases, the Court not only repeatedly

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75. *Id.* (quoting Reagan).

76. *Id.* (quoting Nixon).

77. Cass Sunstein goes further, arguing that Nixon's appointees prevented the adoption of principles consistent with Franklin Roosevelt's Second Bill of Rights. See CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 108 (2004) ("President Nixon appointed four justices who promptly reversed the emerging trend, insisting that the Constitution does not include social and economic guarantees.").

78. 426 U.S. 229 (1976).

79. *Id.* at 232–33.

80. *Id.* at 240.

reaffirmed this holding, but steadily distinguished and limited the holdings of the *Brown* Court.<sup>81</sup>

In the face of Supreme Court decisions that increasingly restricted and eroded *Brown*, *Griggs*, and *Swann*, Congress responded with a series of legislative acts protesting this retreat.<sup>82</sup> But in the field of criminal procedure, rather than resistance, there were cheers of support from the legislature, the administration, and the public at large as the Court made short order of its previously expansive readings of criminal rights.<sup>83</sup> As Yale Kamisar noted in a retrospective on the revolution in criminal rights:

The last years of the Warren Court constituted a period of social upheaval marked by urban riots, disorders on college campuses, ever-soaring crime statistics, ever-spreading fears of the breakdown of public order, and assassinations and near-assassinations of public figures. Moreover, the strong criticism of the Court by many members of Congress and by presidential candidate Richard Nixon and the obviously retaliatory provisions of the Omnibus Crime

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81. *But see* Balkin & Siegel, *supra* note 17, at 3–4 (arguing that *Brown* could be read to support both anticlassification and antisubordination principles and that the Court has repeatedly upheld anticlassification as guided by antisubordination in subsequent cases).

82. When the Court, in the 1976 case of *General Electric Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976), held that excluding disabilities related to pregnancy from a health insurance plan did not constitute sex-based discrimination under Title VII, Congress enacted the Pregnancy Discrimination Act of 1978, which amended Title VII to explicitly prohibit discrimination on the basis of pregnancy, reinstating the EEOC’s interpretation of the law. *Compare* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (amending 42 U.S.C. § 2000e to include decisions based on pregnancy or childbirth within the meaning of prohibited sex-based discrimination in employment), *with Gilbert*, 429 U.S. at 140–41 (considering an EEOC guideline categorizing pregnancy-related conditions as valid “temporary disabilities” for the purpose of benefits). When the Court, in the 1980 case of *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), held that the plaintiffs had to prove changes in voting practices that harmed minorities were motivated by discriminatory intent, Congress responded by amending the Voting Rights Act in 1982, effectively reestablishing the disparate impact standard established in *White v. Regester*, 412 U.S. 755 (1973). *Compare* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (amending 42 U.S.C. § 1973b to bar racially discriminatory vote dilution based on a “totality of circumstances”), *with Regester*, 412 U.S. at 769–70 (holding that racially discriminatory vote dilution may be established based on electoral structure and social and historical factors). And when the Court, in the 1989 case of *Ward’s Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), held that employers could justify hiring practices with disparate impacts if they served “legitimate employment goals of the employer,” Congress passed the Civil Rights Act of 1991, effectively reinstating the Court’s earlier holding in *Griggs*. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (amending 42 U.S.C. § 1981 to restore the standard in *Griggs* and denouncing the standard in *Ward’s Cove*). *See generally* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (ruling that “practices, procedures, or tests . . . even [if] neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices”).

83. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court explicitly walked away from the notion that equality might be achieved through criminal procedure, describing and then rejecting the argument: “The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.” *Id.* at 14–15.

Control and Safe Streets Act of 1968 contributed further to an atmosphere that was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.<sup>84</sup>

Indeed, conservatives continued to use public disapproval of the revolution in criminal rights to gain further political advantage over the next two decades.<sup>85</sup>

The success of Bill Clinton's bid for the Presidency on the Democratic ticket in 1992 was similarly contingent on his distinguishing criminal offenders from the disadvantaged. Clinton, a former state prosecutor, self-consciously adopted a law-and-order stance more doggedly pro-law enforcement than his Republican opponent, moving the party away from its traditional alignment with Warren Court innovations and into what has now become a staple position of the modern Democratic Party.<sup>86</sup> With Republicans in the majority in the House and Senate for the first time since *Brown*, the last leg of the Second Reconstruction's support for the criminal rights revolution had given way.

In the wake of the Republican Revolution, the principle of color-blind equality has all but eclipsed the Court's broader attacks on racial subordination.<sup>87</sup> The Court openly rejects pursuit of equality considerations through criminal doctrine,<sup>88</sup> and the meaning of race is, tragically, defined primarily by the vastly disproportionate number of black men in the criminal justice system and their broken families in the community.

Even some of the staunchest supporters of judicial intervention now look back in anguish, acknowledging that the "constitutionalization of the process . . . may have contributed to an increased willingness to rely on

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84. Kamisar, *supra* note 16, at 3.

85. See Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1338–39 (2002) (ascribing the Republican successes after 1968 to their adoption of the "law and order" issue).

86. See, e.g., THE 2000 DEMOCRATIC NATIONAL PLATFORM: PROSPERITY, PROGRESS, AND PEACE 23 (2000), available at <http://www.democrats.org/pdfs/2000platform.pdf> ("Bill Clinton and Al Gore took office determined to turn the tide in the battle against crime, drugs, and disorder in our communities. They put in place a tougher more comprehensive strategy than anything tried before, a strategy to fight crime on every single front: more police on the streets to thicken the thin blue line between order and disorder, tougher punishments—including the death penalty—for those that dare to terrorize the innocent . . .").

87. But see Balkin & Siegel, *supra* note 17, at 4 (tracing the influence of antisubordination principles within the Court's facially anticlassification jurisprudence).

88. Justice Scalia, writing for a unanimous Court in *Whren v. United States*, 517 U.S. 806 (1996), for example, explicitly drives a wedge between procedure and the Court's equal protection doctrine, insisting that precedent had long "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers." *Id.* at 813. Continuing, Scalia wrote: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.*

prisons and even to the increasing oppressiveness that results from the development of supermaximum institutions.”<sup>89</sup> And some of the fiercest prison litigators concede that “by promoting the comforting idea of the ‘lawful prison,’ the litigation movement may have smoothed the way for ever-harsher sentences and criminal policies.”<sup>90</sup>

Today there is little popular support for expanding the rights of criminal suspects, defendants, or prisoners. And the vast majority of Americans—including black Americans—still feel, as they have for as long as we have records of popular opinion, that courts impose sentences that impose serious burdens on the community and do not demand enough from prisoners.<sup>91</sup> The questions we face today are less questions of overt racial discrimination in the criminal justice process than of how to control the effects of our ever-expanding prison populations—prisons not filled with political protestors, but with those who commit assaults, rapes, murders, and, most commonly, drug crimes in the inner city.

Egalitarians lack a clear agenda. We understand that the harms generated by the criminal justice system are largely borne by racial minorities, but we have also come to realize that criminals impose serious harms on the same disadvantaged communities we hope to protect.

## II. The Egalitarian Response to Mass-Incarceration

Our criminal justice system keeps the idea of race alive and significant today. By reinforcing the conditions that racial stereotypes presume, the criminal justice system has become one of the most race-generative institutions in our society. Indeed, while it remains true that many young black men are incarcerated in part because they are black, it may be equally accurate to say that today they are black because they are incarcerated.<sup>92</sup>

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89. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 375 (1998).

90. Margo Schlanger, *Beyond the Hero Judge*, 97 MICH. L. REV. 1994, 1998 n.19 (1999).

91. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1999*, at 130–31 tbl.2.56 (Ann L. Pastore & Kathleen Maguire eds., 2000) (demonstrating that in 1998, 74% of people surveyed stated that courts did not deal “harshly enough” with criminals). The evidence of a general perception of the lack of sufficient punishment is not limited to statistical studies. See, e.g., Jean Johnson, *Prisoners Have It Easy*, THE HERALD-SUN, Apr. 20, 1995, at A12 (“As a working, taxpaying citizen, I am shocked. [We’re] buying 12 32-inch TVs for prisoners in the new jail. I work every day, live in a 45-year-old house and have a 19-inch TV. It is inhuman for prisoners to be made to pick up litter. I work and help pick up litter on the weekends—give the citizens a break. I suppose we will all have to rob banks, shoot our neighbors or break into someone’s home. Then the county government can support us, too.”); Peter T. Kilborn, *Revival of Chain Gangs Takes a Twist*, N.Y. TIMES, Mar. 11, 1997, at A18 (“Rehabilitation does not work, say people in Centreville. And prisoners have it too easy, they add. A convict gets free room, board, medical care and television, while they have to earn both their own keep and his. They want convicts, like welfare recipients, to work.”).

92. See BRAMAN, *supra* note 2, at 186–87 (“The very problems that incarceration exacerbates—from diminished income to undesired single parenting [to steadily diminishing

In our nation's capital, for example, approximately 1 out of every 20 adult black men is in prison, and, as of the last estimate, 49.9% of the black men between the ages of 18 and 35 were under some form of correctional supervision.<sup>93</sup> If this situation persists, more than 75% of young black men in the District and more than 90% of those in the poorest neighborhoods can expect to be incarcerated at some point in their lives.<sup>94</sup> A few decades ago, in any city these statistics would have been astounding. Today, compared with other cities, these are commonplace.<sup>95</sup> At a cost of over \$40 billion a year, the United States now holds 1 out of every 4 of the world's prisoners<sup>96</sup>—prisoners who in our country, as everyone knows, tend to be black and brown young men in disadvantaged communities. This is a travesty; unfortunately, egalitarian reformers—particularly legal theorists and activists—are working with tools poorly suited to their objective.

*A. An Illustrative Example of the Problem: Crack Cocaine Sentencing*

To understand the complexity of the problem and the failure of traditional egalitarian strategies for resolving it, take the example of recent and highly unproductive debates over the disparities between crack and powder cocaine sentencing.

The evidence that egalitarians have marshaled in their critique of the disparities is troubling indeed. Under federal law, for example, while simple possession of any quantity of powder cocaine by first-time offenders is considered a misdemeanor, punishable by no more than 1 year in prison, simple possession of crack cocaine is a felony, carrying a 5 year mandatory sentence.<sup>97</sup> Then there is the oft-noted 100:1 ratio for dealers: Defendants convicted of selling 500 grams of powder cocaine or 5 grams of crack cocaine both receive 5 year sentences; for 5 kilos of powder cocaine and 50 grams of crack, the penalty is 10 years.<sup>98</sup> All of which would seem rather

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deterrence]—are deeply embedded in stereotypes of black families in America. These racially constitutive aspects of our criminal sanctions, the extent to which our criminal justice system continues to create the social construct of race and to reinforce our understanding of it, are linked to the stigmatization of black Americans in general.”). This essentially reverses standard theories of the “racial construction of crime.” See, e.g., Dorothy E. Roberts, *Crime, Race & Reproduction*, 67 TULSA L. REV. 1945, 1954–61 (1993).

93. Eric Lotke, Nat'l Ctr. on Insts. & Alternatives, *Hobbling a Generation: Young African American Men in D.C.'s Criminal Justice System Five Years Later* (Aug. 1997), <http://66.165.94.98/stories/hobblgen0897.html>. The latter figure includes jail, prison, parole, probation, and warrants.

94. BRAMAN, *supra* note 2, at 3.

95. For example, the overall incarceration rate for the District is 1.8%, while in Baltimore, Maryland, it is 2.1%, and in New Haven, Connecticut, it is 1.7%. *Id.* at 235 n.3.

96. Ed Marciniak, *Standing Room Only: What to Do About Prison Overcrowding*, COMMONWEAL, Jan. 25, 2002, at 10, 10.

97. 21 U.S.C. § 844(a) (2000).

98. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005).

academic were it not for the fact that blacks accounted for 80% of offenders sentenced for possession and sale of crack cocaine but only 30% of those sentenced for possession and sale of powder cocaine.<sup>99</sup>

To be sure, crack cocaine *is* socially destructive. The literature on the effects of crack cocaine prevalence is vast and consistent in this regard. Those addicted to drugs are more likely to engage in criminal activities,<sup>100</sup> and the burdens of criminality fall disproportionately on black communities.<sup>101</sup> Crack cocaine is highly addictive, posing a significant economic burden on those who use it and their families.<sup>102</sup> The material costs are great, as addicts resort to criminal activities in support of their addiction.<sup>103</sup> There are also emotional and psychological costs to the victims of these crimes, including the families of those who are addicted, robbed, threatened, or murdered. And there are special costs to the women and young men who sell sex for crack or money to buy crack. Added to these are the broader social costs that accompany high rates of criminal activity: the dissolution of social trust, the loss of businesses from the neighborhood, and the departure of those who have the means to leave.<sup>104</sup>

The criminal penalty of extended incarceration also has significant costs for non-offenders. For example, even when controlling for other factors, incarceration remains strongly related to lower household income.<sup>105</sup> This is due in part to the loss of the offender's income during incarceration (most

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99. Blacks constituted 84% of drug offenders convicted of crack offenses in 2000. U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 69 tbl.34 (2000), available at <http://www.ussc.gov/ANNRPT/2000/table34.pdf>.

100. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2001: THE DOMESTIC PERSPECTIVE 2 (2000); see HENRICK HARWOOD ET AL., OFFICE OF NAT'L DRUG CONTROL POLICY, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES: 1992-2002, at xii, IV-7 to -8 (2004), available at [http://www.whitehousedrugpolicy.gov/publications/economic%5Fcosts/economic\\_costs.pdf](http://www.whitehousedrugpolicy.gov/publications/economic%5Fcosts/economic_costs.pdf) (positing a link between drug abuse and criminal activity and demonstrating the costs of each).

101. COMM. ON THE STATUS OF BLACK AMS., NAT'L RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 23 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

102. Eric Baumer et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City, Longitudinal Analysis*, 35 J. RES. CRIME & DELINQ. 316, 317-18 (1998).

103. *Id.* at 318.

104. See David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 612 (1999) (listing implicit psychic and health costs as among the effects of criminal activity); see also COMM. ON THE STATUS OF BLACK AMS., *supra* note 101, at 465 (citing arguments that criminal activity deters businesses from locating in the inner city and decreases the neighborhood's livability).

105. See CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 10 (2000) (reporting that 54% of state prisoner parents and 62% of state prisoner nonparents earned less than \$1,000 personal income in the month before their arrests); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 325, 349 (2004) ("High imprisonment rates are concentrated in poor communities. Those elevated rates of incarceration thus impose the greatest social costs on communities that are already socially and economically marginal.").

offenders are employed prior to arrest),<sup>106</sup> but it is also due to the fact that a prison term significantly diminishes the prospective earning potential of offenders after release.<sup>107</sup> There are also direct costs related to the loss of child-care and eldercare that offenders provided. Grandparents, for example, are frequently left not only assuming many child-care duties, but reducing family funds to support their children's relationship with their grandchildren through expensive collect telephone calls, visits to correctional facilities, and so on.<sup>108</sup> In this sense, the burdens of incarceration are spread through the ties of kinship, imposing a kind of hidden tax on many inner-city black families.

There is also evidence that incarceration has a corrosive effect on family structure.<sup>109</sup> While a majority of prisoners are parents, a number of studies have shown that incarceration increases the likelihood that couples, even those with children, will separate.<sup>110</sup> High separation rates are related to other risks, including increased rates of lifetime sexual partners, which in turn have a host of negative consequences.<sup>111</sup> And father absence—the most obvious result of incarceration—is associated with a range of negative outcomes from increased likelihood of physical and sexual abuse for

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106. ALLEN BECK ET AL., U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991, at 3 (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sospi91.pdf>.

107. See, e.g., Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 165, 176 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that offenders have greater difficulty finding work after release due to their lack of employment history for the period of incarceration).

108. More subtle than the immediate and direct material effects of incarceration, but perhaps more serious, is the cumulative impact they can have on familial wealth across generations. By depleting the savings of offenders' families, incarceration inhibits capital accumulation and reduces the ability of parents to pass wealth on to their children and grandchildren through inheritance and gifts. Incarceration, like crime, acts like a hidden tax, one that is visited disproportionately on poor and minority families; while its costs are most directly felt by the adults closest to the incarcerated family member, the full effect is eventually felt by the next generation as well. *Id.* at 175–77 (describing possible reasons that the penal system leaves ex-inmates with lower wages and irregular employment and arguing that this scheme increases racial inequality between blacks and whites).

109. See Bruce Western & Sara McLanahan, *Fathers Behind Bars: The Impact of Incarceration on Family Formation*, in *FAMILIES, CRIME AND CRIMINAL JUSTICE* 309, 322 (Greer Litton Fox & Michael L. Benson eds., 2000) (citing evidence that incarceration has “large destabilizing effects” on low-income families); see also Robert J. Sampson, *Unemployment and Imbalanced Sex Ratios: Race-Specific Consequences for Family Structure and Crime*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS* 229, 251 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995) (arguing that increased incarceration creates imbalanced male–female ratios that leads to disruption of the family unit); Mark Testa & Marilyn Krogh, *The Effect of Employment on Marriage Among Black Males in Inner-City Chicago*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS* 59, 89–90 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995) (showing data that demonstrates that men that have spent time in prison are at a greater risk of premaritally conceiving a child).

110. See, e.g., Western & McLanahan, *supra* note 109, at 315, 318–20.

111. See BRAMAN, *supra* note 2, at 88, 118 (detailing these effects).

children<sup>112</sup> to earlier onset of sexual activity among girls.<sup>113</sup> It is also now well established that incarceration without drug treatment—the norm in most correctional systems today—prolongs addiction, further draining families of capital, straining familial bonds, and distorting community norms.<sup>114</sup> When over 75% of black men in our nation’s capital can expect to spend some time behind bars,<sup>115</sup> these are no longer issues that an isolated and aberrant fraction of black families face; they speak to the collective impoverishment of entire communities and the large-scale disassembly of the black family.

In light of these harms, egalitarians are right to be concerned. But what can they do?

### B. Existing Egalitarian Responses

1. *Civil Liberties.*—One argument is that egalitarians should continue in their pursuit of the criminal rights revolution. David Cole is one prominent advocate of this approach.<sup>116</sup> As an illustrative example, Cole describes the plight of Terrance Bostick, caught with a pound of cocaine in a police drug sweep of a Greyhound bus.<sup>117</sup> Cole notes that while citizens have

112. Several studies have found the absence of a biological father to be a strong predictor of abuse. See, e.g., Margo Wilson & Martin Daly, *Risk of Maltreatment of Children Living with Stepparents*, in CHILD ABUSE AND NEGLECT: BIOSOCIAL DIMENSIONS 215, 223–24 (Richard J. Gelles & Jane B. Lancaster eds., 1987) (reporting data indicating that children living in households with a stepparent and a natural parent experience greater risk of abuse than children living in a two natural parent household).

113. See Bruce Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 801 (2003) (finding that “[g]reater exposure to father absence was strongly associated with elevated risk for early sexual activity and adolescent pregnancy”).

114. Donald Braman, *Families and the Moral Economy of Incarceration*, in CRIMINAL JUSTICE 27, 35–37 (Eleanor Hannon Judah & Michael Bryant eds., 2004). Of course, one of the reasons why there is little or no drug treatment available to prisoners is that the increase in the length of drug sentences in recent decades has overtaxed the resources of the criminal justice system, despite sizeable increases in correctional spending. See, e.g., John M. Broder, *No Hard Time for Prison Budgets*, N.Y. TIMES, Jan. 19, 2003, § 4, at 5, available at 2003 WLNR 5236357 (discussing the budgetary difficulties many states face due to increased sentences as part of “the get-tough-on-crime climate of the past 25 years”). The costs associated with the influx of prisoners lead to dramatic cutbacks in not only drug treatment, but also education, job training, parenting, and other programs in prisons. See, e.g., JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 185 (2001) (reporting that only one in six of the 800,000 inmates with a drug or alcohol addiction receives any kind of treatment). One predictable result of cutbacks in rehabilitation programs is that prisons are increasingly less likely to serve the function of specific deterrence. Indeed, despite stiff penalties, across the country recidivism rates have substantially increased. See PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 11 (2002) (demonstrating that recidivism for drug offenses has increased from 35.3% in 1983 to 47.0% in 1994).

115. Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 2, at 117, 117.

116. See generally DAVID COLE, NO EQUAL JUSTICE (1999).

117. See *id.* at 16 (describing Florida v. Bostick, 501 U.S. 429 (1991)).

a right to not talk to police and to not consent to searches, they often fail to exercise these rights. For this reason, police target common drug transport routes for “sweeps” in which they ask for consent to search for drugs in the belongings of passengers, a practice that nets a large number of convictions.<sup>118</sup> For Cole and other egalitarian supporters of the criminal rights revolution this kind of search and seizure is wrongful, and the evidence should be excluded from trial. The fact that such a search was conducted, evidence was admitted, and Bostick was convicted speaks volumes about how the criminal justice system contributes to the subordination of blacks today.

One need not believe that there is any racial malice involved to follow Cole’s logic. The disparities in arrest and charge rates may well be the result of social and economic conditions that cause police to concentrate their efforts on inner-city populations.<sup>119</sup> Under this theory, police simply find it easier to locate drug dealers, infiltrate drug networks, and make drug arrests in the inner cities where drugs are often publicly sold and consumed than in middle-class white neighborhoods where drugs are sold and consumed in private.<sup>120</sup> It is not race that makes the difference; it is simply that these non-racial differences “make extensive drug-law enforcement operations in the inner city more likely and, by police standards, more successful.”<sup>121</sup> Moreover, “[b]ecause urban drug dealing is often visible, individual citizens, the media, and elected officials more often pressure police to take action against drugs in poor urban neighborhoods than in other kinds of neighborhoods.”<sup>122</sup>

Predictably, then, numerous studies indicate that nationally, charges for possession of crack cocaine are brought against blacks far more often than they are against whites,<sup>123</sup> and that this is so despite the fact that more whites have used crack cocaine than blacks.<sup>124</sup> Put simply, blacks who use crack cocaine are more likely than whites who use the same drug to be charged

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118. *See id.* at 17–22 (explaining how courts do not consider such police procedure to constitute an unconstitutional “seizure” because a reasonable person would feel free to terminate the encounter; such reasoning gives police the discretion to select targets however they like).

119. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 107 (1995).

120. *Id.* at 105–06.

121. *Id.* at 106.

122. *Id.*

123. *See* U.S. SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 69 tbl.34 (2001), available at <http://www.ussc.gov/ANNRPT/2001/table34.pdf> (showing 349 cases brought against whites and 4,140 cases brought against blacks for crack cocaine possession in 2001).

124. More than twice as many whites report having used crack, but slightly higher numbers of blacks report using crack in the last month. *See* OFFICE OF APPLIED STUDIES, DEP’T OF HEALTH AND HUMAN SERVS., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES 1998, at 38–39 (1999), available at <http://www.oas.samhsa.gov/popest98.pdf>.

with and convicted of a drug offense. This is why Cole and others believe that egalitarians should continue to encourage courts to restrain police and prosecutors: by driving up the cost of law enforcement in the inner city, on this account, courts can reduce the harm of mass-incarceration in vulnerable black communities. In light of the harms of mass-incarceration, Cole argues, “the concerns of the 1960s that initially animated the development of constitutional criminal procedure—namely, the use of the criminal law to subordinate African Americans”—should guide egalitarians toward a reassertion of criminal rights, particularly through the increased constitutionalization of criminal procedure.<sup>125</sup>

The problem with this response, of course, is that it is just as likely to backfire today as it was in the 1960s—and backfire in a number of ways. First, it is not at all clear that increasing constraints on criminal procedure will do more good than harm for the communities egalitarians want to protect. As Bill Stuntz has noted, wherever “courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs.”<sup>126</sup> They do this not only by limiting funding for criminal defense, but also by expanding criminal liability, both of which make it far easier to induce guilty pleas and avoid the bite of procedural requirements. As a result, “underfunding, overcriminalization, and oversentencing have increased as criminal procedure has expanded.”<sup>127</sup> By increasing the discretion of police and prosecutors in this way, egalitarian constitutional strategies have actually contributed to the very problems they attempt to ameliorate.

Second, many Americans—even those living in inner-city neighborhoods—simply reject the idea that the harms of police enforcement outweigh the benefits. As Tracey Meares and Dan Kahan have noted, the greatest advocates of greater police discretion are not white oppressors but minority citizens living in crime-ridden communities: “Instead of shunning the police, inner-city residents are demanding that police give them the protection they have historically been denied.”<sup>128</sup> Residents of a public

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125. Cole, *supra* note 16, at 1074.

126. Stuntz, *Uneasy Relationship*, *supra* note 8, at 4.

127. *Id.*

128. See Meares & Kahan, *supra* note 3, at 15; see also *id.* at 19–22; KENNEDY, *supra* note 3, at 19. Meares and Kahan also draw on Ely’s theory of equal protection, suggesting that because black communities are now represented in the political process, there is less justification for court intervention. See ELY, *supra* note 16, at 135–79 (advancing a representation-reinforcing theory of equal protection in which judicial review is appropriate only in questions of representation). Criminals, of course, are not well represented, and there is a fairly detailed historical account of the overtly racist motivation behind the exclusion of criminals from the political process. See, e.g., Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1089–95 (showing racist roots of disenfranchisement laws). Still, it is not clear how much of the exclusion today rests on racial animus and how much on (non-invidious) antipathy towards criminality.

housing project overridden by drug-related gang violence, for example, granted police permission to make a series of warrantless searches in their housing project to root out drug dealers. The ACLU sued, successfully defending limits on police conduct put in place during the 1960s and ironically, Meares and Kahan argue, blocking “efforts by inner-city residents to liberate themselves from the destructive effects of crime.”<sup>129</sup> It is this form of civil-liberties advocacy that has led dedicated egalitarians like Randall Kennedy to complain that criminal-rights advocates should pay more attention to the pleas of those “who must share space on streets and in buildings with crack traffickers.”<sup>130</sup>

And third, for the reasons that these commentators raise and others, the public is adamantly opposed to the reforms Cole and others support. Whether or not most Americans support drug sweeps, the idea of excluding the pound of cocaine at trial because the person consented to a search on a bus rather than in Bostick’s home or car strikes many of those living in the neighborhoods where such drugs are regularly distributed as injurious and unjust.<sup>131</sup>

But if broader readings of civil liberties do not appear helpful, neither do narrower readings. Imagine that, as Meares and Kahan have advocated, antiloitering ordinances were found to be constitutional and those living in housing projects were allowed to consent through popular vote to random searches of their apartments. Without some assurance that those arrested will face socially constructive sanctions, “order-maintenance policing” might well be disorder promoting—not because the police are racist or intent on harming disadvantaged families or communities, but because the police have little control over what happens after they make an arrest. It is hard to argue that broader police powers will help crime-ridden communities unless one has a more detailed conception of the consequences that follow from enforcement. Indeed, variations in each state’s regime of sanctions may provide the best explanation for why order-maintenance policing has had such variable effects.

It is not hard to see why so many living in disadvantaged neighborhoods resist the expansion of *both* prison populations *and* criminal rights. They are trapped between two serious harms, and egalitarians have yet to offer them a reasonable alternative.

2. *Court-Based Equal Protection Claims.*—Under these conditions, it is natural for egalitarian reformers to look to equal protection doctrine for assistance. Historically, the Equal Protection Clause has served as a resource

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129. Meares & Kahan, *supra* note 3, at 15.

130. KENNEDY, *supra* note 3, at 375.

131. This is the case, of course, only if the search was not motivated by illicit intent—for example to intentionally target citizens because they are black. See Bilz, *supra* note 70.

for those committed to protecting against iniquitous legal regimes. An equal protection challenge to the sources of subordination would also be a far more direct approach than attempting to achieve egalitarian ends indirectly through increasingly libertarian readings of criminal procedure. The logic of this claim, in light of the harms outlined above, is relatively straightforward: By constructing a regime of sanctions that is arguably as injurious as the harms it addresses, the state is inflicting disproportionate material and status harms on blacks similar to those that helped motivate the Court's decision in *Brown v. Board of Education*.<sup>132</sup>

Stigma, race, and incarceration are increasingly related in ways that elude most discussions of racial bias in the criminal justice system. There are also more subtle harms that bear on this claim. The very problems that mass incarceration exacerbates—from diminished income to undesired single parenting to steadily diminishing deterrence—are deeply embedded in stereotypes of black families in America.<sup>133</sup> These racially constitutive aspects of our criminal sanctions—the extent to which our criminal justice system continues to create the social construct of race and reinforce our understanding of it—are linked to the stigmatization of black Americans in general. Thus, as many black families and communities confront their intimate familiarity with incarceration, they also confront a widespread set of assumptions about their loved ones and about themselves in the eyes of society at large.

These claims rely on the understanding that a far broader class is harmed by lengthy and non-productive detention than the discrete set of blacks in violation of narcotics laws. Were these burdens evenly shared in our society, one could argue that the public should be allowed to exercise its option to inflict poor policy on itself.<sup>134</sup> But the extraordinarily disparate impact that our criminal justice policies have on black Americans raises serious equal protection concerns—at least within the framework of *Brown*, *Griggs*, and *Swann*.

The objection to this approach is, at this late date, all too familiar: While the Court at one time considered the harm inflicted on a protected class when assessing the law's constitutionality,<sup>135</sup> it has since abandoned this standard.<sup>136</sup> Today, the Court looks to intent rather than effect, allowing

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132. 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

133. See BRAMAN, *supra* note 2, at 183–87 (describing these effects in greater detail).

134. See ELY, *supra* note 16, at 181 (arguing that as long as all groups have access to the political process then the Court should not examine the “political choice” of substantive law).

135. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971) (holding that facially neutral school districts that continued to harm black students were unconstitutional).

136. *But see* Balkin & Siegel, *supra* note 17, at 2 (arguing that the Court still uses a principle of antisubordination, which forces the Court to examine when harm is inflicted upon a protected class).

legislatures and government actors to knowingly employ the criminal law in a way that criminalizes, impoverishes, and subordinates black Americans, so long as they do so with some other purpose in mind. On this standard, litigants must show more than that blacks are disproportionately harmed as a class, more even than that the state *knowingly* inflicted greater harm on blacks as a class; they must show that the state took action with the objective of harming blacks as a class.<sup>137</sup>

As the Court bars racial classifications and demands proof of racial animus, while giving an increasingly cold response to concerns about subordination, egalitarians have dutifully followed suit. This is evident in both the development of increasingly elaborate methods for discerning racial bias,<sup>138</sup> in accusations of hidden racial malice, and in many racial conspiracy theories.<sup>139</sup>

Pursuit of these intent-based strategies in court have met with predictable results. In the most discussed case to date, federal judge Clyde S. Cahill initially refused to sentence an eighteen-year-old offender with no prior convictions to the mandatory minimum sentence of ten years imprisonment required under the federal Anti-Drug Abuse Acts of 1986 and 1988.<sup>140</sup> Seeking to map an equal protection claim to the Court's new intent-based standard, the judge found the Federal Sentencing Guidelines to be, as a

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One reason why this standard has been abandoned might be that the Court believes, per Ely, that minorities have sufficient access to the political process to justify a lower level of scrutiny. This is, to say the least, debatable. See, e.g., Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1015 (2003) ("Although African-Americans have more political power and representation than they did during the Warren Court years, they still do not have the same representation as white voters.").

137. This is the standard of equal protection laid out in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and subsequent cases. Of course, the individual version of this also holds: a plaintiff must show that an agent of the state acted with racist intent. *Bolden*, 446 U.S. at 66.

138. As Lani Guinier has noted, "For many politicians and policymakers, the remedy for racism is simply to stop talking about race." LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 19 (1994). For a tortured attempt at detecting racial motive, see Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000).

139. Kennedy expends a great deal of energy investigating and arguing against these theories. KENNEDY, *supra* note 3, at 351–96. But many continue to argue against him. See, e.g., Kathleen R. Sandy, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665 (2003). Conspiracy theories also thrive on the obviously disproportionate racial effects. Of course, the alleged sale of crack cocaine in black neighborhoods to support the Contras in Nicaragua by CIA operatives (apparently without CIA knowledge) did not help matters. For a sample of the resulting anger and distrust that the alleged crack-Contra-CIA connection brought, see *Southern California Voices / A Forum on Community Issues: Contras and Crack: Too Many Ruined Lives*, L.A. TIMES, Sept. 7, 1996, at B7.

140. *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

matter of fact, the product of “unconscious racism” rather than race-neutral reflection, thus satisfying the requirement of discriminatory intent.<sup>141</sup>

The judge not only drew a swift reversal from the Eighth Circuit, but a painstaking review by Randall Kennedy. Looking at the Congressional Record, Kennedy found not only no hint of racial animus, but that a majority of black members of Congress “voted in favor of the law which created the 100:1 crack–powder differential.”<sup>142</sup> Moreover, Kennedy found, black members of Congress made persuasive arguments in favor of the 100:1 disparity. Some had argued that crack was a special danger because it made “cocaine widely available and affordable for abuse among our youth.”<sup>143</sup> Others argued that the lack of severe punishments for cocaine possession was fueling a rise in addiction.<sup>144</sup>

The distorting effect that the intent-based standard has on the discourse of those seeking justice is apparent in this episode.<sup>145</sup> Egalitarian advocates and judges have been drawn into a framework that forces them to go beyond reasonable claims that state policies contribute to the subordination of low-income and minority populations in practice and to assert that the state is acting with the intent of harming blacks. Strained claims of government racism alienate not only legislators and members of the executive branch who are the object of such accusations; they also alienate a growing portion of the general population who view these strategies as improbable ploys made, of all things, to protect criminals in high crime areas.<sup>146</sup>

But if the intent-based standard has led some egalitarians astray, it is not clear that an effects-based doctrinal standard would help resolve the problems we now face. The same depth of inquiry and reform that was the strength of the early civil rights litigation was also its greatest weakness. Because it demanded the structural reform of subordination, it was thoroughly inquisitive, requiring, on the one hand, painful investigations into the social formation of caste-like hierarchies in America and, on the other, arduous and often protracted review of factual data and bureaucratic minutiae in school organization, employment practices, and local political order.

Even if egalitarians commanded the authority of the Supreme Court, the judiciary would remain ill equipped to enforce an effects-based standard. As

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141. *Id.* at 797.

142. KENNEDY, *supra* note 3, at 370.

143. *Id.* at 371.

144. *Id.* at 372.

145. The danger of this kind of distortion, the danger of letting “our sometimes timid exploration of the boundaries of constitutional justice limit our reflective imagination,” is always present. Sager, *Justice*, *supra* note 7, at 441.

146. *See, e.g.*, KENNEDY, *supra* note 3, at 352 (discussing allegations of racial discrimination in statutory minimum sentences and prosecution patterns for crack cocaine violations); Meares & Kahan, *supra* note 3, at 11–22 (citing examples of community frustration caused by civil libertarian efforts to invalidate community-supported laws that were enacted to reduce criminal activity).

Lawrence Sager has noted, there are a host of institutional constraints that prevent courts from adopting standards that give full expression to constitutional norms. The lack of fit between the deeper conception of justice embodied in the Constitution and the remedies that courts are capable of delivering on their own make it seem fairly natural that policies which redress racial subordination be “understood as constitutional—indeed, as clearly constitutionally desirable—yet not be treated by the judiciary as required by the Constitution.”<sup>147</sup>

One important reason for resisting a pursuit of this broader and deeper conception of justice through courts is that it risks turning courts into political provocateurs. The Supreme Court, as Bickel infamously but accurately described, is simply incapable of achieving the necessary and always contingent fit between what is and what ought to be at the level of specificity that justice requires.<sup>148</sup> When the Court intervenes in too fine a detail, it risks provoking resentment and resistance that overwhelm the purpose of its intervention. This, more than any doctrinal revelation about the Constitution, is the chief lesson of the Court’s intervention into criminal procedure and criminal rights.

### C. *Time for a New Strategy*

Surveying the civil rights battlefield today, egalitarians cannot be pleased. We have lost the battle over the terms on which the war for equality will be fought, and nowhere have we lost more decisively than in the criminal justice system. It is perhaps the biggest modern blunder egalitarians have made, provoking some of the deepest political and practical problems we face today. The constitutionalization of criminal procedure and punishment has not only failed to dent the iniquitous enforcement of the law, it has led to the withdrawal of desired police protection from those who live in communities battered by crime, and, along with a host of other contributing influences, it has turned the public against the broader egalitarian cause, linking the pursuit of equality with the defense of criminals rather than the defense of vulnerable minority communities. We can do better.

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147. Sager, *Justice*, *supra* note 7, at 411 (suggesting that “a broad gap exists between our notions of political justice and the corpus of constitutional case law”).

148. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 26 (1975) (urging that judges “ought never impose an answer on the society merely because it seems prudent and wise to them personally, or because they believe that [the solution offered by a political institution] is foolish” and arguing further that courts should “move cautiously . . . mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles”).

### III. An Effective Egalitarianism

Bearing in mind the many obstacles that face any proposal for change, this Part proposes a modest criminal justice reform that can help egalitarians achieve their abiding goal of justice for all. There are three broad dimensions to my proposal.

#### A. *A Focus on Harms to Non-Offenders*

First, egalitarians should shift their focus from the burdens the criminal law imposes on criminals, suspects, and defendants, to the collateral harms borne by non-criminals in their communities. This not only has the advantage of being far more acceptable to the public at large, it more clearly identifies the true nature of the harm to which egalitarians object. Making the reduction of these harms the principal target of egalitarian criminal justice reform efforts is necessary to the pragmatic resolution of the new American dilemma.

The values and goals of egalitarian reformers are shared by most Americans. And yet, their proposals appear to run against the grain of public sentiment. While the traditional egalitarian response to this divergence is to advocate educating the public, in this instance it does not appear that most citizens need educating (indeed it may be reformers who could do with some education on this point).

During the Civil Rights Movement, the state used police power to preserve white power. The push for restraining the racist state to protect criminal suspects, defendants, and offenders made sense then, but times have changed. Today, however, the relationship between race and the state's use of its police power is more complicated. Black Americans are no longer without political power, and the interests of the state are now more closely aligned with the interests of minority communities—in no small part because those communities elect many of their local and state officials.<sup>149</sup>

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149. In our nation's capital, for example, the mayor, many of the council members, and a substantial majority of the police are black. Again, this matters if the Court is concerned with representation reinforcement. See ELY, *supra* note 16, at 77–88 (arguing that a representation reinforcement approach to judicial review entirely supports the underlying premises of the American system of representative democracy). Not to beat a dead horse here, but in this Article I am suggesting, congruent with other theories of popular constitutionalism, that Ely's theory of the judicial role not only explains why courts limit their interpretation of open-ended constitutional provisions, but also implies that there is a great deal more to the Constitution itself. Cf. Michael Dorf, *Putting the Democracy in Democracy and Distrust: The Coherentist Case for Representation Reinforcement* 45 (Columbia Pub. Law & Legal Theory Working Paper No. 04-77, 2004), available at <http://ssrn.com/abstract=602541> (asserting that, given Ely's claim "that even the People in their capacity as constitution writers, armed with the full legitimacy of a super-majoritarian mandate, ought not entrench what they firmly regard as fundamental substantive values," then "unelected judges armed only with ambiguous text adopted in different circumstances ought not interpret that text to entrench what a bare majority of them regard as substantive values").

Rather than employing its police power to frustrate egalitarian reform, the state is now actively attempting to respond to calls for greater police protection in the inner city and addressing the harms that crime imposes on its citizens.<sup>150</sup> The conflation of the interests of disadvantaged communities with the interests of criminal suspects, defendants, and offenders has gone a fair distance toward alienating those who suffer the ravages of criminal activity. Answering the cry of unjust punishment from these communities by defending criminal actors is worse than incoherent; it forces communities into an impossible choice between two unnecessary injustices.

Instead, egalitarians should shift their focus from the defense of criminals, suspects, and defendants to the collateral harms borne by noncriminals in their communities. The central problem is not discriminatory policing or prosecutions but rather sanctions that harm rather than help the communities where the offenses are committed. These are predictable harms generated by state action, and they burden innocent parties in already burdened and disadvantaged communities. These communities are in dire need of advocates—but advocates of disadvantaged communities rather than advocates of the libertarian rights-endowed criminals who victimize those who live in them.

#### *B. Re-engaging the Public*

Second, egalitarians need to actively reengage the public. Egalitarians have typically distrusted the public, fearing popular sentiment as potentially insensitive to the needs of vulnerable minorities. But on issues of criminal justice, the public is surprisingly sophisticated and sensitive to the needs of communities burdened by crime. Egalitarians can and should leverage public support for sanctions that help rather than hurt communities already injured by crime. We are fully capable of moving the public to support the cause of justice, but we need to trust and engage the public to do it.

The shift in attention from criminals to communities described above gets the problem of modern inequality right: Social subordination today has less to do with over-policing than it does with criminal sanctions that harm as much as they help. But it is also effective symbolic politics. Americans—both those who live in the inner city and those who do not—overwhelmingly support mandatory education, drug treatment, job training, and work requirements for convicts. Indeed, support for these types of socially productive sanctions—the kinds of sanctions that would actually benefit the communities where criminals are convicted—stands at about 90% in one

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150. See generally Kahan & Meares, *supra* note 17 (examining how major urban centers, in responding to citizens' demands for effective law enforcement, are rediscovering community policing and provoking constitutional and procedural challenges from civil libertarian groups).

major public opinion poll.<sup>151</sup> Yet none of these are the norm in sentencing or corrections, and most of these are at the periphery of the egalitarian agenda.

Harnessing public sentiment in the case of the criminal law is important, not only because it can aid egalitarian reform, but also because it is just and good. The criminal law gives expression to our deepest intuitions about right and wrong, and the enforcement of criminal sanctions is an act through which we imagine the limits of our social bonds with one another. Public frustration with our criminal justice system reflects a deeper anxiety about the unraveling of the social fabric itself and the inability of our criminal justice system to do anything about it.<sup>152</sup> Rather than dismissing the concerns of the people, egalitarians should view this as an opportunity for reform.

### C. *Getting the Process Right*

Third, egalitarians need to get the process right. As a pragmatic matter, egalitarians should put aside their attempts at unilateral enforcement through the courts and pursue their deeper commitment to equality through popular reforms.

Who, if not judges, will protect both vulnerable defendants and communities from the potentially capricious use of police power? Juries, although increasingly marginalized in modern jurisprudence, were originally cast in precisely this role.<sup>153</sup> At the time of our nation's founding, it was

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151. See, e.g., TIMOTHY J. FLANAGAN & DENNIS R. LONGMIRE, NATIONAL OPINION SURVEY OF CRIME AND JUSTICE (1995) (on file with author) (covering the period between June 6 and June 26, 1995, and based on telephone interviews with a national adult sample of 1,005). I describe public demand for accountability-enhancing sanctions in greater detail elsewhere. See generally Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1 (2006).

152. This, of course, is not specific to our era. See, e.g., KAI T. ERICKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 179–80 (1966) (describing the worries over crime in Puritan America as the result of shifting definitions of deviance precipitated by broader social anxieties rather than as the result of crime itself); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000) (describing a similar phenomenon today).

153. That is, the jury provides information to the state about popular sentiment through its selection of sanctions. While I focus on the American experience here, it is worth noting that this was also true in the eighteenth-century English jurisprudence from which the Framers drew most of their own inspiration. As one prominent historian has noted:

Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In most cases the accused had been caught in the act or otherwise possessed no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction. These trials were sentencing proceedings. The main object of the defense was to present the jury with a view of the circumstances of the crime and the offender that would motivate it to return a verdict within the privilege of clergy, in order to reduce the sanction from death to transportation, or to lower the offense from grand to petty larceny, which ordinarily reduced the sanction from transportation to whipping.

John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41 (1983).

neither the judiciary nor the legislature that exercised the most sway over sentencing, but juries.<sup>154</sup> In both civil and criminal trials, juries decided law, fact, and quite often sanctions “complicatedly.”<sup>155</sup> And while many today think of Article III and the Sixth Amendment jury requirements as primarily a protection against state corruption, a more careful reading suggests that the Framers were concerned about preserving the right of the people to play a role in the deeply moral decisions about the fit between conduct and sanction.<sup>156</sup> It is for precisely this reason that public participation in juries, while an important safeguard for defendants against state abuse, was also seen as, “more fundamentally, a political institution embodying popular sovereignty and republican self-government.”<sup>157</sup> Criminal trials are *both* fact-finding endeavors *and* morality plays in which community members communicate important information with each other and with state officials.

Unsurprisingly, then, many of the observations made about juries by the Framers and contemporary commentators describe it as the community’s check against an errant state or state actor. As one of the Framers put it, the people’s position as jurors “enables them . . . to come forward, in turn, as the sentinels and guardians of each other.”<sup>158</sup> Juries are, after all, “trials by the

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154. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 29 (1994) (“[T]he law-finding power of juries meant that the representatives of local communities assembled as jurors generally had effective power to control the content of the province’s substantive law.”); JACK N. RAKOVE, *ORIGINAL MEANINGS* 300 (1997) (“When courts exercised their properly judicial . . . functions, the decision-makers were the juries. The most striking feature of colonial justice was the bare modicum of authority that judges actually exercised.”); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 *GEO. L.J.* 641, 681 (1996) (“No idea was more central to our Bill of Rights than the idea of the jury.”).

155. Amar, *supra* note 154, at 686; see also Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 *ST. LOUIS U. L.J.* 299, 299–300 (2000) (describing the diversity of sentencing arrangements at the founding and the large role played by juries in many instances); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 *DUKE L.J.* 951, 958 (2003) (describing the “myth, perpetrated most recently by critics of the Federal Sentencing Guidelines, that English juries had no role in sentencing, and that when the Sixth Amendment was adopted, the sentencing system that the Founders intended to incorporate was one with a long-standing and monolithic tradition of judge sentencing”). I should note that this also was extended through the nineteenth century, during which “[s]tatutes in as many as half of the states . . . granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case.” Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 *YALE L.J.* 1355, 1373 (1999); see also Edward A. Linden, Note, *Jury Sentencing in Virginia*, 53 *VA. L. REV.* 968, 969 n.2 (1967) (listing Alabama, Arkansas, Georgia, Indiana, Kentucky, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Tennessee, Texas, and Virginia as jury-sentencing states); Comment, *Consideration of Punishment by Juries*, 17 *U. CHI. L. REV.* 400, 405 n.21 (1950) (identifying Illinois as a jury-sentencing state).

156. Amar, *supra* note 154, at 685–87.

157. *Id.* at 684.

158. Letters from the Federal Farmer IV, in 2 *THE COMPLETE ANTI-FEDERALIST* 245, 250 (Herbert J. Storing ed., 1981); see also Amar, *supra* note 154, at 684.

people themselves,”<sup>159</sup> and one of the central purposes of citizen juries is to prevent the state from exerting arbitrary and unjust power over citizens through the criminal law.

Jurors are well placed to internalize both the benefits *and* the costs of legal judgments<sup>160</sup>—costs that are both material and social. As Akhil Amar has noted: “a crime . . . constitutes a moral rupture, a distinct breach of the peace of the place where the crime occurred. A crime is committed not merely against the victim, but against the community. . . . [J]udicial response . . . requires not merely good factfinding, but moral judgment—moral judgment by the community via the jury.”<sup>161</sup> Indeed, the jury clauses (particularly the District Clause) can be read as supporting this assessment by insisting that the individuals who determine whether and how the criminal law is applied in a trial will, by feature of their geographic proximity, bear the consequences of their decision.<sup>162</sup>

Juries are at the heart of constitutional protections of both defendants and the community against arbitrary state power because they are the mechanism by which the public inserts itself into the fundamental workings of the state. Precisely because the criminal law governs the most direct application of state control over individual autonomy, the trial is also the site where the people demanded the greatest amount of representation in the form of direct self-government. When the people partake in the moral judgment necessary to sanction a citizen, they are describing the contours of the moral world in which they wish to live—something the state is incapable of doing because it lacks immediate access to the relevant information about the social meaning and social costs involved.

Jury nullification, for example, is normally seen as a choice between one of two great injustices: that of imposing an unjust sanction and that of failing to impose any sanction at all.<sup>163</sup> As Paul Butler has put it, nullification is the decision to follow “conscience” rather than law.<sup>164</sup> But it

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159. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 86, 90 (Paul Leicester Ford ed., 1895).

160. The internalization of externalities necessary to efficient choice is an outcome that law and regulations maintain as a goal. See, e.g., GUIDO CALABRESI, THE COST OF ACCIDENTS 143–50 (1970) (discussing three types of externalities and the inefficiencies they cause).

161. Amar, *supra* note 154, at 687.

162. Of course, pleadings are also affected by the “going rate” established in public trials, so the influence of juries is not limited to cases that go to trial.

163. Compare Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700–01 (1995) (arguing that jury nullification is “justice” based where the jury believes that applying the law would lead to an “unjust” conviction), with Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 124 (1996) (arguing that jury nullification should occur when juries believe the law itself is unjust or when they believe the law is just but do not believe the defendant should be punished).

164. Butler, *supra* note 163, at 700.

can also be seen as a form of *signaling* by frustrated citizens.<sup>165</sup> Members of the public, through jury nullification, may be attempting to communicate their dissatisfaction with the state's overuse of incarceration and underutilization of drug treatment.<sup>166</sup> To be sure, this signaling is costly to society and to the legitimacy of the criminal justice system in ways that are readily apparent to anyone living in a high-crime neighborhood,<sup>167</sup> providing some indication of just how serious the frustration is.

Today, this reading of jury rights in conjunction with equality concerns is particularly apt in our inner cities, where residents, plagued by crime, are also burdened by counter-productive sanctions. The injustice they see in the mass incarceration of their young men and the state's failure to impose requirements of mandatory education, mandatory drug treatment, or mandatory job training as part of criminal sanctions is widely lamented.<sup>168</sup> Those who live in neighborhoods where a substantial majority of the men will spend time behind bars are intimately aware of the inadequacies of the criminal justice system and therefore are all the more capable of making informed choices about what kind of sanctions are likely to achieve justice.

While, generally speaking, the trend in criminal procedure has been to prevent noncapital juries from influencing sentencing,<sup>169</sup> this need not and should not be so. Precisely because juries are so well positioned to inject community concerns into the exercise of state power over offenders, they are a logical starting place for repairing the ongoing moral rupture that unjust sanctions have brought about. Today, more than ever, a renewed commitment to empowering vulnerable communities through the jury should be brought into service of egalitarian concerns.<sup>170</sup>

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165. As Michael Spence demonstrated in his Nobel Prize winning work, well-informed agents can sometimes improve their market outcome through costly signaling. See Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 358 (1973) (defining "signaling costs" as the costs incurred by well-informed agents attempting to inform poorly informed agents). In the market for sanctions, the well-informed agent is the public, the poorly informed agent is the state, and nullification is the signal. Although conducted in other terms, the debate over jury nullification is all about whether, all things considered, the signal of jury nullification is efficient. (I should note that the public is only well informed when compared with the state. See *supra* subpart II(A)).

166. See Butler, *supra* note 163, at 717–18 (arguing that rehabilitating drug offenders is no longer a purpose of the criminal justice system but rather the system seems to have an "antirehabilitative" effect).

167. See Leipold, *supra* note 163, at 138 (arguing that nullification in serious drug offense trials would send a message that law-abiding citizens should stop complaining and face the fact that they will have to continue living with the fear that engulfs their community).

168. See *supra* notes 91–96 and accompanying text.

169. This is consistent with the broader trend away from "public-regarding" doctrine and towards doctrine focused on the individual rights of the defendant. See generally Meares, *supra* note 10 (describing this trend).

170. Vikram Amar has described the way that the Fourteenth and Fifteenth Amendments work together to secure jury participation rights in a way that is close to constitutional protections of voting rights. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

How? The centerpiece of the proposed reforms is a new practice, *jury polling*. Rather than simply having juries or judges choose from a grid of imprisonment terms, as most jury- and judge-centered sentencing regimes now do, judges would poll jurors on an array of sentencing options for review by the state or federal sentencing commission. In every popular poll and experiment where citizens had the choice, they chose socially productive, community- and family-supporting sanctions.<sup>171</sup> Moreover, the more citizens know about the offender and the offense, the more subtle and constructive their sentences become, suggesting that jurors will be particularly conscientious. Egalitarians should harness the decency and good sense of the public by forcing judges and legislatures to pay closer attention to the concerns of the people at sentencing.

The goal of leveraging popular sentiment, particularly in high-crime communities, would still be marred by unrepresentative juries. As a number of judges and scholars have suggested, peremptory challenges exacerbate this problem and should be eliminated altogether.<sup>172</sup> Egalitarians have supported peremptory challenges on the grounds that a white community may treat minorities unfairly. A more reasonable way to achieve the goal of protecting minority defendants would be to look at the source of jury composition. Just as access to the ballot has been severely restricted (mostly to the detriment of the minorities and low-income citizens), so too has access to the jury. Some have proposed making jury service mandatory for every citizen one week a year.<sup>173</sup> Universalizing jury service would help, but would not address the financial barriers citizens with meager means—citizens who are also disproportionately black and brown—face when confronted with the task of jury duty. We should provide reasonable compensation for jury service, say \$150 per day.<sup>174</sup>

Communities that have suffered generations of economic and social marginalization will regularly be confronted with both the burdens and benefits of criminality and criminal sanctions. But egalitarians can draw on the law of juries to help work out better solutions to this problem. And they can better align themselves with the interests of the communities they hope to empower by shifting the focus from the defendant's right to a jury trial to

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171. See BRAMAN, *supra* note 2 (reviewing this data).

172. See, e.g., *Miller-El v. Dretke*, 125 S. Ct. 2317, 2340 (2005) (Breyer, J., concurring) (quoting *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring)) (“The only way to ‘end the racial discrimination that peremptories inject into the jury selection process . . . [is] to eliminat[e] peremptory challenges entirely.’”) (second alteration in original); see also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1183 (1995) (arguing that “we must be vigilant to prevent racial and gender discrimination wrapped in the inscrutable cloak of the peremptory challenge”).

173. Amar, *supra* note 172, at 1178.

174. In other words, why stop a progressive federalism? Take it to the district level with the feds and the county level in the states.

the community's right to participate in a jury trial. Getting the problem and the process right will allow egalitarians to return to the popular politics that animated the Second Reconstruction and allow us to start work on the Third.

#### IV. Conclusion

Throughout this Article I have operated under the assumption—associated most strongly with the work of Larry Sager, but present in the work of many others—that the law has a life outside of the courtroom and that its meaning is never fully articulated in doctrine.<sup>175</sup> With that understanding, my first goal has been to describe a positive and a normative account of equality concerns and criminal law. The positive account described the failure of a particular approach, one that was distrustful of the people and far too invested in doctrinal battles; the normative part articulated a strategy for restoring balance and pragmatic optimism to the promise of equality under the law. Strangely, while attention to the role of popular sentiment in the law is now common, there have been relatively few pragmatic proposals describing how, precisely, egalitarians can pursue their ideals in a popular register.

The second goal of this Article, then, has been to demonstrate by way of example how egalitarians can begin to build the kind of popular strategies necessary to the successful pursuit of justice.

The approach I have taken here also has two parts. The first involves a diagnosis of the split between egalitarian reformers and the public on matters of fundamental justice. In this case, the division was generated in part by egalitarians' defense of criminal rights in the teeth of opposition by the communities egalitarians intended to protect. But it was also generated by a disrespect for the people themselves implicit in a court-centered pursuit of justice. To succeed, I argued, egalitarians will need to shift their focus from criminal offenders to the vulnerable communities in which they live and move beyond distrustful doctrinal remedies to strategies that embrace and empower the communities they seek to protect.

The second part of this object lesson involved developing remedies. In keeping with the substantive commitments of the antistatutory principle, I argued, the remedies needed to embrace the thoroughly inquisitive and respectful nature of our commitment to equality. The proposals for reform

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175. See Sager, *Fair Measure*, *supra* note 7, at 1263 (arguing that since not even “generous readings of federal judicial competence” would advocate that federal courts subject all governmental activities “against the broad values of liberty and fairness embodied in Constitutional provisions,” society is left to “depend heavily upon other governmental actors for the preservation of the principles embodied in these constitutional provisions”); Sager, *Justice*, *supra* note 7, at 414 (“[C]onstitutional case law fails to recognize some obvious candidates for inclusion in the requirements of political justice. For these claims of justice to prevail, they must be affirmed by the institutions of popular government . . .”).

thus sought to vindicate the ideal of equality under the law by promoting the generation of information about the concerns and interests of those in disadvantaged communities through meaningful jury participation and responsible administrative law.

The greater inclusion of citizens in the creation, administration, and enforcement of the law also happens to be good politics. No egalitarian activist, candidate, judge, or administrator need be abashed in campaigning for these reforms. The final lesson of this study, then, is that by properly aligning the mechanisms of democracy with the needs of disadvantaged communities, we can promote both at the same time. That does not make achieving egalitarian goals through popular politics easy, but it does make it refreshingly possible.