

WHY CARE ABOUT MASS INCARCERATION?

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LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE. By *Paul Butler*. New York: The New Press. 2009. Pp. ix, 214. \$25.95.

INTRODUCTION

Advocates for less punitive crime policies in the United States face long and dispiriting odds. The difficulty of the challenge becomes clear if we compare our criminal justice outcomes with those of other nations: We lock up more people, and for longer, than anyone else in the world. We continue to use the death penalty long after Europe abandoned it, we are the only country in the world to lock up juveniles for life, and we have prisoners serving fifty-year sentences for stealing videotapes from Kmart.¹ Our courts offer little relief: the German Constitutional Court prohibits a sentence of life without parole for murder while the U.S. Supreme Court upholds the same sentence for possession of a pound and a half of cocaine.² Our appetite for vengeance sometimes seems insatiable: politicians make careers out of being tough on crime, only to lose elections to those who are yet tougher;³ Alabama sheriffs deny food to inmates to turn a profit;⁴ jokes about raping prisoners are part of popular culture.⁵

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1. *Lockyer v. Andrade*, 538 U.S. 63 (2003). Andrade was sentenced under California's "three strikes" law; his first strike was for misdemeanor theft and his second and third strikes were for stealing videotapes from Kmart, eighty-five dollars worth the first time and seventy dollars worth the next time. *Id.* at 66. The Court held that this was not a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 77. For an excellent discussion of the Court's proportionality jurisprudence, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009).

2. *Compare* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (F.R.G.), translated in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 306, 309 (2 ed. 1997), with *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (1991). See also Markus Dirk Dubber, *Recidivist Statutes As Arational Punishment*, 43 BUFF. L. REV. 689, 714 (1995) (discussing relevant German case law).

3. See, e.g., SASHA ABRAMSKY, *HARD TIME BLUES* 49-50 (2002).

4. Adam Nossiter, *As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter*, N.Y. TIMES, Jan. 9, 2009, at A11.

5. See, e.g., LET'S GO TO PRISON (Casey-Werner Company & Strike Entertainment 2006).

Enter Paul Butler.⁶ Butler was a successful federal prosecutor in Washington, D.C. (pp. 1–21). He spent his days sending people to jail and was good at it. He believed his work was honorable, even courageous. “I put a lot of people in prison, and I had a great time doing it. Not only was I doing the Lord’s work, I was assigned the fun part of His job description—the wrathful, vengeful, angry part” (p. 23). Butler, a black man, did not apologize for putting other blacks in prison. He was protecting black victims. When his friends suggested that somebody who cared about the plight of the black community should work for Legal Aid or as a public defender, Butler responded, “I was helping people in the most immediate way—delivering the protection of the law to communities that needed it most, making the streets safer, and restoring to victims some measure of the dignity that a punk criminal had tried to steal” (p. 24).

Butler admits that he enjoyed retaliating against the type of kids who had made his life difficult when he was young:

When you are a black kid attending a lousy public school on the South Side of Chicago and you get good test scores and you talk like a white boy, you get beat up sometimes—by other black boys with not-so-good test scores who don’t end up at the prosecutor’s table. Years later you might see boys who look like them at the defendant’s table in the courtroom, and you—the prosecutor—point your finger at them and call them names. It is part of your job. This is justice too, the poetic kind. (pp. 23–24)

Then Butler, “the Avenger of the hood,” (p. 23), was arrested and charged with a crime—simple assault. The case arose out of a petty dispute with a neighbor over a parking spot that Butler owned but that the neighbor liked to use. Unfortunately for Butler, his neighbor had mental-health issues; doubly unfortunately, she had friends in the police department. Butler’s story of his encounter with the criminal justice system is depressingly familiar: the arresting officer ignores his claims of innocence and fails to contact an exculpatory witness at the scene; surly courthouse staff throw an inedible lunch through the bars of his filthy holding cell as he waits to see the judge; the police lie at the trial about what Butler said when he was arrested. What is different, of course, is that Butler is a prosecutor and had never seen the system from the defendant’s perspective.⁷ Though Butler is acquitted, he is forever changed:

So now I describe myself as a recovering prosecutor—“recovering” because one never quite gets over it. I still like to point my finger at the bad guy. I get really angry at people who victimize others. The creep who

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7. Another difference—one directly connected to the outcome of his case—is Butler’s class status. Connections and money allowed him to hire Michele Roberts, a former attorney at Washington, D.C.’s well-regarded Public Defender Service and thought by many to be the best trial lawyer in the city. His job as a prosecutor allowed him to call fellow prosecutors as character witnesses, leaving him in the enviable position of having character witnesses from the same office that was prosecuting him for the crime. Pp. 15–16.

snatches the old lady's purse—I would like to kick his ass myself. And the monster who molests little kids—I want him *under* the jail. I don't have a problem with the law reflecting those passions. It should.

But I am scared of what can happen when those feelings get out of control. My sense of justice always has been big and bulging. What my own personal prosecution expanded is my sense of injustice. (p. 18)

Butler is angry at what happened to him, but appreciative in one respect: “In some ways the experience was useful. It made a man out of me—a black man. I now share a bond with lots of people from whom I used to feel somewhat disconnected” (p. 18).

Paul Butler's arrest and prosecution transformed his thinking about crime and punishment, and *Let's Get Free* is his effort to cajole the nation into a similar transformation. He wants America to incarcerate fewer people, and almost no drug offenders. He explains why juries should consider nullifying in nonviolent cases and why prosecutors should rely less on informant testimony. In a chapter that should be required reading for every student considering a career in criminal law, he provocatively claims that no one who cares about justice should become a prosecutor (Chapter Six). And he argues that his proposals should be adopted because they will make all of us—including the law-abiding majority—better off.

This assertion—that punitive crime policy hurts not just criminals but the rest of us—is the heart of *Let's Get Free*. Butler's argument is fresh, provocative, and worth our attention.

I. HOW AMERICA'S CRIME POLICY HURTS US ALL

Calls for reforming American crime policy—like arguments for any sort of change—typically begin by explaining why the present situation is bad. The main point of such explanations is to get people to care. In matters of crime and punishment, there are two predominant modes of argument. The most common emphasizes the harm that American criminal law inflicts on disfavored groups. Glenn Loury, a leading spokesman for this view, argues that America has created a “monstrous social machine that is grinding poor black communities to dust.”⁸ According to him:

[W]e law-abiding, middle-class Americans have made decisions about social policy and incarceration, *and we benefit from those decisions*, and that means from a system of suffering, rooted in state violence, meted out at our request. We had choices and we decided to be more punitive. Our society—the society we have made—creates criminogenic conditions in our sprawling urban ghettos, and then acts out rituals of punishment against them as some awful form of human sacrifice.⁹

Loury's is the strongest version of the argument that the criminal system's harms fall on disadvantaged groups. In his view, middle-class America

8. GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 27 (2008).

9. *Id.* at 27–28 (emphasis added).

benefits from our crime policy while the poor suffer. While Loury makes the case most explicitly, others implicitly adopt a similar formulation. Bill Stuntz, for example, argues that American criminal justice suffers from insufficient local control.¹⁰ Stuntz defines the problem as follows:

To the suburban voters, state legislators, and state and federal appellate judges whose decisions shape policing and punishment on city streets, criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. *Decision-makers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones.* Those sad propositions explain much of the inequality in American criminal justice.¹¹

As Stuntz frames the issue, suburbanites do not bear the costs of our nation's punitive criminal justice policies.

Loury asserts what I will refer to as the *moral case* against our current crime policies.¹² Those making this claim typically argue that it is morally wrong to arrest, prosecute, or incarcerate members of relatively powerless groups at such high rates.¹³ Invoking John Rawls's theory of justice, Loury asks that we go behind the "veil of ignorance," and ask what form of justice we would endorse for a society if we did not know what our position in that society would be. "[I]magine," asks Loury, "that you could be born a black American male outcast shuffling between prison and the labor market on his way to an early death to the chorus of 'nigger' or 'criminal' or 'dummy.'"¹⁴ Yes, we would punish and have prisons, he says, but surely we would not act as harshly and vengefully as we do now. If we knew that we might end up at the bottom, he asks, "wouldn't we pick arrangements that respected the humanity of each individual and of those they are connected to through bonds of social and psychic affiliation?"¹⁵

The moral claim, as Loury and others articulate it, is grounded in race, and it acquires its urgency from an intolerable social fact: the increasing concentration of African Americans in the prison system during the last fifty years. At the time of *Brown v. Board of Education*,¹⁶ African Americans constituted about 30 percent our prison population.¹⁷ Today, the percentage has

10. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

11. *Id.* at 1974 (emphasis added).

12. Dorothy Roberts frames the argument in similar terms: "[M]ass imprisonment's collateral damage to African American communities shows that the extent of U.S. incarceration is not only morally unjustifiable, but morally repugnant. By damaging social networks, distorting social norms, and destroying social citizenship, mass incarceration serves a repressive political function that contradicts democratic norms and is itself immoral." Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304 (2004).

13. See, e.g., LOURY, *supra* note 8, at 26–28.

14. *Id.* at 30.

15. *Id.* at 30–31.

16. 347 U.S. 483 (1954).

17. See MARC MAUER, RACE TO INCARCERATE 121 (1999).

increased to 40 percent.¹⁸ A black man born in the mid-to-late 1960s, *after* the passage of the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965, is more than twice as likely to go to prison as one born in the 1940s.¹⁹ Moreover, there is no other indicator of community well-being in which the black–white disparity is as great. Blacks are about eight times more likely to go to prison than are whites. The 8:1 disparity dwarfs black–white disparities in, for example, unemployment rates (2:1 disparity), infant mortality (2:1 disparity), and out-of-wedlock births (3:1 disparity).²⁰

And yet. Even if mass incarceration’s harms are visited most painfully on poor people, and poor minorities especially, is that the extent of the harm? Moving from the empirical question to the strategic one, will race talk get us very far?²¹ If the goal is to persuade Americans to care about mass incarceration, does it make sense to frame arguments around how the policy harms racial minorities? President Obama would say no: in *The Audacity of Hope*,²² then-Senator Obama wrote of sitting next to a liberal white colleague in the Illinois state senate as they listened to a black representative argue that eliminating a particular program would constitute blatant racism. According to Obama, the white senator leaned over and told him, “You know what the problem is with John? Whenever I hear him, he makes me feel more white.”²³ Obama uses the story to illustrate why claims of racial victimization are unlikely to persuade:

Rightly or wrongly, white guilt has largely exhausted itself in America; even the most fair-minded of whites, those who would genuinely like to see racial inequality ended and poverty relieved, tend to push back against suggestions of racial victimization—or race-specific claims based on the history of race discrimination in this country.²⁴

18. Blacks comprised 38.4 percent of all inmates in state or federal prisons or jails in 2007. Hispanics made up 19.3 percent. See William J. Sabol & Heather Couture, *Prison Inmates at Mid-year 2007*, BUREAU OF JUSTICE STATISTICS BULL. (U.S. Dep’t of Justice, Wash., D.C.), June 2008, at 7.

19. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 25–26 (2006).

20. *Id.* at 16.

21. Sam Gross notes as follows:

Racial discrimination in the operation of the criminal justice system is ancient and common, but for the most part nobody cares. It is notoriously hard to prove it in court, and equally hard to get politicians to pay attention. We are used to living in a country in which a third of young Black men are in custody or on probation or on parole. . . . We barely notice.

Samuel R. Gross, *The Rhetoric of Racial Profiling*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING 35, 57 (Richard L. Wiener et al. eds., 2007) (emphasis omitted).

22. BARACK OBAMA, THE AUDACITY OF HOPE (2006).

23. *Id.* at 247.

24. *Id.* Obama’s story highlights two types of race-based arguments that are often conflated. The black Illinois senator about whom Obama writes had argued that a particular course of action would constitute racism, which is typically understood to suggest intentional discrimination. But when Obama draws his conclusions from the incident, he makes the broader claim that racial justice advocates should avoid “suggestions of racial victimization,” which refers not only to claims of racial animus, but also those of disparate racial impact.

Polling data on this point are inconclusive and insufficient. Lawrence Bobo and Devon Johnson found that white support for the war on drugs declined when respondents were informed about racial disparities in prosecutions for crack and powder cocaine.²⁵ Less hopefully, they found support for the death penalty unaffected when those polled were told that death row inmates are disproportionately black, or when they learned that somebody who murders a white person is more likely to receive the death penalty than somebody who murders a black person.²⁶ In another study, researchers found that telling respondents that “some people say that the death penalty is unfair because most of the people who are executed are African American” actually *increased* support for capital punishment.²⁷ Even if the survey results were consistent, they could tell us only so much. The questions in these surveys all addressed the impact of crime policy on *criminals*—not on minority communities as a whole. Thus, they cannot settle the question of whether it is effective to frame arguments in terms of a policy’s impact on racial minorities.

For his part, Butler is not sanguine about the prospect of persuading America with arguments based on racial disparity. He once wrote, “If it took the white majority more than two hundred years to understand that slavery was wrong, and approximately one hundred years to realize that segregation was wrong (and still many don’t understand), how long will it take them to perceive that American criminal justice is evil?”²⁸ Notwithstanding these doubts, in his earlier writing Butler often rooted his arguments in race—typically to great effect. I have lost count of the number of African American students who told me that they appreciated Butler’s funny yet painful critique of originalism as a mode of constitutional interpretation. With echoes of the comedian Chris Rock, Butler asked the following:

Imagine, for example, that the issue before a court is whether it is appropriate, in a school district with a history of discrimination, to lay off a more senior white teacher in order to allow a black teacher to keep her job. The “law” says look to the Constitution but you and I know that the answer is not found there. If you woke up one of the framers of the Constitution in the middle of the night and asked him, he would say something like, “Wait a minute! Niggers teaching school??! How did they escape from my plantation?”²⁹

I laughed too when I first read it. But I cannot remember a nonblack student telling me they thought it was humorous.

25. Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans’ Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 167 (2004).

26. *Id.* at 160–62.

27. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1002 tbl. 1 (2007).

28. Paul Butler, *Brotherman: Reflections of a Reformed Prosecutor*, in THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES 1, 16 (Ellis Cose ed., 1997).

29. *Id.* at 17.

While *Let's Get Free* is hardly color-blind, this time Butler frames his argument in the form of an appeal to America's collective self-interest. Butler says that everyone—including the non-incarcerated and those who cannot imagine even knowing a person who has been to prison—should care about mass incarceration because it makes us all less safe:

Why should the law-abiding citizen be concerned about the number of people in prison? Self-interest. Locking up too many people for nonviolent offenses has a negative impact on the quality of your life. Even if you set aside moral or political intuition, you should care about the number of people in prison if you want to feel more secure while in your home or walking down the street. (p. 29)

In what way does our criminal justice system make us less safe? Butler's answer is that we incarcerate too many nonviolent criminals, especially drug offenders. Many of these nonviolent offenders become more dangerous after being exposed to violent criminals in prison. And even though there is some benefit to locking up lawbreakers, the poor and minority communities—including the innocent people left behind—are increasingly harmed by the massive scale of incarceration. We have reached a tipping point where taking so many adults out of inner-city neighborhoods disrupts the social organization of those communities—whole neighborhoods are chock full of kids with nobody to raise them, teens grow up thinking that prison is a normal part of adolescence, and waves of young men and women come home from prison needing jobs and support (pp. 30–40).³⁰

In addition to harming public safety, says Butler, our criminal justice system imposes other costs that the law-abiding should care about (p. 34). It is outrageously expensive.³¹ Money that goes to prisons comes directly out of your taxes and is not available for health care, police, or your daughter's financial aid. And giving the police and prosecutors more power to fight crime necessarily threatens all of our civil liberties, which should be of special concern in a nation historically fearful of state power.³²

30. Butler's arguments here draw on the work of a number of scholars, including Jeff Fagan and Tracey Meares. See, e.g., Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 201–05 (2008) (discussing the social consequences of mass incarceration).

31. Rachel Barkow has argued, for a number of years, that rising prison costs combined with economic pressures on states may lead some jurisdictions to cut back on the number of prisoners. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–90 (2005); see also Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1270 (2005) (reviewing JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003)) (“Driven by fiscal considerations, numerous states have developed strategies to avoid continued increases in their prison population. They have abolished mandatory minimums, opted for quicker release of prison inmates, and have reinstated parole.”). Recent events may be proving Barkow and Demleitner right. See Keith B. Richburg, *States Seek Less Costly Substitutes for Prison*, WASH. POST, July 13, 2009, at A1 (“[M]ore than half the states and the District [of Columbia] are trying to reduce the growth in their prison populations through alternative sentencing and through new probation and parole procedures.”).

32. Just as giving police and prosecutors too much power can threaten individual liberties, so too can providing them too few resources to do their jobs. Though civil libertarians typically (and

In suggesting that his proposals advance community safety, Butler attempts to build a defense against the critique that he is unduly sympathetic to criminals or indifferent to the community. This charge was leveled against Butler's earlier, and highly publicized, proposal that juries should acquit nonviolent drug offenders.³³ As Randall Kennedy argued at the time:

Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by circumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system. Butler simply overlooks the sector of the black law-abiding population that desires *more* rather than *less* prosecution and punishment for *all* types of criminals.³⁴

To confront this prior criticism and reclaim the mantle of "the Avenger of the hood," Butler now speaks in the name of Kennedy's law-abiding black citizens, and points out how specific law-enforcement practices make their lives worse. For example, when prosecutors rely on informants (or what defense attorneys, and Butler, call snitches), they solve some crimes, but at great cost. Using informants destroys the social fabric of communities by turning neighbor against neighbor; even worse, innocents can too easily be harmed when the police rely on information from people who have enormous incentives to lie (p. 84). Butler makes this point powerfully through the account of Kathryn Johnston, a law-abiding, eighty-eight-year-old grandmother who had spent her whole life in a tough part of Atlanta (pp. 79–81). Johnston lived alone and was afraid of crime. One night her home was invaded by three intruders who pried off her burglary bars and began tearing down her front door. Johnston pulled out her pistol and shot at the door one time, but missed. The invaders broke down the door and returned fire, with thirty-nine bullets. Mrs. Johnston was killed. The invaders were members of the Atlanta Police Department, and they had received word that Johnston was a drug dealer. Their source: a drug seller who had falsely fingered Johnston in return for leniency in his own case. Why, asks Butler, are the police willing to kill an innocent grandmother on the word of a drug dealer?

Butler's appeal to the interest of the law-abiding is sound strategy. Those seeking a less punitive criminal justice system would do well to frame arguments in terms that appeal to the broadest possible constituency. What

correctly) think that increased funding for the defense function would guard against injustices, so too would increasing resources for prosecution, assuming those resources were well spent. Dismissing cases that should not go forward, for example, requires that prosecutors have sufficient time to evaluate each case individually.

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

34. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 305–06 (1997). It is worth noting that although Butler's original proposal was generally condemned by the legal establishment, at least one leading figure has recently come to his defense. Stuntz, *supra* note 10, at 2038 ("Butler had it right: nullification is the only means of limiting unjust punishment in such cases."). According to Stuntz, Butler's error was to label this "subversion," instead of seeing it as part of historic jury function. *Id.* at 2036–37.

David Garland argues in the context of the death penalty applies here as well: criminal justice reformers must target “the soft middle of undecided voters—people who are unsure, ambivalent or indifferent on the issue,” because “[p]olitical movement will tend to occur when this uncommitted, ambivalent group can be mobilized.”³⁵ The approach is not new—in one of the most influential articles ever written about race and American law, Derrick Bell argued that black interests would find support in the courts only when they converged with those of whites.³⁶ Although the strategy is useful, it remains underutilized. Too much writing about crime policy consists of arguments that are pitched, in tone and content, to those already inclined to agree with the author.

Still, it is not easy to persuade the majority of Americans that our criminal justice system harms them. As David Cole and others have shown, many of the criminal system’s costs are currently hidden from the powerful.³⁷ Our constitutional criminal procedure provides robust protections to the wealthy, which we can afford because we don’t in practice extend them to the poor. In this way, privileged communities never internalize the cost of aggressive law enforcement. There are lots of examples of this dynamic, but enforcement of drug laws might be the most extreme: inner-city residents, especially young men, are subject to frequent (and sometimes suspicionless) searches, yet police stay far away from prep schools awash in drugs.³⁸ In wealthy communities, students give and sell each other drugs (also known as “dealing” drugs when it takes place in the ghetto) with little fear of being caught, and if somebody becomes addicted, parents respond with treatment, not law enforcement.³⁹

35. David Garland, *Capital punishment and American culture*, 7 PUNISHMENT & SOC’Y 347, 360 (2005).

36. Bell originally elaborated this principle as a way of explaining the *Brown v. Board of Education* decision. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“Translated from judicial activity in racial cases both before and after *Brown*, this principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites.”). Bell subsequently applied the interest-convergence theory more broadly, to explain black advancement in the legislature as well as in the courts. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 257 (6th ed. 2008) (“[T]here seems to be at work an unseen but almost universally adhered-to understanding that the rights of blacks under these [civil rights] statutes will receive protection only when that protection is in the interest of, or at least not greatly threatening to, the interests of whites.”).

37. DAVID COLE, *NO EQUAL JUSTICE* (1999); see also James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

38. At my wife’s school, Deerfield Academy in western Massachusetts, drug use was such a part of the culture that the heavy users had their own extracurricular activities. All students were required to play sports at the school, but the drug users were known to choose “recycling” as their alternative; while other students played lacrosse and soccer and the like, the drug users picked up plastic and metal and paper and, well, used drugs. See also HANNAH FRIEDMAN, *EVERYTHING SUCKS: LOSING MY MIND AND FINDING MYSELF IN A HIGH SCHOOL QUEST FOR COOL* (2009) (memoir describing anorexia and drug use at an upscale New York boarding school).

39. See, e.g., Cara Buckley, *Young and Suburban, And Falling for Heroin*, N.Y. TIMES, Sept. 27, 2009, at MB1.

Despite the difficulty, arguments that seek common cause among unlikely allies are nonetheless essential to criminal reform. Consider another criminal law context—aggressive searches of young minorities in inner-city communities. Although *Terry v. Ohio*⁴⁰ authorized such searches only when officers have reasonable suspicion that a suspect is armed and dangerous, observations from the street suggest that police have great liberty in high-crime neighborhoods. As former prosecutor Lenese Herbert writes after watching drug enforcement raids in inner-city Washington, D.C., “the police in high-crime neighborhoods often violate the [Fourth Amendment’s] strictures and regularly reach inside (and often empty) pockets, bags, hats, purses, and other effects without having sufficient suspicion that the stopped individuals are armed.”⁴¹ Young men are so accustomed to these searches, says Herbert, that sometimes they “find a wall” and prepare to submit even before being given an explicit order.⁴²

The other-regarding moral claim would frame this harm as falling on the young people themselves. But there are other harms as well, and emphasizing those might have greater impact on the “soft middle” of which Garland speaks. Indeed, there are reasons for even political conservatives (let alone the soft middle) to care about how police operate in the inner city.⁴³ The most obvious is that this form of policing undermines the ideal that the government should be color-blind. For those who believe that we can get beyond race only if we stop taking account of it, any hint of race-based decision making by police officers should immediately raise concerns.⁴⁴ Similarly, for those who argue that blacks are too race conscious and should view themselves first as individuals (or alternatively, as Americans), putting an end to policing that reinforces a sense of racial grievance should be a high priority.⁴⁵

There are other reasons conservatives should care about this type of policing, as I learned while working with teens at an alternative school in Washington, D.C. named after the poet Maya Angelou. Many of our students had overcome great challenges—including in some cases family abuse and lockup in juvenile facilities—and had nonetheless rededicated them-

40. 392 U.S. 1 (1968).

41. Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime In High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 137 (2002).

42. *Id.* at 138.

43. The argument in this and the following two paragraphs is developed more fully in James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter Forman, *Children, Cops, and Citizenship*].

44. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (“Government action dividing us by race is inherently suspect because such classifications promote ‘notions of racial inferiority and lead to a politics of racial hostility.’” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989))).

45. For an especially thoughtful discussion of differences between how blacks and whites perceive discrimination, see generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

selves to pursuing their education despite the long odds and a set of criminal life choices readily available. They were doing everything that political conservatives would ask—keeping their heads in their books, avoiding drugs, and eschewing crime.⁴⁶ You can imagine their bitter disappointment when, despite these choices, the state through law enforcement engaged in suspicionless searches, sometimes humiliating them right in front of the school.⁴⁷

These searches had an impact that should be profoundly troubling to everyone, including conservatives. They told students that no matter what they do, their race, poverty, and political powerlessness will always mark them as outlaws, available for degradation whenever the state chooses. As one student asked me, mocking the school's message of hope, "How can you tell us we can be anything if they treat us like we're nothing?"⁴⁸ The searches also made students feel that the rules do not apply to the powerful. High school students may not know the intricacies of the Fourth Amendment, but they have a profound sense that these searches are unlawful. The government action told students, "You are low people, people with few rights, and we (the state through the police) are high people who can do what we want to you." There are a number of reasons why it is wrong to tell young people this, but for now consider just one. Criminal law exists in part to combat the principle that might makes right—none of us wants to meet a young man on a dark city street who believes that he is high and we are low and that it is okay for him to take from us because he can. So why should we tolerate or encourage the police to teach such lessons to impressionable young people?

46. MYRON MAGNET, *THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS* 74 (Encounter Books 2000) (1993) ("[W]hat underclass kids need most is an authoritative link to traditional values of work, study, and self-improvement, and the assurance that these values can permit them to claim full membership in the larger community."). When asked what book (except the Bible) has been most important to him, then-candidate George W. Bush named Magnet's book. Jackie Calmes, *Bush, Trying to Gain Ground in New Hampshire, Makes a Stiff Appearance for Campaign Cameras*, WALL ST. J., Jan. 5, 2000, at A24.

47. These searches are more common than people living outside of inner-city communities might imagine. Some of the most rigorous empirical work documenting the prevalence of stop and frisk practices has been done by Jeffrey Fagan and his colleagues. See, e.g., JEFFREY FAGAN ET AL., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS (Stephen K. Rice & Michael D. White eds., forthcoming 2010) (finding that African Americans and Latinos in New York City are disproportionately stopped even after controlling for variables such as rates of offending or neighborhood crime rates, and that stops have increased 500 percent even as crime has declined and the city has become more prosperous). For an important discussion of the prevalence of unconstitutional stops, see Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004) (direct observation of police officers in a middle-sized American city revealed that 30 percent of searches were unconstitutional, and searches of younger suspects were more likely to be illegal). Finally, for anecdotal accounts of degrading and discriminatory policing of minority citizens, see Herbert, *supra* note 41, at 136–37 (account of a federal prosecutor); Bryonn Bain, *Walking While Black*, VILLAGE VOICE, May 2, 2000, at 43 (account of Harvard Law student); Forman, *Children, Cops, and Citizenship*, *supra* note 43.

48. Forman, *Children, Cops and Citizenship*, *supra* note 43, at 154.

II. HOW AMERICA'S PRISON POLICIES ALSO HURT US ALL

Butler's argument that American criminal justice undermines our collective self-interest turns on his critique of how we treat nonviolent criminals, principally drug offenders. Many of them—Butler estimates 500,000 (p. 46)—should not be locked up. Butler asks us to reconsider our notion of who fills our prisons and jails.

Who is the typical inmate? Erase your mind's image of a violent predator. The majority of people who are locked up have committed nonviolent offenses—at least when they first go in. Picture the guy who works in the mailroom at your office, and the men who dry off your vehicle at the car wash, and the sweaty kids who came to your house to deliver the mattress. Think of your high school classmate, the dude who didn't quite make it to graduation but who you got to know a little bit because he sold you weed. Maybe he wouldn't be your ideal companion for lunch at the Four Seasons or your first choice to marry your daughter. But he's not exactly a menace to society. He's made some bad choices, done some stupid things, but he's still young and his life is still salvageable. Spiritual folks might say, "God is not through with him yet." (p. 30)

Butler is surely correct that too many folks like this are behind bars. But what about everybody else—including those who have committed violent crimes? What about the 1.8 million prisoners left after we free Butler's 500,000 nonviolent offenders? After all, even if we released half a million prisoners tomorrow, we would still have the world's largest prison population.⁴⁹

Butler does not have much to say about how that population should be treated. He is not alone in paying little attention to incarceration itself. Legal education does the same thing. All law students study criminal law, but criminal law casebooks address conditions in jails or prisons only briefly, or not at all. Most law students study the pretrial process in Criminal Procedure I (the investigatory process) and somewhat fewer study the trial process in Criminal Procedure II (adjudication). Very few study conditions in, or the law of, jails and prisons.⁵⁰

But inattention from elite law schools is one thing. What about when "race men"⁵¹ like Butler overlook prisons? Butler is not alone here either—

49. China, with 1.57 million prisoners, has the world's second largest prison system. See ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST 1 (8th ed. 2009). It is worth noting that the Chinese figure does not include certain categories of administrative detention, which if included would make China the world's largest jailer. *Id.* at 4. Of course, the United States would still have, by far, the highest *rate* of imprisonment, given that our overall population is much smaller than China's.

50. According to available lists of course offerings, most of the "top twenty" law schools do not offer a course or seminar on prison law.

51. As Butler himself has written in a different context, "[r]ace man," is a term of art in the African American community," and refers to those who zealously seek to defend and uplift the Negro race. Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1273 n.16 (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)). I refer to Butler as a "race man" because, although he does not frame the argument in *Let's Get Free*

indeed, while race women and men devote much attention to the black experience with police, prisons remain largely hidden from view. While it is beyond the scope of this Review to explore the question fully, the explanation for the different treatment is likely rooted in little-discussed questions of class and personal experience.⁵² Put (too) simply, while privileged blacks (especially black men) fall victim to discriminatory policing, they rarely go to prison.⁵³ The list of blacks who believe they have been victims of discriminatory policing reads like a “who’s who” of black America: Justice Thurgood Marshall; General Colin Powell; businessman Earl Graves, Jr; author Walter Mosley; musician Miles Davis; O.J. Simpson’s attorney (Johnnie Cochran) *and* his prosecutor (Christopher Darden); and Professors Cornel West, Michael Eric Dyson, Roger Wilkins, William Julius Wilson, and, most recently and famously, Henry Louis Gates, Jr.⁵⁴ Prison, by contrast, is the province of the poor and the uneducated—of all races.⁵⁵ This class dynamic within the black community helps explain why America’s first black president has done little to address the plight of the almost 1,000,000 black men in prison and jail, yet lost his (seemingly unshakeable) cool when asked about the mistreatment of a Harvard professor by local police.⁵⁶

in racial terms, it is clear from this book and his other writings that “uplift[ing] the Negro race” is one of his central commitments. *Id.* I intend the term as a compliment.

52. I explore the ideas in this paragraph more fully in a work in progress, *Class(blindness), Race and Crime* (Nov. 18, 2009) (manuscript, on file with author).

53. I previously noted that a black man born in the 1960s was more likely to go to prison in his lifetime than one born in the 1940s. *See supra* text accompanying note 19. But that is not true for all African American men; black men with college degrees have been spared. A black man born in the 1960s who dropped out of high school has a 59% chance of going to prison in his lifetime; a black man who attended college has only a 5% chance. For white men the comparable numbers are 11% and less than 1%. WESTERN, *supra* note 19, at 27.

54. KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME* 64 (2d ed. 2009); Thomas Fields-Meyer et al., *Under Suspicion*, PEOPLE, Jan. 15, 1996, at 40, 42, 44–45; Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1; Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 59; Gay Jervey, *Michael and Reggie’s Magician*, AM. LAW., May 1994, at 56; Krissah Thompson, *Harvard Professor Arrested At Home*, WASH. POST, July 21, 2009, at A4; Interview with Colin Powell, *Larry King Live* (CNN television broadcast July 28, 2009); *see also* Floyd Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 444–45 (2004).

55. *See supra* note 53; *see also* ANDREW SUM ET AL., CENTER FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY, *THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL* 9 (2009) (young high school dropouts more than sixty-three times as likely to be incarcerated as college graduates); ALLEN BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SURVEY OF STATE PRISON INMATES, 1991*, at 3 (1993), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/sospi91.htm> (showing that in the most recent year for which government statistics are available, 1991, 53 percent of state prisoners who were free at least a year prior to their arrest had an annual income of less than \$10,000); DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PROFILE OF JAIL INMATES, 2002*, at 2 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf> (reporting that, in 2002, 43.9 percent of jail inmates did not have a high school diploma or a GED).

56. *See* Helene Cooper, *Obama Criticizes Arrest Of a Harvard Professor*, N.Y. TIMES, July 23, 2009, at A20.

Butler, to be fair, does not ignore prison conditions entirely. Indeed, it is clear where his sympathies lie. He says, for example, “[w]hen we lock up so many people—especially so many poor people and minorities—and *then treat them like garbage*, we tell on ourselves” (p. 39) (emphasis added). Butler barely explores the issue further, however; when he does, it is in service of his overall concern about nonviolent offenders. To the extent that Butler focuses on prison conditions, it is because he is fearful that nonviolent offenders will be exposed to the brutality of their more violent counterparts. As he writes, “What the War on Drugs means is that we’ve taken nonviolent offenders, exposed them to violent ones, and then reintroduced them to our communities” (p. 46).

While I share Butler’s concern about exposing nonviolent offenders to violent ones, this is not the only issue raised by our dehumanizing prison system. What if Butler subjected the prison system to the sustained examination he gives to other aspects of the criminal system? He would find that American prisons and jails—while in most respects safer than they once were⁵⁷—are still institutions that themselves can do great harm to prisoners. Sometimes this is due to violence and unnecessary degradation—and not just at the hands of other prisoners.⁵⁸ Even in prisons that are relatively free of violence, education and treatment programs have been gutted.⁵⁹ As a result, inmates spend days, months, and years idle and frustrated. They leave the facilities no better—and often worse—than when they arrived, and return to our nation’s neighborhoods with little support.⁶⁰

57. Inmate homicides and suicides have declined since the 1970s, as have the number of staff killed by prisoners. BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* 96–98 (2008). Data on nondeadly violence are unreliable. For a discussion of the problems with data gathering in the prison context, see JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS* 24–25 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

58. Sources here are many, and varied. For an excellent recent law review article, see Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237 (2009). Nongovernmental organizations have produced a raft of reports documenting prisoner abuse. See, e.g., HUMAN RIGHTS WATCH, *BARRED FROM TREATMENT: PUNISHMENT OF DRUG USERS IN NEW YORK STATE PRISONS* (2009), available at <http://www.hrw.org/en/reports/2009/03/24/barred-treatment-0>; NAT’L PRISON RAPE ELIMINATION COMM’N, *STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS* (2009). For results of government investigations, see U.S. DEP’T OF JUSTICE, *CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT: JAILS AND PRISONS INVESTIGATIONS*, <http://www.justice.gov/crt/split/findsettle.php#FindingsLetters> (last visited Nov. 8, 2009). For a summary of abuse in juvenile facilities, see Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability and Public Safety*, 84 OR. L. REV. 1001, 1064–71 (2005).

59. See, e.g., 20 U.S.C. § 1091(r)(1) (2006) (excluding anybody with a drug-related conviction from federal student-loan eligibility); Joshua Page, *Eliminating the enemy: The import of denying prisoners access to higher education in Clinton’s America*, 6 PUNISHMENT & SOC’Y 357, 373 (2004) (describing how Congress “committed prisoners to ‘social death’” by eliminating Pell Grant eligibility for prisoners, and quoting Loïc Waquant, *Deadly symbiosis: When ghetto and prison meet and mesh*, 3 PUNISHMENT & SOC’Y 95, 120 (2000)).

60. As Sharon Dolovich explains, prisons make it more likely that prisoners with “material and psychological challenges” will commit crimes after release. Dolovich, *supra* note 58, at 247–48. In addition, even those who enter with none of those issues may be so damaged by the experience that they too are more likely to commit crime. *Id.* For a comprehensive discussion of the lack of

These facts could prove useful to Butler—after all, they tie directly into his prudential argument (which, despite the caveats offered earlier, must feature prominently in any effective appeal for reform). Just as the practice of locking up so many nonviolent offenders puts us at risk, so does our brutal or callous treatment of offenders in general. Prisoners have been telling us this for a long time,⁶¹ and some courts in a previous era of prison-litigation cases acknowledged it.⁶² The social-science data is limited—there have been no studies employing a random-assignment design, and quality data on prisons is shockingly scarce⁶³—but recent research suggests that harsher conditions do not reduce recidivism, and may increase it. M. Keith Chen and Jesse Shapiro, for example, compared prisoners with similar backgrounds who were sent to minimum-security federal prisons with those assigned to above-minimum security.⁶⁴ They found no evidence that the harsher conditions deterred future crime and suggestive (if inconclusive) evidence that they increased recidivism.⁶⁵ A recent study of Italian prisoners reached a similar conclusion.⁶⁶

reentry support for returning prisoners, see ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008).

61. Kirk Bloodsworth—an honorably discharged Marine with no criminal record, wrongfully convicted and sent to death row in Maryland—gives a typical account. See TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* 176–79 (2004). Bloodsworth describes being the victim of a violent attack. Other inmates told him that if he did not retaliate, he would be attacked again and could die. Bloodsworth then snuck up on one of his attackers and hit him so hard with a metal mop that the inmate was in a coma for three days. *Id.*; see also DANNIE M. MARTIN & PETER Y. SUSSMAN, *COMMITTING JOURNALISM: THE PRISON WRITINGS OF RED HOG* 56 (1993) (“But say you take a few thousand guys and lock them all up for fifteen years in the most brutal, violent places. Pretty soon everyone—even the ones who don’t deserve that kind of punishment—turn into the kind of monsters it takes to survive in there.”).

62. In a 1975 decision, for example, one court argued:

This Court, in the three years that these cases have progressed, has come to the growing realization, through expert testimony and documentary evidence that severe crisis overcrowding creates violence, brutality, disease, bitterness, and resentment as to both inmates and correctional staff. In addition, severe overcrowding in the prison system tends to perpetuate antisocial behavior and foster recidivism so as to ultimately disserve the rehabilitative goals of the correctional system. A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser.

Costello v. Wainwright, 397 F. Supp. 20, 38 (M.D. Fla. 1975).

63. See GIBBONS & DE B. KATZENBACH, *supra* note 57, at 24–25. The data deficiencies are especially noteworthy in light of the argument that judges and policy makers should be guided by empirical evidence in criminal law. See, e.g., Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

64. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, 9 AM. L. & ECON. REV. 1, 14–15 (2007).

65. *Id.*

66. Francesco Drago et al., *Prison Conditions and Recidivism* 5 (Fourth Annual Conference on Empirical Legal Studies Paper, 2009), available at <http://ssrn.com/abstract=1443093> (“Although being tough on inmates to ‘rehabilitate’ them is to some extent a popular view, we do not find evidence supporting the idea that harsher prison conditions reduce recidivism. The empirical analysis reveals that all the four measures of harsh prison conditions increase recidivism.”).

Overcrowded prisons are a special concern, and a three-judge court recently held that crowded California prisons threaten public safety.⁶⁷ In so holding, the court relied on the testimony of wardens themselves. As Jeanne Woodford, the former warden of San Quentin prison, testified:

I think it's unbelievable that in this state that we have the kind of overcrowded conditions that we have; that we do little or nothing to prepare people for the return to society in spite of the fact that we parole 10,000 people a month from our prison system.

And I absolutely believe that we make people worse, and that we are not meeting public safety by the way we treat people.

And I believe overcrowding is prohibiting us from providing quality medical care and mental healthcare to inmates in our system.⁶⁸

Joseph Lehman, the former head of corrections in Washington, Maine, and Pennsylvania, made a similar point, saying, “‘there’s only one term you can use’ to describe California’s overcrowded prisons: ‘criminogenic.’”⁶⁹

Framing the question this way reorients the traditional debate about prison conditions. In the typical formulation, prisoner advocates object to degrading practices by pointing out how they harm prisoners; conversely, prisons’ defenders say that prison is supposed to be tough. As the Court argued in *Rhodes v. Chapman*,⁷⁰ “the Constitution does not mandate comfortable prisons”⁷¹ and “[t]o the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”⁷² But what if the Court’s account is wrong? After all, at least 95 percent of American prisoners will eventually be released.⁷³ What if harsh conditions are not only part of the penalty *criminal offenders* pay, but are instead part of the penalty *we all* pay?

Such an argument is especially appropriate in the prison-conditions context. Remember that the traditional debate over whether crime policy should be more or less punitive requires weighing the costs of incarceration against the benefits. When Randall Kennedy took Butler to task for advocating jury nullification, Kennedy argued that locking up drug sellers would incapacitate them and therefore protect the community. This incapacitation benefit is

67. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 2430820, at *84 (E.D. Cal. Aug. 4, 2009) (“Indeed, the evidence is clear that the state’s continued failure to address the severe crowding in California’s prisons would perpetuate a criminogenic prison system that itself threatens public safety.”).

68. *Id.* at *55–56.

69. *Id.* at *86.

70. 452 U.S. 337 (1981).

71. *Id.* at 349.

72. *Id.* at 347.

73. TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES, <http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm> (last visited Nov. 8, 2009).

what Kennedy had in mind when he argued (and some courts agreed⁷⁴) that prison is “a good for those whose lives are bettered by the confinement of criminals who might otherwise prey upon them.”⁷⁵ But the cost-benefit calculus is different when the debate is over how to treat people while they are locked up, rather than whether to lock them up. After all, incapacitation is ensured. The only remaining questions concern how they will be treated while they are being punished. Will we treat them as human beings with dignity, who are deserving of punishment yet still worthy of our concern? Will we seek to facilitate their successful reintegration into society, with the attendant crime reduction? Or will we instead—as we do so often now—treat them as degraded individuals worthy of only further degradation?

CONCLUSION

Paul Butler has significantly furthered the cause of criminal justice reform by making the case that less-punitive crime policy is in our collective self-interest. But the prudential argument must accompany, rather than displace, the moral claim. This is illustrated by the experience of an earlier race man, Martin Luther King, Jr. In a sermon titled “The Drum Major Instinct,” King recalls his conversations with his jailers in Birmingham:

And when we were in jail in Birmingham the other day, the white wardens and all enjoyed coming around the cell to talk about the race problem. And they were showing us where we were so wrong demonstrating. And they were showing us where segregation was so right. And they were showing us where intermarriage was so wrong. So I would get to preaching, and we would get to talking—calmly, because they wanted to talk about it. And then we got down one day to the point—that was the second or third day—to talk about where they lived, and how much they were earning. And when those brothers told me what they were earning, I said, “Now, you know what? You ought to be marching with us. . . . You’re just as poor as Negroes.”⁷⁶

The audio recording of King’s speech reveals knowing laughter and calls of “yes” from his black audience at Atlanta’s Ebenezer Baptist Church. And they tell him to “make it plain”⁷⁷ as he goes on to say that “the poor white has been put into this position, where through blindness and prejudice, . . . he is forced to support his oppressors.”⁷⁸ But the dilemma for Butler and other race men and women is this: although the black audience believed

74. A number of courts, in rejecting challenges to federal law punishing crack cocaine more harshly than powder cocaine, cited Kennedy’s claim that tough criminal law helped black people. *See, e.g.*, *United States v. Thompson*, 27 F.3d 671, 678 (D.C. Cir. 1994).

75. KENNEDY, *supra* note 34, at 375.

76. Martin Luther King, Jr., *The Drum Major Instinct* (Feb. 4, 1968), in *A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR.* 169, 178–79 (Clayborne Carson & Peter Holloran eds., 1998).

77. “Make it plain” is an affirmation heard in the call and response of the black church, and means “make it clear” or “tell it like it is.”

78. King, *supra* note 76, at 179.

King's insight to be "plain," his jailers did not. His jailers' understanding of their self-interest was mediated through a range of beliefs and emotions that led them to support segregation. They did not free him, after all, and as far as we know they did not march with him (and King would surely have told us if they did).

King's (and his generation's) eventual success was predicated on the ability to marry the self-interest arguments with moral claims about segregation's fundamental inhumanity. Successfully challenging mass incarceration—and our treatment of prisoners while they are incarcerated—will require the same.