The New Jim Crow

Attorney Michelle Alexander has written a most astonishing book, The New Jim Crow, about the mass incarceration of black men in America. The facts themselves are astonishing enough, but even more important is the evidence that mass incarceration is not an attempt to solve a drug problem but to subjugate poor black men. Mass incarceration is how our society keeps the inner-city ghetto devastated. The following is an extensive review. I hope it only whets your appetite to read the book.

What'cha doin'?

I'm reading this amazing book by Michelle Alexander about the criminal justice system as a system of racial control.

Hunh?

Yeah, hard to believe, isn't it? She argues that the mass incarceration of poor black men and, to a lesser degree, women is as deep and overwhelmingly oppressive of anything since slavery—including the cruelty of Jim Crow.

On, come on. That's just way over the top, even for a liberal!

Well, that's what I thought initially. In fact, that's what Alexander—herself an African-American lawyer who has worked in the field of civil rights for her entire professional career—thought at first, too. But consider this simple statistic:

The rate of illegal drug use in the United States is about the same for young black men as for young white men. Nevertheless, an African American drug user will be incarcerated at a rate at least thirteen times higher than a white person. In some states it's fifty times higher.

You're kidding me, right?

No, I'm perfectly serious, and I'm not sure anything else need be said about racial injustice in the United States.

Racial injustice, please! I'm sure there are some pockets of prejudice and discrimination around, but almost everyone in this country values equality between the races. How often do you hear a white person use the word "nigger" anymore? For God's sake, the President, the Attorney General, and the richest woman in the world are African Americans. How can you even talk about "racial injustice"?

Well, we'll get to that later. But first let me give some background history. In 1970, the United States incarcerated about 300,000 Americans for a rate of 140 per 100,000 people, somewhat above the average for Western nations at the time. The current number of people incarcerated is over 2.3 million or about 770 per 100,000, by far the highest in the world and over 5 times the average rate of other Western countries. Russia is second, lagging way behind at 607 per 100,000.

The other important thing to know is that drug charges have accounted for over sixty percent of that increase. Contrary to popular opinion, it is neither hard drugs nor the drug kingpins that have been the target of the War on Drugs. Four out of five drug arrests have been for simple possession, overwhelmingly of marijuana. In addition the rates of incarceration for drug offenses have quadrupled over the last generation. The real issue is race: seventy-five percent of all people imprisoned for drug offenses have been black or Latino—up to ninety percent in some states.

How did that happen? We must have higher crime rates or something.

No, remarkably the crime rate in the United States has not been very different from other western countries. Murder is considerably more common here, but that's most likely due to the availability of guns. In 1960 official crime rates in the United States, Germany, and Finland were identical. That had not changed much by 1990, but the German rate of *incarceration* had

stayed about the same, the Finnish rate had declined to less than half and the US incarceration rate had quadrupled. In 2004 the combined violent crime and property crime rate in the US was about the same as in 1970.

The original forces behind the increase in incarceration were almost exclusively political. After President Lyndon Johnson and other Democrats pushed through the Civil Rights Act of 1964, Southern poor and working-class whites (who had borne the brunt of the negative effects of desegregation) became disaffected from the Democratic party. Sensing an opportunity to attract these voters, Republicans, beginning with President Richard Nixon, pushed the "Southern strategy," campaigning under the rubric of "law and order," which was a conscious [1]
tactic to create a political wedge between African Americans and the disaffected whites. Conflating civil rights activism and the urban riots of the mid-1960s with actual crime rates, these politicians referred to a "breakdowns in law and order," which became a clear reference to African Americans. Social mores had changed, so race was not explicitly mentioned, but "law and order," "welfare cheat," "predator class," and many other such phrases became code words in American politics that meant "keeping blacks in their place." Denouncing "crime in the streets" and referring to a "welfare state" that took money from "hard-working" (white) taxpayers to pay benefits to "lazy, ungrateful" (black) welfare recipients became staples of Republican political speech … without ever having to mention race.

It was during this period in the mid-seventies that incarceration rates began to soar. Quickly noticing the political effectiveness of the Republican emphasis on "law and order," politicians from both parties competed with each other to demonstrate their tough-on-crime position by passing ever-more-draconian laws: jail sentences for crimes that had not previously carried them, longer sentences, mandatory minimum sentences, abolition of parole, and three-strikes-and-you're-out laws [2] . Much of this was to increase penalties for drug crimes. Even today, the label of being soft on crime will kill most political careers.

Politicians didn't have to use the word "nigger" to let people know whom they were referring to. During his 1980 campaign for the presidency, Ronald Reagan took this strategy to an art form, combining his personal (apparently sincere) affection for individual African Americans with public denunciations of the "predator class" and anecdotes about "welfare queens." (Although denying any personal animus toward African Americans, Reagan had demonstrated his political inclinations by announcing his campaign for the presidency in Neshoba County, Mississippi [population 7,902], whose only claim to fame was as the location of the brutal 1964 murders of the Civil Rights workers James Chaney, Andrew Goodman, and Michael Schwerner.)

So? That still doesn't prove the connection between a political strategy and our high rates of incarceration of black men, to say nothing of a "new Jim Crow."

No, that connection didn't become obvious until President Reagan declared the War on Drugs, breaking open the floodgates and washing large numbers of African Americans into prison. Declaring the War on Drugs was a conscious political strategy to procure white votes.

Now, wait a minute! There was a drug epidemic going on; crack cocaine was flooding the streets of the cities. Surely something had to be done!

Well, that's the mythology, but it's simply not true. When the War on Drugs was declared in 1982, polls showed that only 2% of Americans considered drugs the most important problem facing the country. Crack cocaine, in fact, didn't surface until 1984. The first newspaper reference to crack in American cities was a *New York Times* article in late 1985. The reports of a "crack epidemic" didn't begin showing up until early 1986. The War on Drugs was declared well before crack was an issue and at a time when drugs were neither more prevalent nor of greater concern than previously.

But the Reagan administration faced two other problems in its War on Drugs. The first was that responsibility for enforcing drug laws belonged to the states, not to the federal government. The second was the reluctance of local law enforcement to buy in.

Yeah, I was just going to ask you. I'm sure states and local police departments had other, more important things to do. If crack wasn't a problem, then why were they so willing to spend money and scarce police resources fighting drugs?

Good question! Initially local law enforcement didn't pay much attention to the War on Drugs. Some resisted it for just the reasons you mentioned. Others thought it was none of the federal government's business. But for the political reasons I've mentioned, prosecuting the War on Drugs was very important to the Reagan Administration. So (as hard as it was for me to believe before reading *The New Jim Crow*) the federal government essentially bribed local law enforcement to participate.

First, federal laws were passed that gave state and local police departments money and equipment *if* they put their energy into the drug war. In some cases the allocation of federal money offered was even on a per person basis; in Wisconsin it was $153 per arrest. No extra money was offered for other kinds of arrests, even for violent crime.

Second, other laws were passed giving law enforcement the power to confiscate 80-100% of the value of *any* items that were arguably involved in the drug transactions, even if the person owning those items was ignorant of the transaction. If an older child living at home purchased drugs on the street near his house, for instance, her parent's home could be confiscated and sold because it had been "involved" in a crime. One man's home was confiscated because his visiting nurses' aide was arrested for drug possession … elsewhere. Once something was confiscated, the burden of proof was on the owner to get it back … even if the person arrested was ultimately released without conviction. You could appeal, but if you were unable to afford a lawyer or were afraid to confront the police or if the amount confiscated was less than what it would cost to get it back, most people just let it go, and the police kept the proceeds.

It didn't take long for law enforcement agencies to be convinced of the importance of the drug war. Federally funded SWAT teams were used just to serve routine drug warrants.

Still, with all the other serious issues facing Americans, why was the electorate so willing to go along? Everyone now seems agreed that drugs are a major problem. Where did that agreement come from?

Anticipating this problem, the Reagan administration waged a very conscious media campaign to sensationalize the "crack epidemic" and its "terrible" consequences. The Drug Enforcement Administration (DEA) agent that Reagan placed in charge of the media program later commented, "The media were only too willing to cooperate, because as far as the New York media was concerned, crack was the hottest combat reporting story to come along since the end of the Vietnam War." [3] Thousands of articles and images flooded the media, reporting on the "drug crisis." By 1989, 64% of people polled believed that drugs were the most important problem in the country (compared to 2% in 1982) and crack the most dangerous of them all. (Most assertions used to publicize crack's danger—for instance that people became addicted to crack after one use or that crack caused more violent behavior than powder cocaine—were later disproved, but the damage in public opinion was done.) "Rampant urban drug use" and all the violence that supposedly came with it now "threatened the nation."

Yeah, but those laws applied to whites and blacks equally.

Technically that's true. But while race was never mentioned, it was ever-present. For example, before crack, white use of powder cocaine was frequently referred to as "experimentation," emphasizing a rehabilitative rather than punitive response; a few years later, the images chosen to represent the crack epidemic were overwhelmingly black (even though there are more white crack users than black) and the response was overwhelmingly punitive. Think of all the true-crime shows: Most of the criminals are black. A perfect example came only a few years ago, after Hurricane Katrina. Showing residents taking food from shuttered supermarkets, the media famously labeled African Americans "looters" while whites were "foragers."

But, by and large, cops, prosecutors, judges and juries aren't racist. Many of them are black. So why are black drug users so much more likely to land in prison?

Well, we'll get to who's racist in a little bit, but juries and judges aren't the problem. In fact, in over 95% of drug cases, there is no trial. Cases are settled by plea bargains rather than trials, so judges have little leeway in sentencing.

If African Americans are pleading guilty as a result of plea bargaining, doesn't that say something about their guilt?

Just hold on a bit. I'm coming to that.

There are essentially three players in the conviction of and sentencing for any crime: the defense attorney, the prosecuting attorney and the judge. As far as the defense attorney goes, most people who are arrested (of either race) are poor and can't afford lawyers. So they rely on public defenders, who are absolutely swamped with cases (in Mississippi, there are two public defenders for 2000 cases a year) or on private lawyers appointed by the court who are notoriously underpaid. (In Virginia, for instance, a court-appointed attorney is paid a maximum of $428 per case … for any charge carrying a sentence of less than twenty years. The result is that defense lawyers can spend almost no time preparing a reasonable defense. In some cases, the only time a defendant sees his lawyer is outside the courtroom door on the way to the hearing with the judge. Egregious examples abound, for instance, the man who was

sentenced to life imprisonment for second-degree murder after meeting with his public defender for a total of eleven minutes.

Thirty years ago, judges were major players in the process. After conviction, they had considerable discretion in sentencing within a broad range of punishments—from probation to years in prison—depending on the extenuating circumstances. Under the mandatory minimum sentences or three-strikes-and-you're-out provisions, however, judges have lost most of their role in sentencing. Regardless of individual circumstances, judges are legally required to stay within narrow boundaries. The injustice has sometimes been so egregious that some judges, even very conservative ones known for their hard sentences, have resigned their positions, saying they could no longer be part of such a travesty.

That leaves the prosecuting attorney with a wide range of options power.

Like what?

Once a person has been arrested, the prosecutor can decide whether to dismiss charges or prosecute. She can decide to prosecute in state court or in federal court (where sentences are considerably more punitive). She can prosecute for more serious charges (possession with intent to sell) or less serious charges (simple possession). Even if there is no realistic chance of proving certain charges in court, she can pile on and prosecute for as many as she chooses as long as there is "probable cause," a lower standard of proof than is necessary for conviction in court. Juveniles can be sent to adult prison. And so on. And none of these decisions is reviewable by any other authority. The prosecutor has virtually unlimited discretion.

What all this comes down to is inordinate and almost absolute power invested in one individual after a person's arrest. While there are several other important implications, that power dominates plea bargaining negotiations. The prosecutor's decision to choose federal court, to prosecute for more serious charges, and/or to bundle multiple charges for one offense can result in the difference between a six-month sentence and twenty-five years in prison. Knowing the chances in court for a black man accused of drug crime, especially when there's no time to investigate guilt or innocence, the defending attorney for an indigent client almost invariably recommends a plea bargain for the lesser sentence.

As a result, in plea bargaining “negotiations,” defendants will choose to admit guilt for lesser sentences when an actual investigation might reveal insufficient evidence to convict or even complete innocence [4] or they will choose to accept conviction and a couple of years in prison for a minor offense (first arrest for possession of a small amount of marijuana, for instance) that deserves only a warning, a fine, or probation. There’s a reason so many defendants, even innocent defendants, accept plea bargains; it’s a perfectly rational choice between one lesser punishment and the good chance that one will get another far more severe.

OK, so prosecutors have too much power in the system, perhaps way too much. Are you saying that the police and prosecutors are racist? You said you’d deal with the question of racism? Why are you pointing to that when our society is so rapidly approaching colorblindness to race?

The problem isn’t outright discrimination or conscious racism. To some degree the nation’s “colorblindness” is the problem, making it almost impossible for a person (like you, for instance) to believe that the forces behind the mass incarceration of African Americans are racially motivated. More at issue is unconscious discrimination, even among people who do not perceive themselves to be prejudiced and whose honest, conscious intent is to be unbiased. Especially when police and prosecutors have as much discretion and little accountability as they do, unconscious racism plays a powerful role in the process.

Hold it; two questions. You’ve shown me that prosecutors have a lot of discretion but what discretion do the police have?

Think about it. Drug crimes are different from other crimes. If someone is robbed, they will report it to the police who will go after the suspect without reference to their color. But neither buyer nor seller is going to report their violations of drug laws And, since well over half of all Americans have used illegal drugs in the past and over 10% during the last year, the police are going to find drugs pretty much wherever they look. Overwhelmingly, they look in the black ghetto, rather than say, on the college campus where rates of drug use are higher)

Well, yeah, but there a lot of reason for that. The ghettos are different. The rate of drug selling and use may be the same (although I still have trouble believing that), drug sales in the ghetto happen in the streets while sales in middle-class, white areas happen in residences, so it’s easier to get evidence. Drug-related violence is higher in the ghetto. Surrounding citizens call the police more in the ghettos and so on.

Those are the reasons we give, but most of that is myth, too. A study in Seattle found that police concentrated their efforts on the one black open-air drug market (ignoring both the near-by white open-air drug markets and even the white sellers in the mostly black market). They concentrated on crack cocaine rather than powder cocaine used at higher rates by blacks, and so on. And if violence is the problem, why arrest mostly drug *users*? The study concluded: "White people are simply not perceived as drug offenders by Seattle police officers." [5]

Okay. Second question: You said "unconscious racism." What makes you say that? Racial hostility is largely a thing of the past. Lots of people support affirmative action. The majority voted for Barack Obama. It seems to me that your reliance on "unconscious racism" just gives you license to talk about something you can't really prove.

No, we *can* prove it. For most of us the word "racist" conjures up a blatant, hostile bigot. But that's not what I mean. There are decades of research studies into unconscious bias. [6] In one survey, respondents were asked to create a mental image of a drug-user or seller; 95% of people imagined a black man. In one particularly relevant study, subjects played a video game in which they were rapidly shown pictures of white and black men holding either a gun or another object. The subjects were asked to shoot at the men holding guns and not to shoot if they held some another object, like a cell phone. The study subjects were more likely to shoot unarmed black men than unarmed white men and to refrain from shooting the armed white men than armed black men. Even black shooters showed bias against blacks. Another study revealed that both jurors and police officers "become increasingly harsh when an alleged criminal is darker and more 'stereotypically black.'" [7] Most of these people would claim (quite honestly, I'm sure) that they are racist.

Presumably, police officers, prosecutors and members of juries share the same bias as everyone else. The problem is the virtually unlimited discretion given to police officers and to prosecutors. If 95% of prosecutors visualize drug users and dealers to be black, they are going to be much more likely to believe that the black defendant is guilty or the white defendant not. So the prosecutor will make allowances for the white person or offer better terms for the same crime. And studies indicate that that's just what happens.

In one case, for instance, out of fifty-three arrests for crack violations, 48 were black, 5 were

Hispanic and exactly zero were white … despite the fact that more whites use crack than blacks.

Now wait a minute! When something like that happens the courts intervene. That kind of blatant discrimination must be unconstitutional.

It may be unconstitutional, but that's not what the Supreme Court thinks. One of the most distressing aspects of the whole War on Drugs has been the role of the Supreme Court. The Court has ruled, for instance, that even clear *statistical* evidence of discrimination will be tolerated unless the defense can show the deliberate racial intent on the part of the police or prosecutor. In an age of official colorblindness when everyone knows not to use racist language, it's going to be very difficult to show deliberate intent. And to make it even harder for the defense, the Supreme Court has ruled that the prosecutor's records cannot even be opened to search for evidence of deliberate attempt.

Catch-22.

But that's not all.

The Court has eviscerated the Fourth Amendment protections against unreasonable search and seizure in the drug war. Although police officers must still "request permission" to search your car or home, most people—even those with something to hide—are not going to be aware that they can refuse and, if they are aware, they are unlikely to refuse a police officer who has ""asked" to search the car after pulling them over with lights flashing and standing outside your car window with a gun in his holster. The Court has allowed police to stop drivers for the most minor traffic offense and make their "request" to search the car. The police can arrest drivers and hold them in jail (even if the penalty for the traffic offense was just a fine) or bring in drug-sniffing dogs, who give "probable cause" to search.

The Court has ruled that the Fourth Amendment prohibition of unreasonable search and seizure is mitigated by the request. Since everyone knows that they are free to refuse such a request, it's not really the "search and seizure" prohibited by the Constitution. But in another case the Court refused to require that police inform the detained person about the right to refuse, arguing that with drugs would allow the police to search if they knew they could refuse.

You can't have it both ways: If everyone already knows, there can't be any harm in reminding them. Dissenting Justice Thurgood Marshall felt it necessary to remind his fellow judges that there is no Constitutional exception for drugs.

These court decisions give the police almost complete discretion to "search and seize" whenever they want, despite the Fourth Amendment prohibition.

The Court has also ruled that the draconian punishments sometimes meted out—such as life imprisonment for possession of less than a kilogram of crack for a defendant with no prior record—are not "cruel and unusual punishment."

Reading Alexander's account of the many relevant Supreme Court decisions feels like entering a bizarre, Kafkaesque world. It is impossible to believe that the justices did not know the impact of their decisions on the African American community … especially as the bodies began to mount.

What do you mean, "bodies began to mount."

The war on drugs has utterly devastated the poor black community, especially the inner-city ghetto. In Washington's inner city, roughly 25% of the men 18-34 are incarcerated at *any given time* and over 80% can expect to be incarcerated during their lifetimes. Imagine what it would do to any community if a quarter of all the young men disappeared! Presidential candidate Barack Obama decried the abandonment of inner-city children by their fathers, asking, "Where are all the black men?" But he didn't answer the question. They're in prison.

But incarceration is just the beginning. Perhaps worse is what happens after you get out.

Wait a minute; I heard something about that after the 2000 presidential campaign. If I remember right, people with records weren't allowed to vote and since most African Americans vote Democratic, Gore would have won Florida and that would have won him the presidency.

Exactly right. Although it's different from state to state, the majority deny felons the right to vote after they are released on parole, and some states won't allow it after their term of punishment is up. Since African Americans vote strongly Democratic, many close races would have ended up differently if felons had the vote. At least seven senatorial races for instance, would almost certainly have been decided differently between 1980 and 2000. The same is true for the thousands of local elections and referenda that affect the voter directly.

Felons are often denied the right to sit on juries, meaning that other young black men will not be tried by a jury of their peers, as is their right.

But voting and jury duty are not the worst of it, either. Discrimination in jobs, housing, government aid, and education is. Discrimination may no longer be legal on the basis of race, but it's perfectly legal to discriminate against any felon. To make matters worse the federal government not only discriminates but refuses felons access to public housing, welfare programs and other government services for at least five years after release and permits it forever.

What happens, essentially, is that many black men are labeled "criminals" for breaking exactly the same laws that white men break with impunity. Would we call a college kid who happened to get caught by the cops a *criminal*? I don't think so.

Labeled as criminals, black, semi-skilled laborers (whether they actually have records or not) have little chance of getting a job (especially in our economy, especially considering that white men with criminal records are more likely to be hired than black men without records). Two-thirds of black men who didn't finish high school are not working.

Why do we blame the poor for their poverty? Why do we expect the poor to pull themselves up by their bootstraps? The majority of poor black men who are ex-felons have had their bootstraps removed. For most, their boots are gone, too.

Shame and stigma are part of it, too.

What do you mean? If so many residents have been in prison, why is there any shame or stigma? Gangsta Rap seems even to brag about having been incarcerated. I've heard that people in those communities see it as normal, almost a right of passage.

Well, again, that's the myth. The truth is that most people who live in the ghettos have values no different from the rest of society. Families of felons feel shame and isolation and often keep confidential the fact that their son is in prison. They don't realize that many of their neighbors hold the same secret. The returning felons themselves feel ashamed of their failure, which makes it doubly difficult to reintegrate into their neighborhood. All that contributes to the devastation of the communities to which they return.

OK, so what else does she say?

Lots. The stories and statistics are overwhelming actually. But the primary issue that remains is whether this whole system of mass incarceration is the successor to slavery and to Jim Crow. Her title, of course, says it all.

Oh, c'mon. Her facts and figures are awful enough. But Jim Crow was a deliberate system of racial control designed explicitly for the purpose of keeping African Americans subjugated as second-class citizens. Mass incarceration may be terrible, but it is certainly not intentional.

Well, I, too, still find it difficult to believe that it's intentional in the sense that white people sat down and planned ahead of time the mass incarceration of African Americans. But then again, intention is an internal state of mind hard to discern from speech or behavior. In an age of official colorblindness, that's going to be hard to come by.

The facts are:

- The system of mass incarceration began almost immediately following the civil rights laws of the 1960s.
- Southern politicians began using the coded language of "crime in the streets" even

before the end of legal segregation. There is no doubt that the emphasis on “law and order” in both the Nixon and Reagan administrations was a deliberate political strategy to separate poor and working-class whites from the Democratic Party with coded language that resulted in mass incarceration.

- This strategy was picked up by politicians of almost all political persuasions and then by the media.
- Despite the overwhelming injustice of the facts, after the declaration of the War on Drugs no one in the media or elsewhere picked up on the story.
- The Supreme Court made decisions that shredded the intention of the Fourth Amendment, mostly in relationship to drug laws. (p. 60)

As Alexander observes, “Judging by the political rhetoric and the legal rules employed in the War on Drugs, [mass incarceration] is no freak accident.” (p. 225) It doesn’t really matter whether it was intentional in the sense I mentioned: it was deliberate.

Well, okay, but you said it was a system of racial control just like the Jim Crow laws. That’s way over the top. Prove that to me.

Well, first you have to agree with me that slavery and the Jim Crow laws were deliberate systems of racial control. Their purpose was to keep African Americans under control as second-class citizens.

Okay.

So how is mass incarceration different? True, it’s not directed at all African Americans; something so obvious would not be allowed here in this day and age. But making large communities of young black men into second-class citizens, against whom we can legally discriminate, is also a system of racial control.

Poor black men are controlled by being incarcerated and then excluded from the larger society. And no one is doing anything about it. I would define that as “deliberate.”

I can't quite buy that.

That's certainly understandable. Alexander's book is very disturbing, and I wouldn't expect you'd be able to digest the whole thing immediately. But her book is the most important work in the fields of race and poverty in decades.

Read *The New Jim Crow*. It's required reading for anyone interested in race in America.

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