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# Who Locked Us Up? Examining the Social Meaning of Black Punitiveness

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# THE YALE LAW JOURNAL

DARREN LENARD HUTCHINSON

## *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*

*Locking Up Our Own: Crime and Punishment in Black America*

BY JAMES FORMAN, JR.

FARRAR, STRAUS AND GIROUX, 2017

**ABSTRACT.** Mass incarceration has received extensive analysis in scholarly and political debates. Beginning in the 1970s, states and the federal government adopted tougher sentencing and police practices that responded to rising punitive sentiment among the general public. Many scholars have argued that U.S. criminal law and enforcement subordinate people of color by denying them political, social, and economic well-being. The harmful and disparate racial impact of U.S. crime policy mirrors historical patterns that emerged during slavery, Reconstruction, and Jim Crow. In his Pulitzer Prize-winning book *Locking Up Our Own: Crime and Punishment in Black America*, James Forman, Jr. demonstrates that many blacks supported aggressive anticrime policies that gave rise to mass incarceration. On the surface, this observation potentially complicates arguments that conceive of U.S. criminal law and enforcement as manifestations of white supremacist political power. Forman's failure to provide a comprehensive analysis of the racist dimensions of punitive sentiment makes his research subject to such an interpretation. A deeper analysis, however, reconciles Forman's research with antiracist accounts of U.S. crime policy. In particular, social psychology literature on implicit bias, social dominance orientation, and right-wing authoritarianism provides a helpful context for situating black punitive sentiment within antisubordination criminal law theory. These psychological concepts could link punitiveness among blacks with out-group favoritism and in-group stigma that derive from structural inequality and antiblack social stigma. The social psychology of punitive sentiment, resilience of white supremacy, and conservative political ideology will likely present substantial barriers to the merciful approach to criminality that Forman proposes.

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## INTRODUCTION

The precipitous rise of incarceration in the United States has become a central focus of contemporary political and legal debates.<sup>1</sup> In the 1970s, state and federal governments began enacting tough criminal law reforms, including the elimination of parole, mandatory minimum sentences, and enhanced sentences for certain offenders, including recidivists.<sup>2</sup> Prosecutors also wielded their broad discretion to bring more serious charges against the average defendant and secure longer sentences.<sup>3</sup> The impact of these punitive measures has been quite stark. Over two million Americans are now incarcerated in federal, state, and local penal institutions,<sup>4</sup> and the rate of incarceration has increased 400 percent over the last forty years.<sup>5</sup> Presently, the United States has the highest incarceration rate of all developed nations.<sup>6</sup>

Commentators attribute these exacting anticrime policies that caused mass incarceration to numerous factors, including sensationalized media coverage of crimes<sup>7</sup> and public opinion favoring stricter punishment.<sup>8</sup> Many scholars also contend that mass incarceration contributed to structural racial inequality.<sup>9</sup> Citing the disparate and detrimental impact of aggressive policing and incarceration

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1. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE UNITED STATES* 60 (rev. ed. 2012) (discussing incarceration statistics); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 7 (2017) (same).
  2. Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 *CRIME & DELINQ.* 56 (2011) (discussing enhancements and mandatory terms); Jeffrey Lin, *Parole Revocation in the Era of Mass Incarceration*, 4 *SOC. COMPASS* 999 (2010) (discussing the move to determinate sentencing and finding that revocation of parole has contributed to a larger prison population).
  3. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 127-59 (2017) (discussing prosecutorial discretion and its contribution to mass incarceration).
  4. Mirko Bagaric, Sandeep Gopalan & Marissa R. Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 *CARDOZO L. REV.* 1663, 1670 (2017).
  5. *Id.*
  6. *Id.*
  7. Jared S. Rosenberger & Valerie J. Callanan, *The Influence of Media on Penal Attitudes*, 36 *CRIM. JUST. REV.* 435 (2011) (linking punitive attitudes and time spent watching media coverage of crime).
  8. Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 *AM. J. POL. SCI.* 857 (2014) (examining links among public punitiveness, mass incarceration, and congressional responses to crime).
  9. See ALEXANDER, *supra* note 1, at 190-200 (discussing parallels between historical and contemporary racial inequality created by criminal law); Dorothy E. Roberts, *The Social and Moral*

on communities of color, these scholars argue that contemporary criminal law and enforcement<sup>10</sup> operate as mechanisms of racial subordination. Studies indicate that implicit and overt racism among jurors, voters, lawmakers, judges, prosecutors, police, and probation officers causes some of the racial inequities related to criminal law and enforcement.<sup>11</sup> Moreover, while poverty explains some racial disparities associated with policing and incarceration,<sup>12</sup> studies that control for socioeconomic status find that race influences length of sentence<sup>13</sup>

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*Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298-1300 (2004) (arguing that mass incarceration facilitates racial subordination); see also Darren Leonard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 81-84 (2014) (arguing that contemporary criminal law and enforcement subordinate persons of color).

10. In this Article, I use “criminal law and enforcement” to describe state and federal penal law and agencies created to prevent and punish criminal activity or to rehabilitate criminals. Thus, the term includes police departments, other law-enforcement agencies, judges, courts, prosecutors, defense attorneys, and correctional institutions. Most scholars use the term “criminal justice system” for the same definitional purpose. As other scholars have observed, however, that term, though widely utilized, is somewhat problematic. First, it suggests that a uniform “system” of substantive criminal law and enforcement exists. However, numerous institutional and individual decisions – often uncoordinated – shape the administration of criminal law. See Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 195 (2017). Moreover, referring to criminal law and enforcement as comprising a system of “justice” can seem problematic in light of the racial and class disparities that pervade it. See, e.g., SUSAN EHRlich MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 3 (2d ed. 2017). To avoid these difficulties, this Article uses “criminal law and enforcement” where other scholars might use “criminal justice system.”
11. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013) (“African Americans, who are disproportionately poor, are the target of explicit and implicit bias by key actors in the criminal justice system, including police, prosecutors, and judges.” (footnotes omitted)); Hutchinson, *supra* note 9, at 57-72 (discussing research regarding implicit bias and racial disparities within criminal law and enforcement).
12. See, e.g., Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J.L. & ECON. 1, 25 (2002) (examining crime data from multiple countries and finding that poverty alleviation leads to a reduction in homicides and violent crime); Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 27-37 (discussing research linking poverty and crime).
13. See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 306 (2001) (finding “that blacks and Hispanics are much less likely than whites to be assigned no prison term when that is an option,” and noting that the results are “mitigated, but remain statistically significant” after controlling for numerous relevant variables). Other studies reach both similar and different results. See, e.g., *id.* at 286 (“Many analyses concluded that sentencing exhibits racial discrimination, while others argued that if the offense severity and criminal history were controlled for appropriately, there was little or no evidence for sentencing differences.”).

and defendants' access to pretrial diversion.<sup>14</sup> Furthermore, because historical and ongoing racism contributes to high rates of poverty among people of color,<sup>15</sup> class-based explanations for racial inequality still implicate racial discrimination.<sup>16</sup>

Today, the contention that criminal law and enforcement subordinate people of color and reinforce racial hierarchy is widely accepted in the academic literature.<sup>17</sup> Perhaps the most prominent antistatutory criminal law scholar is Michelle Alexander, whose research links contemporary racial hierarchies seen in U.S. crime policy with historical practices that emerged during slavery, Reconstruction, and the Jim Crow era.<sup>18</sup> Before Alexander published her landmark work, however, scholars such as Dorothy Roberts had already observed that U.S.

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14. See Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210 (2013) (finding that black and Latino defendants are less likely than white defendants to receive pretrial diversion).
  15. See, e.g., DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (linking racism and poverty).
  16. See, e.g., Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1210 (1995) ("Because crime and violence are strongly correlated with income deprivation, any social process that concentrates poverty also concentrates crime and violence to create an ecological niche characterized by a high risk of physical injury, violent death, and criminal victimization.").
  17. ALEXANDER, *supra* note 1, at 190-200 (discussing parallels between historical and contemporary racial inequality created by criminal law); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1485 (2013) ("With the legitimacy of ostensibly race-neutral criminal law and procedure, lawmakers reproduced the racial hierarchies of decades past."); Hutchinson, *supra* note 9, at 81-84 (arguing that contemporary criminal law and enforcement subordinate persons of color); Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1407 (2016) ("Criminal law enforcement in the United States has long served as a means of racial discipline and a manner of enforcing racial subordination—shaping for more than a century the tolerated brutality in criminal law enforcement and rendering U.S. carceral practices particularly severe across the board."); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1185-1199 (2015) (analyzing historical and contemporary racial subordination imposed by the U.S. penal state); Priscilla A. Owen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1260 (2012) ("[T]he constructs that initially attached to Black women through an ideological edifice that justified enslavement and the racial domination through the use of the criminal law became normalized within the punishment system over time."); Roberts, *supra* note 9, at 1298-1300 (arguing that mass incarceration facilitates racial subordination); Jim Sidanius, Michael Mitchell, Hillary Haley & Carlos David Navarrete, *Support for Harsh Criminal Sanctions and Criminal Justice Beliefs: A Social Dominance Perspective*, 19 SOC. JUST. RES. 433, 445 (2006) ("[T]he empirical data are consistent with the notion that support for severe criminal sanctions is, at least in part, motivated by the desire to establish and maintain group-based social hierarchy, and is additionally rationalized or justified in terms of moral norms (e.g., retribution) . . . and/or causal beliefs (i.e., belief in deterrence).").
  18. See, e.g., ALEXANDER, *supra* note 1.

criminal law and enforcement facilitated racial subordination.<sup>19</sup> If, as these scholars contend, criminal law and enforcement function as sites of racial subordination, then these systems operate against blacks. In other words, mass incarceration and intense police surveillance are imposed upon—or *done to*—blacks. Indeed, U.S. crime policy reinforces racial oppression through many mechanisms rooted in historical racism, including coerced labor,<sup>20</sup> denial of political rights,<sup>21</sup> economic deprivation,<sup>22</sup> loss of educational opportunity,<sup>23</sup> and the infliction of physical and emotional trauma.<sup>24</sup>

The racial dimensions of U.S. criminal law and enforcement have inspired a new generation of activists to organize and contest abusive police conduct, mass incarceration, and other contemporary policies that disparately impact persons of color—particularly, blacks.<sup>25</sup> Academic research linking mass incarceration and racial subordination has informed the work of many of these younger racial justice activists—including members of the Black Lives Matter Movement.<sup>26</sup> Thus, the antisubordination theory of criminal law and enforcement presently has substantial currency among academics and activists.

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19. See Roberts, *supra* note 9, at 1298-1300.

20. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 870, 891 n.135 (2012) (discussing inmate labor).

21. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006) (discussing felon disenfranchisement).

22. Christy A. Visser, Sara A. Debus-Sherrill & Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698-712 (2010) (discussing employment difficulties faced by ex-offenders of color).

23. David S. Kirk & Robert J. Samson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 54 (2013) (“Our analysis shows that arrest in adolescence hinders the transition to adulthood by undermining pathways to educational attainment.”).

24. Jason Schnittkera, Michael Massoglia & Christopher Uggena, *Incarceration and the Health of the African American Community*, 8 DU BOIS REV. 133, 137 (2011) (discussing health consequences of incarceration for black Americans).

25. Julius Bailey & David J. Leonard, *Black Lives Matter: Post-Nihilistic Freedom Dreams*, 5 J. CONTEMP. RHETORIC 67-69 (2015) (discussing the genesis of and focus on the Black Lives Matter movement).

26. Eric Levitz, *Two of the Intellectual Pillars of the Black Lives Matter Movement (Kind of) Endorsed Bernie Sanders*, N.Y. MAG. (Feb. 10, 2016), <http://nymag.com/daily/intelligencer/2016/02/ta-nehisi-coates-just-sort-of-endorsed-sanders.html> [<http://perma.cc/GBJ9-DX8H>] (observing that Alexander’s *The New Jim Crow* “is often called ‘the bible of the Black Lives Matter movement’”).

James Forman, Jr.'s Pulitzer Prize-winning book, *Locking Up Our Own: Crime and Punishment in Black America*,<sup>27</sup> uncovers a “neglected story”<sup>28</sup> that adds complexity to contemporary understandings of race and crime, including those antistubordination analyses that describe U.S. crime policy as an exercise of authority by whites over blacks. Forman complicates prevailing academic arguments regarding race and crime by demonstrating that many blacks supported, enacted, and administered policies that expanded the policing and incarceration of other blacks. Forman integrates personal narratives – an academic style popularized in critical race theory – with traditional analysis.<sup>29</sup> Drawing extensively from his own personal experiences as a public defender in Washington, D.C., qualitative studies, and, to a lesser extent, opinion polls, election data, and empirical research, Forman observes that increasing crime rates in the 1970s through 1990s caused many blacks to demand aggressive policing and longer punishments for criminals.<sup>30</sup>

Forman has three primary objectives. First, he aims to uncover a modern history of black punitiveness, which correlated with high crime rates and increased demand for tougher criminal law and enforcement policies among the general public.<sup>31</sup> This historical account is often obscured in literature that frames mass incarceration and police surveillance as systems imposed upon rather than created – at least in part – by blacks. Forman’s research reveals that blacks exercised political power in ways that contributed to higher rates of incarceration and greater police monitoring of blacks. Second, Forman seeks to explain that black punitiveness resulted from concerns about accelerating criminality and drug addiction among blacks.<sup>32</sup> Fear of crime led black voters, legislators,

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27. FORMAN, *supra* note 1.

28. I am borrowing from the terminology Peggy Cooper Davis uses to describe her research that unearths obscured perspectives of marginalized people in legal and political debates. See, e.g., Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.–C.L. L. REV. 299, 311 (1993) (discussing the importance of examining “perspectives of those who struggled” against oppression to create Reconstruction).

29. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

30. See *infra* Part I.

31. FORMAN, *supra* note 1, at 10 (“[I] have tried to recover a portion of African American social, political, and intellectual history – a story that gets ignored or elided when we fail to appreciate the role that blacks have played in shaping [punitive] criminal justice policy over the past forty years.”).

32. *Id.* (“To understand [black punitive sentiment] we must start with a profound social fact: in the years preceding and during our punishment binge, black communities were devastated by historically unprecedented levels of crime and violence.”).

prosecutors, and judges to embrace harsher criminal law and enforcement policies. They asserted that community empowerment depended upon sobriety and freedom from the instability caused by violence and other forms of criminality. Many blacks contended that strong sentencing laws and police practices would facilitate these goals. Third, Forman seeks to demonstrate that even as blacks demanded tougher sentencing and police surveillance, many of them also supported social welfare policies, such as education and job training programs, that could combat the root causes of criminality.<sup>33</sup> While blacks often favored a mixture of punitive and preventive measures, political factors made punitive policies far more attractive and easier to implement.<sup>34</sup>

Forman's research makes a compelling contribution to scholarship regarding race and crime. His analysis of black punitive sentiment advances academic research on the causes of mass incarceration and the influences of public attitudes towards crime and punishment. Forman's research will undoubtedly reshape conversations on race and criminality and spark engagement from many scholars in the field. Forman's work could prove particularly helpful in public discourse regarding the future direction of U.S. criminal law and enforcement. As Americans rethink the appropriateness of strict anticrime measures, it is important that scholars, politicians, and advocates have a comprehensive understanding of the origins of U.S. punitive sentiment. By offering a more complex analysis of punitive social policy, Forman's research will likely broaden the terms of public discourse regarding the reform of U.S. criminal law and enforcement.

Though compelling in several respects, Forman's research suffers from an important limitation: he does not thoroughly analyze the white supremacist dimensions of U.S. punitive sentiment, including punitiveness among blacks. While Forman does not devote much attention to white supremacy, he recognizes the centrality of racism in American criminal law and enforcement.<sup>35</sup> Nonetheless, insufficient analysis of racism leaves Forman's work vulnerable to the perception that he seeks to minimize the importance of white supremacy in the development of mass incarceration. Indeed, one legal scholar has already cited to Forman's research in order to debunk antiracist criticism of U.S. criminal law and enforcement.<sup>36</sup> Employing Forman's research to undermine antiracist legal theory, however, would distort the goals of his compelling project. To elaborate this point, this Review examines three important implications of Forman's

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33. *Id.* at 12 (stating that African Americans wanted punitive policies and economic development).

34. *Id.* (stating that "American racism" made antipoverty programs politically infeasible).

35. *Id.* (stating that "it is impossible to understand American crime policy without appreciating racism's enduring role").

36. See *infra* text accompanying notes 144-154.

research that should alleviate any tension a reader might find between his observations and antiracist critiques of U.S. criminal law and enforcement. First, black support for aggressive criminal policies could stem in part from racial stereotypes and negative in-group preferences among blacks that derive from pervasive antiblack stereotypes.<sup>37</sup> Second, although Forman's title suggests that *Locking Up Our Own* explores "crime and punishment in black America," his research is geographically limited: it focuses almost exclusively on historical moments among black Washingtonians. Washington, D.C., however, represents a fairly unique site of black political power.<sup>38</sup> As such, even if black Washingtonians had the political power to enact pro-carceral policies, black residents in most other places did not. Third, while Forman carefully analyzes punitiveness among blacks in Washington, D.C., he misses an opportunity to situate his analysis within a comparative framework. Although blacks became more punitive as violent crime increased during the latter part of the twentieth century, punitive attitudes among blacks always remained much lower than corresponding perspectives among whites.<sup>39</sup> Furthermore, while scholars have linked blacks' punitiveness to their exposure to criminality, numerous studies indicate that white punitiveness typically stems from racial resentment.<sup>40</sup> Also, many studies find that blacks are less punitive than whites because they do not trust law enforcement and believe that the U.S. legal system discriminates against blacks.<sup>41</sup> These additional considerations provide a complementary framework for contextualizing Forman's important research.<sup>42</sup> After attending to these primary concerns, this Review analyzes the possibility of implementing the type of reforms that

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37. See *infra* Section II.A.

38. See *infra* Section II.B.1.

39. See Mark D. Ramirez, *Punitive Sentiment*, 51 CRIMINOLOGY 329, 352 (2013). Ramirez measures punitiveness across four different categories, including support for the death penalty, harsher sentencing by courts, expanding the authority of law enforcement, and increased expenditures to toughen law enforcement. See *id.* at 337-38.

40. Eva G. T. Green, Christian Staerklé & David O. Sears, *Symbolic Racism and Whites' Attitudes Towards Punitive and Preventive Crime Policies*, 30 LAW & HUM. BEH. 435, 444-45 (2006); see also 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, 171-72 (2004) ("[T]he most consistent predictor of criminal justice policy attitudes is, in fact, a form of racial prejudice. While racial resentment does not ever explain a large share of the variation in any of the attitudes we have measured, it is the most consistently influential of the variables outside of race classification itself.").

41. Indeed, research links the black-white racial-punitiveness gap to the combined racial resentment of whites and perceived systemic racism by blacks. See Devon Johnson, *Racial Prejudice, Perceived Injustice, and the Black-White Gap in Punitive Attitudes*, 36 J. CRIM. JUST. 198, 204 (2008) ("The results indicate that the racial gap in support for harsh criminal justice policies is linked to racial prejudice on the part of Whites and perceived injustice among Blacks.").

42. See *infra* Section II.B.2.

Forman advocates, namely the development of more merciful approaches to criminality. While Forman makes a persuasive case for departing from the current state of affairs, substantial political and social constraints – including racism, punitive sentiment, and conservative political ideology – will impede the implementation of the reforms he advocates.

This Review proceeds in three Parts. Part I describes the principal arguments and conclusions Forman makes in *Locking Up Our Own*. It also examines the positive contributions Forman's research brings to legal scholarship regarding race and crime. Part II, the heart of the Review, considers the implications of Forman's research and attempts to reconcile his conclusions with antiracist literature. Part III examines the possibility of enacting the criminal law reforms that Forman advocates. While Forman urges policymakers and reformers to discard the harsh punitive approaches that gave rise to mass incarceration and to embrace mercy and forgiveness, the current political climate might make such a shift in legal culture difficult. That being said, state democratic and judicial processes and federal litigation could lead to some reforms. Proponents of criminal law and enforcement reform must utilize multidimensional mobilization strategies – involving courts, legislatures, executives, social movement organizations, and media – in order to accomplish the types of policy changes that Forman proposes.<sup>43</sup>

## I. LOCKING UP OUR OWN: ARGUMENTS AND CONTRIBUTIONS

In *Locking Up Our Own*, Forman complicates racial explanations for mass incarceration by revealing that blacks supported many of the criminal law and enforcement policies that contributed to the rapid rise of incarceration in the United States between the 1970s and the 2000s. This Section summarizes Forman's principal arguments and conclusions.

### A. Neglected Story: Black Punitiveness

Social science research indicates that blacks are far less punitive than whites,<sup>44</sup> especially with respect to harsh penalties such as capital punishment.<sup>45</sup>

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43. See *infra* III.

44. See Johnson, *supra* note 41, at 199 (“When it comes to punishing criminals, Blacks have historically been less punitive than Whites.”).

45. Bobo & Johnson, *supra* note 40 (finding a racial gap in black and white support for the death penalty); John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty*

This academic literature has led to a popular understanding of blacks as distrustful of law enforcement – a view documented by numerous empirical studies.<sup>46</sup> Forman’s research, however, complicates this traditional perspective by unearthing a neglected part of U.S. history during which black support for punitive measures gave rise to the enactment of policies that led to increased police surveillance and incarceration. Focusing almost exclusively on Washington, D.C., Forman examines the attitudes of black politicians, civilians, police officers, judges, and prosecutors. Forman chooses to study Washington, D.C. because by the mid-1970s, blacks constituted a supermajority of the city’s population.<sup>47</sup> Furthermore, in 1973, Congress enacted the Home Rule Act, which gave Washington, D.C. residents the power to elect their own mayor and city council.<sup>48</sup> When home rule was established, Washington, D.C. had only one majority-white political district.<sup>49</sup> Thus, black voters wielded substantial power in determining who would serve as a member of the city council and as mayor. In 1975, Washington, D.C.’s first black mayor in one hundred years took office (sworn in, as Forman observes, by Thurgood Marshall, the first black Supreme Court Justice).<sup>50</sup> Many Washington, D.C. blacks used their growing political power to enact and enforce punitive measures that disparately impacted other blacks.

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*Support*, 34 J. CRIM. JUST. 85, 85 (2006) (“Among the various ‘known’ correlates of death penalty support, one of the strongest and most persistent predictors is respondent’s race. Whites are significantly more supportive of capital punishment than are Blacks.”).

46. Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 261 (2010) (“[R]esearch concerning citizens’ attitudes toward police has consistently found that black adults and adolescents report more dissatisfaction and distrust than their counterparts from other racial groups.”); Yolander G. Hurst, James Frank & Sandra Lee Browning, *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING: AN INT’L J. OF POLICE STRATEGIES & MAN. 37, 38 (2000) (observing that “many studies have found that race is a significant determinant of attitudes, with blacks holding less favorable attitudes toward the police than whites”); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 323 (2005) (observing that “it has been repeatedly shown that there is a wide gap between the levels of trust and confidence found among minorities and Whites – with minorities especially distrustful of the police”).
47. FORMAN, *supra* note 1, at 18.
48. *Id.* at 19.
49. *Id.* at 19-20.
50. *Id.* at 19.

### 1. Antidrug Punitiveness

As many commentators have demonstrated, the “War on Drugs” has severely impacted “low-income African American communities.”<sup>51</sup> Nevertheless, as Forman carefully explains, in 1975, Washington, D.C. blacks used their political power to defeat a measure that would have decriminalized possession of small amounts of marijuana.<sup>52</sup> Marijuana arrests in Washington, D.C. had increased 900% between 1968 and 1975, and blacks were disproportionately impacted.<sup>53</sup> Seeking to address this issue, David Clarke—a liberal white Washington, D.C. city council member—sponsored a bill that would have eliminated prison sentences for minor marijuana possession.<sup>54</sup> Clarke tried to secure support for the bill among his colleagues by providing evidence which indicated that Washington, D.C. police and prosecutors discriminatorily enforced antimarijuana laws to the detriment of blacks.<sup>55</sup> Furthermore, he argued that marijuana arrests led to debilitating collateral consequences, as the stigma of a marijuana arrest, even without a conviction, impeded blacks’ access to employment, housing, and educational opportunities.<sup>56</sup> Although Washington, D.C. had a majority black city council and local population as well as a black mayor, Clarke failed to persuade the city to enact drug-law reform.

As Forman’s exhaustive research reveals, many Washington, D.C. blacks rejected Clarke’s proposal due to high rates of drug addiction among blacks in the city.<sup>57</sup> By the 1960s, heroin use had become a substantial problem in Washington, D.C.<sup>58</sup> Heroin addiction was linked to criminal activity and incarceration—demonstrated by the addiction rate among men detained in Washington, D.C. jails approaching fifty percent in 1969.<sup>59</sup> While black activists often expressed

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51. *Id.* at 17. This observation is consistent with findings in academic literature. See, e.g., Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 381 (2002) (“The War on Drugs has had a devastating effect on African American communities nationwide.”).

52. FORMAN, *supra* note 1, at 17-46 (discussing the 1975 marijuana decriminalization effort in Washington, D.C.).

53. *Id.* at 20. Specifically, Forman observes that eighty percent of Washington, D.C.’s marijuana arrestees were black.

54. *Id.* at 22.

55. *Id.* at 22-23.

56. *Id.* at 23-24.

57. *Id.* at 25

58. *Id.*

59. *Id.*

some concern for heroin addicts,<sup>60</sup> they also opposed successful public health policies like methadone maintenance, which they viewed as encouraging drug dependency.<sup>61</sup>

Forman provides a rich analysis of blacks' use of racial justice rhetoric to legitimize tough antidrug policies. He vividly recounts how Douglas Moore – a black Washington, D.C. city council member – became an outspoken and skillful opponent of Clarke's proposal.<sup>62</sup> Moore, a former black nationalist,<sup>63</sup> argued that lenient drug laws would reinforce a systemic lack of concern for black lives among law enforcement.<sup>64</sup> Like Moore, many blacks believed that police discriminatorily withheld protection from them.<sup>65</sup> Moore contended that Clarke's proposal would perpetuate this structural indifference by allowing the police to wash their hands of black drug addicts.<sup>66</sup> Moore also argued that the marijuana liberalization movement actually sought to protect white youth from incarceration for drug offenses; he contended that advocates of leniency cynically employed black suffering in order to make drug use less punitive for whites.<sup>67</sup> In addition, Moore and other activists asserted that drug-liberalization policies would lead to increased drug use among blacks and that this would detract from antiracist politics and individual betterment.<sup>68</sup>

Forman observes that themes of racial justice animated public hearings regarding Clarke's proposal.<sup>69</sup> Black clergy, a politically influential lobby, framed their disagreement with the measure as a moral issue. They argued that marijuana use caused psychological harms and criminality and that marijuana was a gateway to more harmful drugs.<sup>70</sup> Limited polling data indicated that blacks opposed decriminalization of marijuana by a slim margin, while a solid majority of

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60. *Id.* at 27 (discussing black activists' acceptance of modest methadone treatment for heroin addicts).

61. *Id.* at 27.

62. *Id.* at 33.

63. See Juan Williams, *The Many Facets of Douglas Moore*, WASH. POST (Sept. 5, 1978), <http://www.washingtonpost.com/archive/local/1978/09/05/the-many-facets-of-douglas-moore/78f31f70-0573-4a84-8bdo-18a37371fbae> [<http://perma.cc/A4VR-MQHT>].

64. FORMAN, *supra* note 1, at 35.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 36-37. Some blacks took an even more extreme position. Stokely Carmichael, for example, described drugs as a weapon of racism. He contended that whites sent "drugs into the [black] community" in order to nullify black opposition to racial oppression. *Id.* at 37.

69. *Id.* at 37-38.

70. *Id.* at 39-40.

whites supported it.<sup>71</sup> Nevertheless, the city council approved Clarke's proposal by an 8-4 vote.<sup>72</sup> Federal law, however, required a second city council vote and mayoral approval.<sup>73</sup> Local activists, particularly the powerful black ministers' lobby, intensified their opposition.<sup>74</sup> Eventually, Sterling Tucker, a black man who chaired the city council, tabled the bill, effectively killing it.<sup>75</sup> Forman suggests that Tucker feared political reprisals from black ministers and, possibly, voters.<sup>76</sup>

Forman offers additional examples of punitiveness among Washington, D.C. blacks, many of which involve the use of racial equality themes to justify implementation of harsh anticrime policy. For instance, in a 1976 article, Carl Rowan, a prominent black journalist, contended that "locking up thugs is not vindictive,"<sup>77</sup> but rather a way to prevent violent offenders from "terroriz[ing] minority communities again and again."<sup>78</sup> Longer sentences advanced the betterment of blacks and promoted racial equality. Similarly, former police chief Burtell Jefferson, a black man, also supported tougher legislation, and he found an ally on the city council in John Ray, a prominent Washington, D.C. black attorney.<sup>79</sup> Ray sponsored a bill that would have raised maximum sentences for a number

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71. As Forman concedes, this poll did not ask respondents to consider the precise issue presented by Clarke's proposal. *Id.* at 42. It is also the only poll he cites regarding Washington, D.C. black opinion on marijuana laws. Furthermore, the study is susceptible to other interpretations that do not indicate significant disparities between black and white opinion, particularly that the intersection of age and race, rather than race alone, influenced respondents' views on marijuana. See Jay Matthews, *Legal Marijuana Opposed: Survey Shows 55 Percent in Area Would Oppose*, WASH. POST, Aug. 1, 1975, at B5 ("A heavy concentration of relatively young, white college grads in the District apparently has produced survey results in the city far different from those in the rest of the Washington area."); *id.* ("The only clear support for legalization came from residents under 30 years old . . ."); *id.* (reporting minimal racial variation among residents in the D.C. metropolitan area). The actual study is not contained in the archives of the now-defunct Bureau of Social Science Statistics housed at the University of Maryland. Conversation with Eric C. Stoykovich, Historical Manuscripts Project Archivist, Special Collections, University of Maryland (Oct. 27, 2017).

72. FORMAN, *supra* note 1, at 41.

73. *Id.*

74. *Id.* at 42.

75. *Id.* at 43.

76. *Id.*

77. *Id.* at 128.

78. *Id.* at 129.

79. *Id.* at 130-31.

of offenses, including terms of fifteen and ten years, respectively, for selling heroin and cocaine and three years for marijuana.<sup>80</sup> Ray also backed mandatory minimum sentences for various gun-related offenses.<sup>81</sup> Ray promoted his proposal in racial equality terms, noting that crimes involving black victims typically received lower sentences than similar crimes with white victims.<sup>82</sup> Mandating minimum sentences and increasing maximum sentences for crimes would secure equal justice for black victims.

Forman presents a complicated historical account of the political battle over sentencing law by revealing that many black activists and governmental officials opposed Ray's proposal. For example, the Washington, D.C. chapter of the NAACP advocated a more cautious approach that would have allowed judges to retain discretion over sentencing.<sup>83</sup> Also, the Urban League contended that Ray's proposal would not reduce crime.<sup>84</sup> Despite these objections from established civil rights organizations, the Washington, D.C. city council increased maximum sentences for drug crimes; the minimum-sentences proposal failed.<sup>85</sup>

## 2. *Punitiveness Regarding Gun-Related Violence*

Forman also analyzes black support for the enactment of tough penalties for gun-related crimes.<sup>86</sup> Although contemporary observers might not view gun-control policies as punitive, the proposals that Forman analyzes sought to criminalize all gun possession in Washington, D.C. and to impose prison terms for violations, including mandatory sentences for repeat offenders.<sup>87</sup> As Forman observes, black lawmakers in Washington, D.C. supported tough gun-control measures in response to growing public fear resulting from a sharply increasing homicide rate.<sup>88</sup> Forman specifically examines the successful efforts of John Wilson, a black city council member, to enact punitive measures in response to gun-

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80. *Id.* at 131.

81. *Id.*

82. *Id.* at 132.

83. *Id.*

84. *Id.*

85. *Id.* at 133. Ray would later sponsor a successful ballot initiative that implemented mandatory minimum sentences for drug and gun offenses. *See id.* at 139, 143.

86. *Id.* at 56-77.

87. *Id.* at 56.

88. *Id.* at 57-60.

related violence.<sup>89</sup> Wilson hailed from a civil rights background, having participated in the Student Nonviolent Coordinating Committee when he was younger.<sup>90</sup> Despite the historical use of U.S. crime policy to subordinate blacks, Wilson's solution for violent crime was decidedly punitive.<sup>91</sup> He introduced a measure that would have prohibited the "sale, purchase, and possession of all handguns and shotguns" in Washington, D.C.<sup>92</sup> Wilson also advocated mandatory minimum sentences for gun-related offenses.<sup>93</sup>

As Forman's thorough research demonstrates, public hearings regarding Wilson's proposal follow a similar pattern forged by earlier political advocacy: these hearings used civil rights rhetoric to justify punitive policies. Supporters of Wilson's plan argued that violence hindered black unity and dampened pride.<sup>94</sup> Black ministers dramatically recounted officiating funerals of homicide victims.<sup>95</sup> They also reminded council members that guns ended the lives of many civil rights icons, including Dr. Martin Luther King, Jr.<sup>96</sup> Although some supporters of Wilson's plan conceded that gun control laws would not address the social and economic factors that led to criminality,<sup>97</sup> they nonetheless emphasized that blacks deserved protection from violence, along with policies that addressed economic inequality.<sup>98</sup> In other words, some black proponents of gun control favored a multifaceted approach that included stricter criminal laws and the expansion of economic opportunity for blacks.<sup>99</sup>

Forman deepens his historical analysis by observing that blacks who opposed gun control also employed racial justice narratives. Douglas Moore, who fought Clarke's marijuana decriminalization proposal, became an important opponent of gun control. Moore argued that blacks needed guns to defend themselves from white racial terrorism and violence by other blacks.<sup>100</sup> Forman correctly

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89. *Id.* at 55-61, 71.

90. *Id.* at 55.

91. *Id.* at 56.

92. *Id.*

93. *Id.* at 60.

94. *Id.* at 57-58.

95. *Id.* at 59.

96. *Id.*

97. *Id.* at 64.

98. *Id.*

99. *Id.* at 63-64. Ultimately, the city council did not approve Wilson's proposal for a complete ban on guns. Instead, the city required gun registration and prohibited owners from acquiring additional guns. The legislation only created a ten-day sentence for offenders. *Id.* at 71.

100. *Id.* at 64-65.

links these arguments to a historical tradition of blacks viewing gun ownership as necessary for combating white racial violence.<sup>101</sup>

### 3. *Aggressive Policing and Black Police Officers*

Forman also examines how black police contributed to the criminalization of other blacks. While antiracist advocacy has historically focused on the role of all- or predominately white police forces in the perpetuation of racial subordination,<sup>102</sup> Forman complicates this narrative with his study of police practices in Washington, D.C., which had a majority-black police force by the late-1970s.<sup>103</sup>

Many blacks once viewed integration of police forces as a critical component of racial justice.<sup>104</sup> As Forman's research demonstrates, however, black officers typically did not consider themselves to be agents of civil rights. Instead, their advocacy focused on good jobs, wages, benefits, and working conditions.<sup>105</sup> Furthermore, Forman finds that many black police officers held negative views of

101. *Id.* at 65-70.

102. See Vicky M. Wilkins & Brian N. Williams, *Black or Blue: Racial Profiling and Representative Bureaucracy*, 68 PUB. ADMIN. REV. 654, 654 (2008) ("Historically, American policing has a heritage of legally sanctioned, disparate service delivery and the enforcement of racially motivated laws and statutes, inclusive of slave codes, black codes, and other oppressive policies directed toward Africans, African Americans, and other marginalized populations.").

103. FORMAN, *supra* note 1, at 78-115.

104. As Forman observes, many different assumptions sustained this optimistic perspective. Blacks thought that black police officers would command greater respect from and compliance by black civilians, encourage cooperation by informants, and demonstrate a stronger commitment to protection of black life. They also assumed that black officers would respect the rule of law more evenhandedly than white officers. According to the civil rights argument, black officers would be less prone to harassing blacks or utilizing excessive force, and they would be able to distinguish law-abiding blacks from criminals. Some activists advocated black police as a means of economic advancement, while others believed that arming blacks and giving them State authority would deconstruct white supremacist notions of black inferiority. Blacks also resented white police wielding authority—often abusively—in black neighborhoods. Police had their history in slave patrols—a fact that was not lost among civil rights activists. Many blacks viewed black police as an appropriate solution for police misconduct and abuses. *Id.* at 79-80.

105. *Id.* at 110. Black police contested race-matching—being assigned to work in black communities exclusively. They viewed this practice as an extension of Jim Crow. They also challenged exclusionary practices that kept them from advancing to supervisory positions, and they demanded affirmative action policies that would enhance their presence on police forces. *Id.* at 90-91, 99.

blacks and supported stronger punitive measures, including mandatory minimum sentences for drug and gun offenses.<sup>106</sup> Some of these officers felt embarrassed by criminality among blacks and believed that aggressive policing would alleviate the problem.<sup>107</sup> Further undermining the racial justice argument for integrated police forces, black officers often harassed other blacks and subjected them to excessive force.<sup>108</sup>

In one of the most compelling sections of *Locking Up Our Own*, Forman analyzes the relationship between harsh policing tactics and the advent of crack cocaine in the late-1980s.<sup>109</sup> As Forman observes, fear of crack cocaine-related crime led to black acceptance of “warrior policing”<sup>110</sup> – or quasi-military police patrols in poor black urban neighborhoods.<sup>111</sup> Despite the invasive and racially disparate nature of these practices, the burgeoning crime associated with crack cocaine addiction and trafficking legitimized aggressive policing.<sup>112</sup> For example, the president of a Maryland NAACP chapter described crack cocaine as “the worst thing to hit us since slavery.”<sup>113</sup> From this perspective, aggressive policing and harsh punishment of drug dealers were part of an abolitionary project.<sup>114</sup>

Forman’s research reveals that, in the climate of fear caused by crack cocaine-related violence, urban police forces obtained powerful weapons and engaged in aggressive practices. At a 1988 press conference in Washington, D.C., Mayor

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106. *Id.* at 108, 114.

107. *Id.* at 109.

108. *Id.*

109. *Id.* at 151.

110. *Id.* at 155-56.

111. *Id.* at 156.

112. *Id.* at 156-57.

113. *Id.* at 158 (also discussing an article in the *Los Angeles Sentinel*, a black newspaper, asserting that the crack cocaine epidemic “is perhaps the most serious threat we have faced since the end of slavery”).

114. Although Forman ultimately takes a skeptical stance towards policing, other scholars have argued that courts should accommodate black community demands for more stringent policing due to their vulnerability to criminality. See, e.g., Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. CHI. L. F. 197, 198 (“Though the residents of inner city communities increasingly demand law enforcement measures in response to the crime problems they face, the understanding of constitutional criminal procedural rights promoted by *Youkhana* and *Morales* threatens to hamper and retard the development of innovative community policing measures these citizens desire.”); see also Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 699 (1998) (arguing that “inner city” residents should have the authority to impose aggressive police tactics on their communities in order to combat crime and that criminal procedure doctrines should accommodate these decisions).

Marion Barry demonstrated a new automatic weapon and boasted about the power it would give local police.<sup>115</sup> In 1986, Isaac Fulwood, a black man, became the assistant chief of field operations for the Washington, D.C. police department.<sup>116</sup> In this position, Fulwood developed “Operation Clean Sweep,” the city’s most aggressive law enforcement response to crack cocaine and other illegal drugs.<sup>117</sup> Operation Clean Sweep utilized a number of aggressive techniques, including “surveillance of street sales with arrests made by jump-out squads,” “buy-busts,” “reverse stings,” “undercover buys,” “uniformed saturation patrol,” “roadblocks,” “seizure and forfeiture of drugs, weapons, cash, cars,” and “raids on crack houses.”<sup>118</sup> Mayor Barry promised that Operation Clean Sweep would “make it hotter on drug dealers and pushers who are destroying the minds of our young people.”<sup>119</sup> Though short-lived, Operation Clean Sweep led to a substantial increase in drug arrests.<sup>120</sup> Nonetheless, while Fulwood designed the aggressive antidrug program, he later expressed internal conflict regarding its toughness. Fulwood stated during an interview that Operation Clean Sweep only proved that Washington, D.C. was “very proficient at arresting drug dealers and users . . . .”<sup>121</sup> He conceded that the program did not end drug addiction in the city; accomplishing this goal required allocation of more resources for “education and treatment.”<sup>122</sup>

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115. FORMAN, *supra* note 1, at 167.

116. Peter Hermann, *Isaac Fulwood, Washington Police Chief During Tumultuous Era, Dies at 77*, WASH. POST (Sept. 1, 2017), [http://www.washingtonpost.com/local/obituaries/Isaac-fulwood-washington-police-chief-during-tumultuous-era-dies-at-77/2017/09/01/7a3a8900-8f80-11e7-84c0-02cc069f2c37\\_story.html](http://www.washingtonpost.com/local/obituaries/Isaac-fulwood-washington-police-chief-during-tumultuous-era-dies-at-77/2017/09/01/7a3a8900-8f80-11e7-84c0-02cc069f2c37_story.html) [<http://perma.cc/AB4P-UDUJ>].

117. FORMAN, *supra* note 1, at 167.

118. Edward F. Connors, III & Hugh Nugent, Bureau of Justice Assistance, *Street-Level Narcotics Enforcement*, U.S. DEPT. JUST. 33-34 (1990), <http://www.ncjrs.gov/pdffiles1/Digitization/123726NCJRS.pdf> [<http://perma.cc/3E83-QTHS>].

119. FORMAN, *supra* note 1, at 168.

120. *Id.* (noting “unprecedented” drug arrests in “only a couple of years”); Connors & Nugent, *supra* note 118, at 34 (“In its first year, Clean Sweep produced 23,000 arrests, 12,700 of them drug-related; 2,700 convictions with sentences; 4,800 convictions with fines; seizures of \$10 million worth of drugs, \$950,000 in cash, 351 vehicles, and 632 weapons.”). The city shut down the program because it was funded with police overtime budgets, making it too costly. In addition, local penal institutions and courts could not manage the increased prison population and caseload. *Id.* at 35.

121. FORMAN, *supra* note 1, at 168.

122. *Id.* at 168-69.

#### 4. *Black Judges and Prosecutors*

Drawing extensively from his experiences as a criminal defense attorney, Forman also analyzes punitiveness among black judges and prosecutors in Washington, D.C. In the first pages of his book, Forman describes a sentencing hearing during which a judge rejected his proposal that a juvenile client receive probation rather than incarceration.<sup>123</sup> The judge clothed his decision in civil rights rhetoric. Delivering “*the* Martin Luther King speech,”<sup>124</sup> the judge asserted that by engaging in criminal activity, the black youth had squandered opportunities the Civil Rights Movement created for him:

Now you can go to school, study hard, live your dreams. It isn't easy – I know that. But it is *possible*. And people fought, struggled, and died for that possibility. Dr. King died for that, son. And what are you doing? Not studying! No, you are cutting class, runnin' and thuggin', not listening to your momma or grandmother. Instead, you want to listen to some hoodlum friends.<sup>125</sup>

Black prosecutors also invoked civil rights rhetoric to justify their punitiveness. For example, Eric Holder, who served as U.S. Attorney for the District of Columbia, criticized black criminality during a Dr. Martin Luther King Day celebration in 1995.<sup>126</sup> Holder said, “Dr. King would be shocked and disheartened by the condition of his people in 1995 – and I, for one, would be ashamed to reveal to him what we have let happen to our community.”<sup>127</sup> Holder also stated that black criminality, the product of “misguided or malicious members of our own race,” undermined King’s accomplishments.<sup>128</sup>

#### B. *Toward Forgiveness and Mercy*

In the final section of *Locking Up Our Own*, Forman advocates reform. Like scholars such as Bryan Stevenson,<sup>129</sup> Forman argues that judges and prosecutors

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123. FORMAN, *supra* note 1, at 3-8.

124. *Id.* at 3 (emphasis added).

125. *Id.* at 4.

126. *Id.* at 195.

127. *Id.*

128. *Id.*

129. See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (describing Stevenson’s personal experiences with the justice system as a criminal defense attorney and advocating reform).

must undergo a cultural shift toward mercy and away from punitiveness.<sup>130</sup> He persuasively makes the case for a more compassionate, rather than retributory, legal system by telling the story of a young black male client who avoided a prison sentence after pleading guilty to robbery.<sup>131</sup> Many readers will find Forman's narratives in this section among the most compelling in the book. Although the judge and prosecutor wanted Forman's client to spend time in prison,<sup>132</sup> Forman boldly asked the victim to testify at the sentencing hearing in opposition to incarceration.<sup>133</sup> After Forman informed the victim of his client's childhood disadvantages and his potential for future success, the victim agreed to speak on the defendant's behalf.<sup>134</sup> Forman's strategy proved successful, as the judge ordered probation.<sup>135</sup>

Forman also criticizes popular reform efforts advocated by many liberals and progressives.<sup>136</sup> Specifically, he argues that proposals that centralize reduction of penalties for "nonviolent drug offenders" will not eradicate mass incarceration, because nonviolent drug offenders represent only a small portion of the U.S. incarcerated population.<sup>137</sup> The individuals who make up the largest segment of the prison population and those with the longest sentences have committed violent crimes.<sup>138</sup> Accordingly, reserving leniency for nonviolent drug offenders will not lead to a substantial decrease in the overall U.S. prison population. Recently, other scholars have criticized reforms limited to nonviolent drug offenders on the same grounds as Forman.<sup>139</sup>

Forman's research makes a valuable contribution to debates regarding the intersection of race and crime, adding much needed context to literature concerning punitiveness among blacks. Despite the overall success of Forman's endeavor, *Locking Up Our Own* has some important limitations. The next Part identifies some of those limits and uses them as a vehicle for analyzing the critical

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130. FORMAN, *supra* note 1, at 237 ("Our challenge as Americans is to recognize the power each of us has in our own spheres to push back against the harshness of mass incarceration.").

131. *Id.* at 222-36.

132. *Id.* at 223-24.

133. *Id.* at 232-35.

134. *Id.* at 232-35.

135. *Id.* at 235-36.

136. *See id.* at 185-202 (discussing the link between violent crime and mass incarceration).

137. *Id.* at 220.

138. *Id.* at 230 ("People who have committed a violent offense make up 53% of the nation's state prisoners . . .").

139. *See, e.g.,* PFAFF, *supra* note 3, at 35-36 (questioning criminal law reform efforts that centralize nonviolent drug offenders).

implications of Forman's research for antiracist accounts of U.S. criminal law and enforcement.

## II. RACIAL NUANCES IN BLACK SUPPORT FOR AGGRESSIVE POLICING AND STRONG PUNITIVE MEASURES

Although Forman provides a nuanced analysis of black perspectives on police and punishment, his research does not substantially analyze *white supremacy*. Forman's focus on black punitiveness, however, does not make racism irrelevant to his project. Indeed, Forman emphatically states that he does not wish to obscure the role of racism in the development of mass incarceration.<sup>140</sup> To this end, Forman contends that societal racism framed the punitiveness of blacks and their elected officials.<sup>141</sup> Forman also attributes racially discriminatory practices such as felon disenfranchisement, prosecutorial exclusion of blacks from juries, and public support for tough punitive measures to pervasive implicit racial biases.<sup>142</sup> Furthermore, Forman qualifies his analysis of black punitiveness by observing that blacks often sought tougher criminal law and enforcement policies together with a broader package of economic reforms that could have potentially tackled the root causes of criminality. Racism, however, made broad economic reforms politically infeasible.<sup>143</sup>

Notwithstanding these important observations, Forman's inattention to racism might lead skeptical scholars or other commentators to use his research to question antisubordination theories of U.S. criminal law and enforcement.<sup>144</sup> Indeed, at least one academic has already relied upon Forman's work to criticize

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140. FORMAN, *supra* note 1, at 11 ("But in focusing on the actions of black officials, I do not minimize the role of whites or of racism in the development of mass incarceration.").

141. *Id.* at 11-12 (arguing that "racism shaped the political, economic, and legal context in which the black community and its elected representatives made their choices").

142. *Id.* at 12.

143. *Id.*

144. At least two reviews of *Locking Up Our Own* have reached a similar conclusion. See Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1980 (2018) ("Some might deploy Forman's book to advance the proposition that race has played less of a role in the mass incarceration of African Americans than liberals and progressives like to admit. After all, black people have been agents, and not just victims, of mass incarceration."); Jemar Tisby, *Mass Incarceration and the "Politics of Respectability,"* CARDUS (Dec. 14, 2017), <http://www.cardus.ca/comment/article/5165/mass-incarceration-and-the-politics-of-respectability/> [<http://perma.cc/3786-KZT9>] ("Some readers may be tempted to read *Locking Up Our Own* as a book about how black people supported harsh penalties for other black people, thus shifting culpability away from America's long history of racism and

antiracist accounts of U.S. crime policy. In a recent publication, Dan Subotnik attempts to rebut arguments William Nelson makes regarding the distributional effects of state criminal law and enforcement.<sup>145</sup> Recounting his own personal experiences contesting a traffic citation, Nelson argues that U.S. criminal law and enforcement, particularly courts, operate in an authoritarian fashion<sup>146</sup> and that the burdens of this system likely fall more harshly on persons of color and poor whites<sup>147</sup> rather than white male lawyers (such as Nelson).<sup>148</sup> Although Nelson makes several arguments in support of his observations regarding U.S. legal process, Subotnik reserves his deepest criticism for Nelson's racial inequality claims.<sup>149</sup> Subotnik contends that Nelson, like antiracist theorists, focuses "indiscriminately" on race and class.<sup>150</sup> Subotnik also argues that antiracist critics

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excusing the racism embedded in the criminal justice system. After all, if black people supported the same consequences and approaches to law enforcement as some white people, then mass incarceration really has nothing to do with race. As the book title indicates, black people locked up their own."). White ambivalence regarding the ongoing significance of racism is particularly meaningful in this setting. See, e.g., Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 43 & n.260 (2017) (citing *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart> [<http://perma.cc/B93W-NEDQ>] (reporting that fifty-three percent of whites and eighty-eight percent of blacks believe "more changes [are] needed"; twenty-two percent of whites and sixty-four percent of blacks believe employers treat blacks less fairly; and thirty-six percent of whites and seventy percent of blacks believe racial discrimination prevents blacks from "getting ahead").

145. See Dan Subotnik, *The Simple Meaning of Stop Signs: A Response to Professor William Nelson*, 33 TOURO L. REV. 739 (2017) (criticizing William E. Nelson, *The Emerging American Police State: The Problem Is Not with the Police, but Higher Up*, 33 TOURO L. REV. 709 (2017), and dismissing the claim of racial profiling made by a law professor).

146. William E. Nelson, *The Emerging American Police State: The Problem Is Not with the Police, but Higher Up*, 33 TOURO L. REV. 710 (2017) ("I believe my experience and observations in this proceeding potentially offer insights into why the law enforcement system, though not necessarily police officers themselves, increasingly appears to function like an authoritarian police state and why many Americans, especially Americans of color and other minority groups, increasingly find the legal system unfair, unjust, and oppressive.").

147. *Id.* at 721.

148. *Id.* at 728 ("I wondered what an African-American, Latino, recent Asian immigrant, or poor white person, who unlike me does not have a law degree, would conclude when confronting the same police state . . . [C]ould a poor African-American, Latino, recent Asian immigrant, or poor white who lacked the resources, knowledge, and personal contacts that I possess have made the same decision [to hire counsel and contest the ticket]?").

149. Subotnik, *supra* note 145, at 743 ("There is something even more problematical [sic] about the race/class charge.").

150. *Id.*

of U.S. criminal law and enforcement invoke race due to the potency of the subject rather than the actual relevance of racism.<sup>151</sup> Furthermore, Subotnik asserts that “too much speech on [race] is fatuous and manipulative;”<sup>152</sup> the context of this contention makes it clear that Subotnik actually means *antiracist* speech. Subotnik also cites the work of several black scholars, including Forman, to justify his skepticism regarding antiracist criticism of U.S. criminal law and enforcement.<sup>153</sup> Specifically, Subotnik argues that Forman’s analysis of black punitiveness substantially undermines commentary that links mass incarceration with racism.<sup>154</sup> Subotnik has published numerous articles that question or dismiss the ongoing relevance of race and sex discrimination,<sup>155</sup> including within criminal law and enforcement.<sup>156</sup> This Review contends that using Forman’s work to undermine antiracist critiques of U.S. criminal law and enforcement in this way would be terribly misguided. Forman’s research implicates but does not give attention to three important issues that help to alleviate any conflict a reader might find between his observations and antiracist analysis of U.S. criminal law and

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151. *Id.* (“Because race and class are so rhetorically potent in our society, writers will reach for them when possible.”).

152. *Id.* at 744.

153. *Id.* (discussing Stanley Crouch, Richard Ford, and James Forman).

154. *Id.* (rejecting antiracist criticism of U.S. criminal law and enforcement because “as black Yale law professor James Forman, Jr. recently pointed out, violent crime was behind more incarceration and the black community was deeply complicit in the passage of crime control legislation because it bore the burden of most crime” (citing FORMAN, *supra* note 1)).

155. See, e.g., Dan Subotnik, *Are Law Schools Racist? Part II*, 43 U.S.F. L. REV. 761, 769 (2009) (“All of us have a moral obligation to isolate and destroy racism when it rears its ugly face. For too long, however, we have undermined this goal by indulging in promiscuous charges of racism, thereby allowing our inter-group relations to be poisoned and our attention to be diverted from real problems . . . .”); Dan Subotnik, *Do Law Schools Mistreat Women Faculty? Or, Who’s Afraid of Virginia Woolf?*, 44 AKRON L. REV. 867, 869 (2011) (responding to feminist theorists who argue that sexism limits opportunities of women in law schools and concluding that the “charges are almost entirely unproven” and that “perhaps for now, male faculty can lay down the burden of guilt for the long-term exclusion of women from the academy”); Dan Subotnik, *The Duke Rape Case Five Years Later: Lessons for the Academy, the Media, and the Criminal Justice System*, 45 AKRON L. REV. 883, 898–99 (2012) (describing critical race theorists as “modern day Don Quixotes [who] inflate their self-importance, feed their self-righteousness, undermine individual responsibility by promoting self-pity, impale innocents, and, in so doing, shred the social fabric”).

156. Daniel Subotnik, *What’s Wrong with Critical Race Theory?: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL’Y 681, 738 (1998) (dismissing racism as a cause for disproportionate involvement of blacks in penal system and attributing this reality to the “abandon[ment] of the traditional family” and to the United States “having the highest rate of teen pregnancy in the industrialized world”).

enforcement: the possible influence of white supremacy on black punitive sentiment, geographical limitations of black political power, and the pervasiveness of antiblack racism as a motivator of punitiveness among whites.

*A. Social Psychology and Possible Explanations for Black Punitiveness*

For some readers, Forman’s observations might complicate arguments that link mass incarceration with white supremacist decision making. Because blacks endorsed aggressive policing and harsh punishments, something other than racism – such as a misguided reaction to fear – must have sparked the enactment of policies that gave rise to mass incarceration. The narratives Forman unearths, however, could also fortify antiracist accounts of U.S. criminal law and enforcement. Social psychology research on implicit bias and other theories of human behavior, including social dominance orientation and right-wing authoritarianism, provide important context for understanding why some level of punitiveness among blacks could *result from* – rather than disprove – the existence of racism. Thus, this research could help to reveal the centrality of white supremacy to U.S. punitive sentiment, including punitiveness among blacks.<sup>157</sup>

*1. Implicit Bias and Out-Group Preferences*

Substantial cognitive psychology research finds that human mental processes, thoughts, and behavior take place “largely outside conscious awareness, control, and intention.”<sup>158</sup> Implicit bias describes the unconscious behavioral leanings that result from two important types of unconscious mental processes: “implicit attitudes” and “implicit stereotypes.”<sup>159</sup> Implicit attitudes, which are

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157. This Section does not (and cannot) offer proof that racist constructs gave rise to punitiveness among blacks. Furthermore, even if the social psychology concepts analyzed in this Section could explain black punitiveness, this would not preclude other possible explanations. Racial inequality and mass incarceration are very complex social problems that are sustained by numerous influences. Consequently, readers should not view this Review as foreclosing multiple explanations for black punitiveness.

158. Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 428 (2007).

159. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 947 (2006).

produced by prior experiences, involve unconscious preferences regarding a particular “social object.”<sup>160</sup> An unconscious and implicit stereotype is a “mental association between a social group or category and a trait.”<sup>161</sup> Legal scholars and other academics argue that pervasive implicit biases explain how racial, sexual, and other inequities persist in spite of cultural and legal norms that promote egalitarianism.<sup>162</sup>

Implicit bias theory has broad implications for criminal law and enforcement policy and research. Implicit bias studies have found that whites tend to view people of color—particularly blacks—as more violent.<sup>163</sup> For example, “shooter studies” test whether implicit racial biases can explain why police officers use lethal force against unarmed blacks to a much higher degree than unarmed whites.<sup>164</sup> Participants in shooter studies watch a screen that projects images of persons of different racial backgrounds. The researchers instruct participants to press a button to shoot if they see a person holding a gun and not to shoot if the person is unarmed.<sup>165</sup> Many of these studies demonstrate that participants, including police officers, tend to shoot unarmed blacks at a much higher rate than unarmed whites.<sup>166</sup> Other studies find that race influences whether participants,

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160. Lane et al., *supra* note 158, at 429 (quoting Anthony G. Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 8 (1995)).

161. Greenwald & Krieger, *supra* note 159, at 949.

162. See, e.g., Greenwald & Krieger, *supra* note 159, at 961; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005).

163. See, e.g., Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 405-06 (1991) (discussing a study that found participants more likely to rate behavior engaged in by blacks as “violent” and less likely to do so when whites engaged in the same behavior); *id.* at 406 (discussing a study that “found that both Black and White children tended to rate relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites”).

164. Lane et al., *supra* note 158, at 429-30; see also Hutchinson, *supra* note 9, at 39-40 (discussing shooter studies).

165. Lane et al., *supra* note 158, at 429-30.

166. See Hutchinson, *supra* note 9, at 40 n.105 (citing Lane et al., *supra* note 158, at 429-30) (“The data revealed systematic racial bias in shooting, with faster and more accurate responses to unarmed white targets and armed black targets compared with armed white targets and unarmed black targets.”); see also R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1174 (2006) (“The shooting studies, conducted by several different groups of researchers, all found that shooting behavior differed based on the race of the ‘suspect.’ One finding was that images of unarmed Black men were more likely to be ‘shot’ than were images of unarmed White men, a result consistent with the shootings of unarmed Black men that have generated so much controversy.” (citations omitted)); Kimberly Barsamian Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup*

including persons of color, interpret observed behavior as aggressive or violent.<sup>167</sup> Furthermore, some implicit bias research indicates that probation officers who score high on implicit racial bias measures tend to rate black offenders as having a greater risk of recidivism than similarly situated whites.<sup>168</sup> These studies suggest that implicit racial bias could have a substantial effect on criminal law and enforcement.<sup>169</sup>

Forman isolates fear as the primary motivation for black punitiveness, but antiblack stigma among blacks could also explain their support of aggressive crime policy. The social psychology concepts of out-group and in-group preferences can illuminate this point. *Out-group* preferences refer to an individual's negative perception of persons from his or her social class and favorable impression of outside groups (e.g., blacks believing whites are smarter than blacks).<sup>170</sup> *In-group* preferences indicate positive attitudes regarding members of the individual's social class and negative impression of outsiders (e.g., whites favoring other whites over persons of color).<sup>171</sup> Most of the existing research examines implicit biases among members of socially advantaged classes, but some studies analyze implicit biases among marginalized groups.<sup>172</sup> This research reveals greater in-group preferences among members of privileged classes and greater

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*Members*, 14 GROUP PROCESSES & INTERGROUP RELS. 569, 577-79 (2010) (finding a positive correlation between darker racial phenotypes, negative stereotypes, and decisions to shoot).

167. See Kwei Yung Lee, *supra* note 163, at 405-06.

168. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

169. Although the idea that implicit bias impacts human behavior has wide support in academic literature, some scholars question this observation. See, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Gregory S. Parks, Jeffrey Rachlinski, & Richard Epstein, *Implicit Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210, 216-20 (2008) (questioning the relevance of implicit bias) (remarks of Richard Epstein); see also Hutchinson, *supra* note 9, at 41-42 (discussing academic criticism of implicit bias research and responses to these critiques).

170. See Greenwald & Krieger, *supra* note 159, at 959.

171. See Lane et al., *supra* note 158, at 433.

172. See, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004) ("Initial investigations on the nature of implicit prejudice and stereotypes focused entirely on attitudes and beliefs held by members of advantaged groups toward members of disadvantaged groups."); *id.* at 149-51, 160-62 (discussing studies); Leslie Ashburn-Nardo, Megan L. Knowles & Margo J. Monteith, *Black Americans' Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 62 (2003) (observing that "[d]ecades of research have documented the negativity that many white Americans associate with black Americans" but that "[f]ar fewer studies have examined blacks' own attitudes toward and evaluative associations regarding their own race").

out-group preferences among members of socially disadvantaged groups.<sup>173</sup> Although researchers have not conclusively identified the cause of this disparity, they have theorized that out-group preferences among socially subordinate groups likely stem from the pervasiveness of negative stereotypes concerning their classes.<sup>174</sup> Members of subordinate classes unconsciously accept the societal stigma of their own groups.<sup>175</sup>

Although Forman does not significantly examine the possibility that implicit racial bias might cause blacks to support harsh punitive measures, the existence of out-group preferences among blacks could provide additional context for Forman's findings and bolster antiracist explanations for mass incarceration.<sup>176</sup> Indeed, social psychology studies demonstrate that blacks hold some of the same implicit biases regarding blacks that scholars have observed among whites. For example, a leading shooter bias study found that, like their white counterparts, black participants "shot" armed blacks more quickly than armed whites and shot unarmed blacks more often than unarmed whites.<sup>177</sup> Similarly, a 1980 study—conducted when the surge in U.S. incarceration was relatively embryonic—found that both black and white participants were more likely to view blacks as more violent or aggressive than whites.<sup>178</sup> Other research shows that blacks exhibit out-group preferences in noncriminal contexts by implicitly associating whiteness with greater intellectual capacity.<sup>179</sup> If this research accurately captures the existence of implicit racial bias among significant numbers of blacks, then black support for tough criminal justice policies could stem, at least in part, from exposure to antiblack stigma. This finding would strengthen the link between

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173. Dasgupta, *supra* note 172, at 149 ("Consistent with system justification theory, a number of studies reveal outgroup favoritism (or sometimes, less in-group favoritism) in the case of disadvantaged groups, especially when people's attitudes and beliefs are assessed using indirect measures rather than self-report measures.").

174. *Id.* at 148.

175. *Id.* ("[F]or members of disadvantaged social groups, implicit liking for the ingroup may sometimes be attenuated by the cultural construal of their group . . .").

176. FORMAN, *supra* note 1, at 12-13.

177. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002).

178. See H. Andrew Sagard & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980) (finding a propensity among white and black children to evaluate the same behavior by white and black actors as more aggressive when the actor was black).

179. Ashburn-Nardo et al., *supra* note 172, at 72-77 (finding a correlation between implicit out-group bias and blacks' preference for whites as partners for the completion of an intellectual project).

racism and mass incarceration made by antisubordination theorists. If black punitive attitudes reflect negative conceptions of blacks, then Forman's research fits comfortably within antiracist analysis of U.S. criminal law and enforcement.

The "Martin Luther King speech"<sup>180</sup> is just one example of how implicit racial bias could have shaped black punitive attitudes in the individuals Forman analyzes. To Forman, the King speech stands as a racial-equality justification for black punitiveness. Facially, this is a reasonable conclusion. Nonetheless, implicit racial (and class) bias could also provide context for the speech. The judge's assertion that Forman's client had squandered opportunities that civil rights activists obtained for him obscured the salience of racism and poverty in the 15-year-old's life, thus reducing his hardships to a series of flawed individual choices. This reasoning strongly suggests that the judge implicitly (or, perhaps, explicitly) subscribed to racial and class stereotypes that depict blacks as lawbreakers<sup>181</sup> who prefer criminality over working hard to escape poverty.<sup>182</sup> While it is impossible to determine exactly how the judge would have responded to white defendants, it is clear that race shaped his treatment of the black defendant. If the defendant were white, the King speech would have had no rhetorical value. Viewed in a more complicated racial context, the King speech suggests the possible operation of implicit bias and the relevance of antiblack stigma to black punitive sentiment.<sup>183</sup> Given the powerful impact of unconscious stereotypes on human behavior, legal scholars and social scientists should explore the potential influence of implicit racial bias on blacks in future research regarding race, crime, and punitiveness.

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180. See *supra* text accompanying notes 124-128.

181. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580-82 (2013) (discussing stereotypes of black men).

182. Christopher D. DeSante, *Working Twice as Hard To Get Half as Far: Race, Work Ethic, and America's Deserving Poor*, 57 AM. J. POL. SCI. 342, 353-54 (2013) (finding that whites are more likely to conclude that poor blacks are lazy and undeserving of benefits and less likely to hold such a view of poor whites).

183. Cf. Bobo & Johnson, *supra* note 40, at 164 ("Among Blacks we find that racial resentment increases support for the death penalty . . ."); *id.* at 167 ("Among Blacks, those who deny the existence of racial bias, who worry most about crime, and who harbor racial resentments, are the most likely to support the crack vs. powder sentencing differential.").

## 2. Social Dominance Orientation and Negative In-Group Attitudes

Another social psychology concept—social dominance theory<sup>184</sup>—could potentially explain punitiveness among some blacks. In their leading work on the subject, Jim Sidanius and Felicia Pratto observe that group-based hierarchy exists in all human societies.<sup>185</sup> In hierarchical societies, dominant classes have access to desirable resources, like high-quality schools, jobs, and medical care, while subordinate classes struggle to obtain important goods and services.<sup>186</sup> Social dominance theorists measure an individual's commitment to group-based hierarchy by testing for “social dominance orientation” (SDO).<sup>187</sup> Although social dominance theory has substantially influenced social science research, only a handful of legal scholars have engaged with this concept.<sup>188</sup> Nevertheless, social dominance theory could provide a contextual framework for understanding punitive sentiment generally, as well as blacks' endorsement of aggressive criminal law and enforcement practices.

Criminal law and enforcement implicate social dominance theory due to the potency of state authority. The enforcement of criminal law is one of the most powerful exercises of state authority.<sup>189</sup> Criminal law and enforcement allow the state to deprive individuals of life, liberty, and property, subject to the constraints

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184. See generally JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* (1999) (developing social dominance theory).

185. *Id.* at 31.

186. *Id.* at 31-32.

187. *Id.* at 50, 61 (“SDO is defined as a very general individual differences orientation expressing the value that people place on nonegalitarian and hierarchically structured relationships among social groups.”).

188. See, e.g., Hutchinson, *supra* note 9, at 46-56; Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 41-42 (2015); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 673-77 (2003); Michael Selmi, *Understanding Discrimination in a “Post-Racial” World*, 32 CARDOZO L. REV. 833, 853 (2011); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1570-71 (1998).

189. See Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 BYU L. REV. 321, 366-67 (1990) (describing “enforcement of state criminal law” as “perhaps the most important exercise of state sovereign prerogative”); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010) (“Punishment under law is a profound exercise of state power the meaning and justification of which depend on the social and political institutions that authorize it.”); Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner's Dilemma*, 98 IOWA L. REV. BULL. 97, 99 (2013) (“Incarceration . . . is one of the most profound exercises of state authority.”).

of due process.<sup>190</sup> Because criminal law and enforcement subordinate persons of color, social dominance theory could help to shed light on the roots of U.S. punitive sentiment. Specifically, social dominance theory provides a psychological basis for understanding why U.S. crime policy continues to subordinate persons of color. In this vein, social dominance theorists argue that the racially oppressive nature of criminal law and enforcement exists in order to allow dominant classes to retain privileged access to high-value social resources and to deprive subordinate groups of hierarchy-attenuating goods and services.<sup>191</sup>

Furthermore, because SDO strongly correlates with individual approval of tough criminal law and punishment, including the death penalty and torture,<sup>192</sup> social dominance theory could potentially explain why some blacks support punitive policies that disproportionately harm other blacks. Although social dominance research finds that members of dominant classes have higher SDO scores, studies also indicate that significant numbers of people in subordinate groups, including racial minorities and women, have high SDO scores.<sup>193</sup> In addition to backing tough criminal laws and punishment, high-SDO individuals tend to embrace negative stereotypes that portray people of color as disposed to criminality.<sup>194</sup> Moreover, social psychology research finds that persons with high SDO scores can exhibit out-group or in-group preferences.<sup>195</sup> Researchers in this field

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190. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); *id.* amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

191. SIDANIUS & PRATTO, *supra* note 184, at 205 (arguing that criminal law and enforcement “function[] to protect and maintain the status, privilege, and power of dominants”).

192. See Sidanius et al., *supra* note 17, at 445-46.

193. See Shana Levin et al., *Social Dominance Orientation and Intergroup Bias: The Legitimation of Favoritism for High-Status Groups*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 144, 145 (2002) (reviewing literature finding an out-group preference among subordinates with high SDO scores); Felicia Pratto & Andrew L. Stewart, *Group Dominance and the Half-Blindness of Privilege*, 68 J. SOC. ISSUES 28, 38 (2012) (finding higher SDO among European Americans than Hispanic Americans and African Americans).

194. See Hutchinson, *supra* note 9, at 85 (discussing such findings).

195. Levin et al., *supra* note 193, at 145 (“In this spirit, social dominance theory . . . has suggested that a basic desire for group-based forms of inequality and dominance also may give rise to intergroup bias.”). By contrast, persons in subordinate classes with high SDO scores have strong in-group preferences if they believe existing hierarchies are invalid. *Id.* at 147 (“In general, studies in this area suggest that members of both high- and low-status groups tend to accept the hierarchical status quo – and consensually favor the high-status group – when the status distinction between the groups is believed to be legitimate.”); see also John T. Jost & Erik P. Thompson, *Group-Based Dominance and Opposition to Equality as Independent Predictors of Self-Esteem, Ethnocentrism, and Social Policy Attitudes Among African Americans and European*

contend that high-SDO scorers within subordinate groups will favor out-groups if they believe existing group hierarchies are legitimate.<sup>196</sup> It may follow logically that high-SDO blacks who accept social hierarchy as valid would likely support policies – such as harsh criminal law and enforcement – that favor out-groups.

Other social dominance scholarship connects SDO with punitiveness. For example, some research examines SDO among subordinate and advantaged criminal law professionals.<sup>197</sup> One study conducted using a sample drawn from Los Angeles finds that police have higher levels of SDO than civilians and criminal defense attorneys.<sup>198</sup> The study, however, finds racial differences that are consistent with other relevant research. For example, white police officers have the highest SDO levels of all of the subject groups.<sup>199</sup> While “minority”<sup>200</sup> officers have lower SDO scores than white police, their scores exceed those of black and white civilians.<sup>201</sup> Furthermore, this particular study finds that minority officers have the highest punitive sentiment of all subject groups – although the researchers cannot explain this result.<sup>202</sup>

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*Americans*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 209, 229–30 (2000) (finding a negative correlation between opposition to egalitarian policies and in-group preferences among blacks). Researchers in this area find two strands of SDO: desire to dominate and opposition to equality. The linkage between SDO and negative in-group perceptions among subordinate classes appears to reflect opposition to equality more than desire to dominate. See, e.g., Jost & Thompson, *supra*; Levin et al., *supra* note 193, at 147.

196. See Levin et al., *supra* note 193, at 147 (“In general, studies in this area suggest that members of both high- and low-status groups tend to accept the hierarchical status quo – and consensually favor the high-status group – when the status distinction between the groups is believed to be legitimate.”); *id.* at 155 (finding that “high SDO leads members of [low-status] groups to favor the high-status group in a system-justifying fashion only when social change is seen as impossible or unnecessary”). By contrast, persons in subordinate classes with high SDO scores have strong in-group preferences if they believe existing hierarchies are invalid. *Id.* at 147 (“[W]hen the status distinction is believed to be illegitimate, intergroup behavior is no longer under the influence of shared norms, and each group tends to follow its own interests. In practical terms, this implies continued ingroup bias among members of high-status groups and a shift from outgroup bias toward ingroup bias among members of low-status groups.” (citations omitted)).

197. See, e.g., Jim Sidanius et al., *Social Dominance Orientation, Hierarchy Attenuators and Hierarchy Enhancers: Social Dominance Theory and the Criminal Justice System*, 24 J. APPLIED SOC. PSYCHOL. 338, 344–45 (1994) (examining SDO among police officers, public defenders, jurors, and civilians).

198. *Id.* at 348–49.

199. *Id.* at 350.

200. The study does not disaggregate findings for Blacks and Latinos. Instead, they are presented together as “minorities.” *Id.*

201. *Id.* at 357.

202. *Id.*

This research does not focus specifically on the issue Forman examines — namely, 1970s-2000s punitiveness among Washington, D.C. blacks. Nevertheless, these findings could have important implications for analysis of black punitive sentiment. Consider, for example, a study Forman examines regarding attitudes among black and white police officers in Boston, Chicago, and Washington, D.C.<sup>203</sup> Forman correctly observes that the study finds that “a significant minority of black officers . . . expressed antiblack attitudes.”<sup>204</sup> In particular, the study finds that twenty-eight percent of black officers in black precincts were “highly prejudiced” or “prejudiced.”<sup>205</sup> Forman also analyzes statements made by black officers who participated in the study.<sup>206</sup> One black officer who worked in a predominately black precinct told a researcher, “I’m talking to you as a Negro, and I’m telling you these [blacks] are savages. And they’re real dirty. We were never rich, but my mother kept us and our home clean.”<sup>207</sup> Another black officer stated that “[t]here have always been jobs for Negroes, but the f—people are too stupid to go out and get an education.”<sup>208</sup> Statements made by a black police officer in another study Forman discusses follow a similar pattern. That officer, who worked in Baltimore, said that “[ghetto residents] are lazy. L-A-Z-Y. Waiting in the cheese line. Being poor is no excuse for being ignorant. I made it in this country. It can be done. But you got to work for it.”<sup>209</sup>

These officers’ comments reflect antiblack sentiment,<sup>210</sup> as Forman observes. The statements, however, also indicate that the officers view the existing social hierarchy as legitimate. Blacks are poor because they choose not to pursue an education — not because racial subordination limits opportunity. Also, blacks live

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203. FORMAN, *supra* note 1, at 108. The study Forman cites is Donald J. Black & Albert J. Reiss, Jr., *Patterns of Behavior in Police and Citizen Transactions*, 2 *STUD. CRIME & L. ENFORCEMENT* 135 (1966).

204. FORMAN, *supra* note 1, at 108.

205. *Id.* (citing Black & Reiss, *supra* note 203, at tbl.25).

206. *Id.*

207. *Id.* (citing Black & Reiss, *supra* note 203, at 137).

208. *Id.*

209. *Id.* at 265 n.130 (citing Peter C. Moskos, *Two Shades of Blue: Black and White in the Blue Brotherhood*, 8 *LAW ENFORCEMENT EXECUTIVE F.* 57, 74 (2008)). The black officer was describing his view of Baltimore’s “ghetto residents.” See Moskos, *supra*, at 74.

210. The officers’ comments draw upon pervasive antiblack stereotypes. See FORMAN, *supra* note 1, at 108 (discussing antiblack attitudes among black police officers); see, e.g., Marci Bounds Littlefield, *The Media as a System of Racialization: Exploring Images of African American Women and the New Racism*, 51 *AM. BEHAV. SCI.* 675, 679 (2008) (analyzing “common stereotypes of African Americans as savages” in U.S. popular culture); Lee Sigelman & Steven A. Tuch, *Blacks’ Perceptions of Whites’ Stereotypes of Blacks*, *PUB. OPINION Q.*, Spring 1997, at 87, 88 (analyzing stereotypes of blacks as “lazy, poor, violent, unintelligent, and welfare dependent”).

in poor housing conditions because they are “savages” who lack the capacity or desire to improve their circumstances – not because racial subordination deprives them of the necessary resources for social advancement, such as jobs, education, and valuable social networks. The black officers subscribe to negative in-group attitudes *and* view the existing social hierarchy as legitimate; this combination correlates positively with SDO.<sup>211</sup> When high-SDO subordinates disfavor members of their in-group and perceive group-based inequality as just, they also tend to oppose egalitarian policies designed to redistribute important resources to their group.<sup>212</sup> Furthermore, because police officers – including racial minorities – have higher SDO scores than civilians and because SDO strongly correlates with punitiveness, social dominance theory could likely help to explain why some black police officers engage in and support aggressive law-enforcement practices that harm blacks. In order to develop a more comprehensive analysis of punitiveness among blacks, researchers should consider whether SDO influences black attitudes regarding crime and punishment. The forgoing analysis does not prove that SDO shaped black punitiveness in twentieth-century Washington, D.C. (or that it does so today), but rigorous academic engagement with social dominance research could provide context for explaining the dimensions of black punitiveness. The relationship among SDO, group-based inequality, racism, and punitiveness provides a compelling basis for employing social dominance theory to explicate the influences of punitive sentiment, including punitiveness among blacks.

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211. See Levin et al., *supra* note 193, at 147.

212. See *supra* text accompanying notes 195-196. Some scholars would argue that acceptance and promotion of status quo racial inequality as a legitimate social order are essential dimensions of the “new” racism. See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 2 (4th ed. 2013) (arguing that “contemporary racial inequality is reproduced through ‘new racism’ practices that are subtle, institutional, and apparently nonracial”); William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 *COLUM. L. REV.* 1855, 1857–58 (2012) (“The old racism of state-sponsored segregation and avowedly bigoted private action has thankfully diminished. However, it has largely been supplanted by the ‘new racism’ of systemic inequality, unconscious bias, and more subtle forms of racial exclusion.”); Colin Wayne Leach, *Against the Notion of a “New Racism”*, 15 *J. COMMUNITY APPLIED SOC. PSYCHOL.* 432, 433 (2005) (“That racial discrimination and racist political movements persist in societies that have achieved *de jure* equality has led many to suggest that a ‘new racism’ serves as an ideological basis of contemporary white investment in racial inequality.”).

### 3. *Right-Wing Authoritarianism and Support for Law and Order Policies*

Forman's research implicates a third social psychology category: right-wing authoritarianism (RWA), a model developed by Canadian psychologist Bob Altemeyer in his work *The Authoritarian Specter*.<sup>213</sup> RWA consists of three attitudinal measures:

1. Authoritarian submission: a high degree of submission to the authorities who are perceived to be established and legitimate in the society in which one lives.
2. Authoritarian aggression: a general aggressiveness, directed against various persons, that is perceived to be sanctioned by established authorities.
3. Conventionalism: a high degree of adherence to the social conventions that are perceived to be endorsed by society and its established authorities.<sup>214</sup>

The second attitudinal cluster—authoritarian aggression—relates most closely to individual support for harsh punitive measures. Aggression involves intentional infliction of harm, which is authoritarian when “it is accompanied by the belief that proper authority approves it or that it will help preserve such authority.”<sup>215</sup> Because right-wing authoritarians uncritically submit to the legitimacy of “established authorities,”<sup>216</sup> they support inflexible application of punitive measures.<sup>217</sup> As Altemeyer observes, “[r]ight-wing authoritarians are predisposed to control the behavior of others through punishment . . . . They deplore leniency in the courts and believe penal reform just encourages criminals to continue being lawless.”<sup>218</sup> Furthermore, right-wing authoritarians subscribe

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213. BOB ALTEMEYER, *THE AUTHORITARIAN SPECTER* (1996). Altemeyer's model builds upon THEODOR W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

214. ALTEMEYER, *supra* note 213, at 6 (citation omitted). Altemeyer created a thirty-item attitude scale to measure RWA personality. *See id.* at 12-15.

215. *Id.* at 10.

216. *Id.* at 9.

217. *Id.* at 10.

218. *Id.*; *see also* John S. Carroll et al., *Sentencing Goals, Causal Attributions, Ideology, and Personality*, 52 J. PERSONALITY & SOC. PSYCHOL. 107, 108 (1987) (“Authoritarians are usually found to have a more punitive attitude toward crime and to give harsher sentences.”); Ian R. McKee & N.T. Feather, *Revenge, Retribution, and Values: Social Attitudes and Punitive Sentencing*, 21 SOC. JUST. RES. 138, 141 (2008) (“One personality variable that has demonstrated a consistent association with punitive and retributive reactions to criminal offenses is RWA.”).

to traditional views regarding sexuality and gender, which lead them to support policies that subordinate and discriminate against LGBT individuals.<sup>219</sup> In addition, right-wing authoritarianism is highly correlated with prejudicial views of racial minority groups.<sup>220</sup>

Although Forman's research does not discuss RWA, some research indicates that this attitudinal cluster exists among blacks.<sup>221</sup> Furthermore, some of the anecdotes that Forman narrates in his research suggest the possible influence of RWA upon black attitudes regarding criminal behavior. In particular, statements of Washington, D.C. law enforcement officials and politicians regarding the 1996 antidrug policy "Operation Clean Sweep" indicate strong support for aggressive policing and punishment commonly associated with RWA. For example, police chief Maurice Turner said at a press conference announcing the program that, "We're going to arrest every one of those [SOBs] that we can get."<sup>222</sup> Furthermore, Mayor Barry boasted about the program: "If you think it's hot to-

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219. ALTEMEYER, *supra* note 213, at 31.

220. *Id.*

221. See, e.g., Patrick C. L. Heaven & Ruth L. Greene, *African Americans' Stereotypes of Whites: Relationships With Social Dominance Orientation, Right-Wing Authoritarianism, and Group Identity*, 141 J. SOC. PSYCHOL. 141, 141-43 (2001) (finding SDO and RWA among blacks but finding a weak linkage between these psychological concepts and antiwhite stereotypes among blacks); Bernard E. Whitley Jr. et al., *Differences in Black and White American College Students' Attitudes Toward Lesbians and Gay Men*, 64 SEX ROLES 299, 304 (2011) (finding higher RWA among blacks in the sample); cf. Kevin O. Cokley et al., *Predicting Student Attitudes About Racial Diversity and Gender Equity*, 3 J. DIVERSITY HIGHER ED. 187, 192 (2010) (finding the existence of RWA across a racially diverse sample that included blacks but presenting results as ethnic majority and minority). The extent of RWA among blacks and the implications of this possibility remain substantially unexplored in academic literature.

222. FORMAN, *supra* note 1, at 168. Some research finds higher RWA among police officers and criminal justice majors (who often become police officers). See, e.g., Juliette Gatto et al., *Prejudice in the Police: On the Processes Underlying the Effects of Selection and Group Socialisation*, 40 EUR. J. SOC. PSYCHOL. 252, 259 (2010) ("Newly recruited police officers displayed greater levels of both SDO and RWA than participants in the control group . . ."); *id.* at 264 ("In other words, one of the reasons why police officers, when entering the police force, are significantly more prejudiced (towards prisoners) than are the standard population, may be because they are strongly oriented towards RWA."); Stephen S. Owen & Kenneth Wagner, *The Specter of Authoritarianism Among Criminal Justice Majors*, 19 J. CRIM. JUST. ED. 30, 47 (2008) ("Criminal justice majors, males, and lower-division students have higher mean RWA scores than non-criminal justice majors, females, and upper-division students. Upon further examination, male criminal justice majors (overall, at the lower division, and at the upper division) have the highest mean RWA scores.").

day, we're going to make it hotter on drug dealers and pushers who are destroying the minds of our young people."<sup>223</sup> Barry also bragged about militaristic weaponry that the city purchased for the police department.<sup>224</sup> These comments implicate "authoritarian aggression" and indicate support for rigid law and order approaches that correlate with the punitive aspects of RWA.<sup>225</sup>

Additionally, the history of other activists discussed by Forman reveals attitudes indicative of RWA. Consider, for example, Douglas Moore, who helped to defeat marijuana decriminalization in Washington, D.C.<sup>226</sup> A closer examination of Moore, who had a black nationalist background,<sup>227</sup> indicates that he was motivated by attitudes suggestive of RWA. For example, Moore's political history includes troubling stances on gay rights. Indeed, Moore lost a 1978 bid for city council chair after he decried "fascist faggots," which caused many voters to support his opponent.<sup>228</sup> Furthermore, Moore backed removing protections for gays and lesbians from local civil rights law.<sup>229</sup> Numerous studies link RWA to anti-LGBT attitudes because persons who exhibit this personality cluster respond very negatively to departures from traditional morality.<sup>230</sup>

Moore's political rhetoric also indicates that he might have subscribed to problematic views of poor blacks. For example, Moore explained that black youths who saw him drive a Cadillac might learn that they could make money selling "coal" rather than "coke," referring to the coal-trading business he founded.<sup>231</sup> This statement could indicate that Moore dismissed the structural constraints that lock poor blacks in poverty and evince possible contempt for their plight. Ultimately, it is impossible to draw any firm conclusions regarding Moore's racial attitudes from the limited historical resources in a Review. Nonetheless, the parallels between Moore's attitudes and RWA demonstrate that scholars should consider how RWA might influence black punitive sentiment.

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223. FORMAN, *supra* note 1, at 168.

224. *Id.*

225. See ALTEMEYER, *supra* note 213, at 10 (discussing punitiveness and RWA).

226. See *supra* text accompanying notes 62-68.

227. See *supra* note 63 and accompanying text.

228. See Milton Coleman, *Washington's Gay Vote*, WASH. POST (Apr. 21, 1979), <http://www.washingtonpost.com/archive/politics/1979/04/21/washingtons-gay-vote/bcd52b24-f3eb-45a3-908b-d10e1956775a> [<http://perma.cc/D8RU-NASV>].

229. Sandra Evans, *The New, Conservative Douglas Moore*, WASH. POST (Sept. 5, 1986), <http://www.washingtonpost.com/archive/local/1986/09/05/the-new-conservative-douglas-moore/59252267-1c58-40ab-a690-0d40153f3834> [<http://perma.cc/633Z-DS6N>].

230. ALTEMEYER, *supra* note 213, at 31.

231. See *id.*

Although the racial dimensions of RWA are clear for whites, researchers have not meaningfully explored this factor in blacks. Nonetheless, because RWA correlates so strongly with punitiveness, researchers – particularly those who employ social psychology to illuminate legal problems – should consider how RWA, including its association with antiblack prejudice, might influence black punitiveness. If right-wing authoritarianism exists among blacks and leads to out-group preferences, then this psychological category could explain why some blacks desired punitive measures that contributed to racially disparate mass incarceration policies. Indeed, many of Forman’s observations regarding black Washingtonians’ arguments in favor of strict punitive measures mirror the ideological commitments of right-wing authoritarians that Altemeyer’s groundbreaking research identifies. Individuals motivated by RWA oppose “leniency in the courts”<sup>232</sup> and object to “penal reform”<sup>233</sup> on the grounds that this would encourage criminality. Forman’s research uncovers similar attitudes among blacks. For example, Forman observes that Washington, D.C. blacks frequently objected to perceived leniency among judges.<sup>234</sup> Carl Rowan, a prominent black journalist, offered strong criticism of courts in a provocative column titled *Locking Up Thugs Is Not Vindictive*.<sup>235</sup> Rowan argued that judges allowed violent criminals to “terrorize minority communities again and again.”<sup>236</sup> Furthermore, black ministers opposed liberalization of marijuana laws because doing so would presumably lead to a host of social harms, including criminality.<sup>237</sup> The symmetry between the justifications for punitiveness among some Washington, D.C. blacks and right-wing authoritarian attitudes toward crime warrants greater examination by scholars. If RWA explains why a significant number of blacks endorse harsh punishment as social policy and if RWA among blacks causes out-group (or pro-white) preferences, these relationships would suggest that white supremacy informs some blacks’ punitive attitudes. Accordingly, RWA provides yet another possible contextual basis for understanding punitiveness among blacks. Analyzing this psychological category could provide a conceptual bridge that links Forman’s work with antisubordination accounts of U.S. criminal law and enforcement.

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232. *Id.* at 10.

233. *Id.*

234. FORMAN, *supra* note 1, at 127 (discussing critiques of the court system, including the perception of leniency).

235. *Id.* at 128–29 (citing Carl T. Rowan, *Locking Up Thugs Is Not Vindictive*, WASH. STAR (Apr. 23, 1976)).

236. *Id.*

237. *Id.* at 39.

*B. The Empirical Limits of Forman's Findings*

*1. Washington, D.C. as an Exceptional Site of Black Political Power*

Although Forman persuasively argues that blacks in Washington, D.C. used their political power to implement aggressive anticrime policies, this observation does not describe the reality of blacks' political power throughout the United States. Unlike in most of the country, blacks constituted a political majority in Washington, D.C.<sup>238</sup> During the 1980s, when the city's criminal law and enforcement policies became far more punitive, blacks controlled the city council, and the city had a black mayor.<sup>239</sup> Furthermore, the city appointed its first black chief of police in 1978.<sup>240</sup> Elsewhere in the United States, black political control over criminal law and enforcement was not, and continues not to be, as consistently strong. Furthermore, while blacks exercised substantial political power in Washington, D.C. and in other U.S. urban cities, they constituted a minority among individuals with great influence over punitive policies—including legislators, prosecutors, judges, and voters. Thus, blacks played a less substantial role in the rise of mass incarceration than *Locking Up Our Own* might suggest to some readers.

*a. Blacks as a Political Minority in State Legislatures and Congress*

Several factors limit the ability of blacks to impact criminal policies nationwide. First, blacks invariably constitute minorities in state legislatures, which are largely responsible for enacting state criminal statutes and for funding policing, prosecution, and incarceration. A 2015 study by the National Conference of State Legislatures found that only nine percent of state legislators are black, despite the fact that blacks comprise thirteen percent of the population.<sup>241</sup> Blacks' political underrepresentation extends to Congress as well. Only three blacks are members of the Senate, while only forty-eight blacks occupy seats in the House

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<sup>238</sup>. *Id.* at 18-19.

<sup>239</sup>. *Id.*

<sup>240</sup>. See Metropolitan Police Dep't, *Burtell M. Jefferson*, D.C. GOV'T, <http://mpdc.dc.gov/page/burtell-m-jefferson> [<http://perma.cc/LP77-QL4U>].

<sup>241</sup>. *Who We Elect: An Interactive Graphic*, NAT'L CONF. ST. LEGISLATURES (2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect-an-interactive-graphic.aspx> [<http://perma.cc/7A8Q-EFQP>].

of Representatives. Thus, only fifty-one of the 541 members of Congress are black—and this number represents the largest in U.S. history.<sup>242</sup>

*b. Blacks' Underrepresentation Among State Executives*

Blacks are also greatly underrepresented among state executives, who enforce criminal policies. The disproportionately low number of black state executives limits the extent to which blacks could be complicit in enforcing criminal policies and carrying out mass incarceration. Only four blacks have ever served as governors.<sup>243</sup> One of those—Pinckney Pinchback—held office for just 35 days during Reconstruction.<sup>244</sup> And, of course, only one black person has served as President of the United States.<sup>245</sup> Prosecutors are also disproportionately white, demonstrating that much of this nation's prosecutorial policy is shaped by whites, not blacks. Further, it is important to note that even in Washington, D.C., the prosecutor who enforces major criminal laws, including all felonies and serious misdemeanors, is not elected by the city's voters. Instead, the U.S. Attorney for the District of Columbia, who is appointed by the president, prosecutes all federal and serious local crimes in the city.<sup>246</sup> And while Washington, D.C.'s Attorney General oversees the prosecution of petty offenses, until 2014 the city's mayor, rather than voters, selected individuals to serve in this position.<sup>247</sup> These facts,

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242. See JENNIFER E. MANNING, CONG. RES. SERV., R44762, MEMBERSHIP OF THE 115TH CONGRESS: A PROFILE 7 (2018).

243. Anna Brown & Sara Atske, PEW RES. CTR., *Blacks Have Made Gains in U.S. Political Leadership, but Gaps Remain* (June 28, 2016), <http://www.pewresearch.org/fact-tank/2016/06/28/blacks-have-made-gains-in-u-s-political-leadership-but-gaps-remain> [<http://perma.cc/S45V-F63J>].

244. *Id.*

245. Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES (Nov. 4, 2008), <http://www.nytimes.com/2008/11/05/us/politics/05elect.html> [<http://perma.cc/BYC6-5SFG>].

246. Irvin Nathan, Opinion, *Let D.C.'s Elected Attorney General Prosecute D.C. Crimes*, WASH. POST (Feb. 12, 2016), [http://www.washingtonpost.com/opinions/let-dcs-elected-attorney-general-prosecute-dc-crimes/2016/02/12/91ded204-c91c-11e5-88ff-e2d1b4289c2f\\_story.html](http://www.washingtonpost.com/opinions/let-dcs-elected-attorney-general-prosecute-dc-crimes/2016/02/12/91ded204-c91c-11e5-88ff-e2d1b4289c2f_story.html) [<http://perma.cc/B2EA-5THJ>] (“In every city except the District, the prosecutions of serious local crimes—from murder to consumer fraud—are handled by prosecutors either elected or appointed by elected local officials. But in the District, all felonies and some serious misdemeanors are prosecuted by the U.S. attorney's office, whose chief is appointed by the president and is not accountable to D.C. citizens.”).

247. T. Rees Shapiro & Mike DeBonis, *Karl Racine Wins First-Ever Race for D.C. Attorney General*, WASH. POST. (Nov. 4, 2014), [http://www.washingtonpost.com/local/dc-politics/dc-voters-set-to-choose-their-first-elected-attorney-general-tuesday/2014/11/04/do6e9160-6141-11e4-8b9e-2ccdac31a031\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-voters-set-to-choose-their-first-elected-attorney-general-tuesday/2014/11/04/do6e9160-6141-11e4-8b9e-2ccdac31a031_story.html) [<http://perma.cc/QYW3-NC2J>].

to some extent, diminish black electoral control over the prosecution of crime in Washington, D.C.

Black political control of prosecution is substantially weaker in other jurisdictions. A 2015 study compiled by the Reflective Democracy Campaign, for example, found that ninety-five percent of elected prosecutors in the United States are white and eighty-three percent are male.<sup>248</sup> Just one percent of U.S. elected prosecutors are women of color.<sup>249</sup> Considering these numbers in light of prosecutorial power raises serious questions about the extent to which blacks contributed to the policies and practices that expanded the U.S. carceral state. Prosecutors have an enormous amount of power; they can charge an individual, determine the level of the charges, use deferred adjudication or other diversionary programs, negotiate plea agreements, and pursue available sentencing enhancements.<sup>250</sup> Not only do all of these choices rest within the scope of prosecutorial authority, but they are also all discretionary—prosecutors have full discretion to make the choices that determine whether an individual is prosecuted, receives a favorable plea agreement, or faces the maximum available sentence. Furthermore, head prosecutors, almost all of whom are elected, greatly influence the policies for the offices they manage.<sup>251</sup>

Typically, prosecutors can choose from many different charges for a single set of facts.<sup>252</sup> The proliferation of criminal offenses and correspondingly higher sentences in state penal codes give prosecutors a tremendous amount of leverage

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248. *Justice for All\*?*, WOMEN DONORS NETWORK, <http://wholeads.us/justice> [<http://perma.cc/VLA8-DGAJ>]. None of these studies indicates that the number of black elected prosecutors is lower today than it was in the 1970s. Given the increase in the number of black attorneys over time, that result would be counterintuitive. See Carla D. Pratt, *Sisters in Law School: Black Women Lawyers' Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1780-81 (“Admittedly, since the 1970s there has been steady improvement in the number of black women becoming lawyers. In the two decades between 1970 and 1990, the number of black women lawyers increased dramatically from 446 to over 11,000.”); *Diversity in Law Firms*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (2003), <http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw> [<http://perma.cc/CK46-RPKS>] (showing an increase in the percentage of black attorneys in large firms between 1975 and 2002 and among law school graduates between 1982 and 2002).

249. Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015), <http://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<http://perma.cc/62CP-7M6M>] (citing *Justice for All\*?*, *supra* note 248).

250. See Angela J. Davis, *The Prosecution of Black Men*, in *POLICING THE BLACK MAN* 178-83 (Angela J. Davis ed., 2017) (discussing prosecutorial discretion).

251. Prosecutors are elected in forty-six states. See PFAFF, *supra* note 3, at 128.

252. *Id.* at 129.

over defendants. Prosecutors can use the threat of a higher charge – and potential sentence – to pressure defendants into a plea agreement. Empirical research indicates that defendants plead guilty in the vast majority of felony cases that go into prosecution.<sup>253</sup>

Prosecutors have used their power over charging decisions to play a significant role in mass incarceration. From 1990 to 2007, the number of prosecutors in the United States increased by fifty percent, even though the rates of violent and property-related crimes dropped thirty-five percent.<sup>254</sup> These prosecutors used their broad discretion to file more felony cases; as criminal law scholar John Pfaff has observed, the number of felony cases rose substantially between 1994 and 2008.<sup>255</sup> Thus, even as crime rates declined, the number of incarcerated individuals increased sharply, due in large part to prosecutors charging defendants with more serious crimes.<sup>256</sup> Although prosecutors played a major role in creating mass incarceration, demographic data suggests white prosecutors were far more influential in this process.

*c. Blacks' Underrepresentation Among Judges*

Blacks are also underrepresented among state and federal judges. For example, although thirteen percent of the U.S. population is black,<sup>257</sup> just seven percent of state judges are black.<sup>258</sup> The severe underrepresentation of black judges in the state court system is particularly important because eighty-seven percent of prisoners in state systems are black.<sup>259</sup> Meanwhile, eleven percent of federal judges are black.<sup>260</sup> Forman discusses the punitive attitudes of black judges in

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253. *Id.* at 132 (citing Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, BUREAU JUST. STAT. 10 (May 2010), <http://www.bjs.gov/content/pub/pdf/fdluco6.pdf> [<http://perma.cc/B9BZ-8LAS>]).

254. *Id.* at 129.

255. *Id.* at 72 (documenting a forty percent increase in Pfaff's sample).

256. *Id.*

257. *2010 Census Shows America's Diversity*, U.S. CENSUS BUREAU (Mar. 24, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn125.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html) [<http://perma.cc/39FS-J2R5>].

258. Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016, 9:00 AM), <http://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts> [<http://perma.cc/376E-BX9P>].

259. PFAFF, *supra* note 3, at 13.

260. *Id.*

Washington, D.C.,<sup>261</sup> but as a group, black judges have not been able to exercise a tremendous amount of power within criminal law and enforcement relative to whites. The relatively small number of black judges in the United States limits the impact of their decisions on the overall level of incarceration. While black judges have undoubtedly sentenced individuals to prison, their collective contribution to mass incarceration is constrained by their numbers.

2. *Empirical Research on Blacks' Opinions Regarding Crime and Punishment*

While Forman correctly observes that blacks in Washington, D.C., favored implementation of punitive policies, it is important to contextualize this support. Although empirical research confirms Forman's general observations regarding black punitiveness in the lead-up to mass incarceration, these studies also indicate that white support increased during this period and that white preference for strong law and order policies consistently exceeded black support.<sup>262</sup>

a. *Blacks, Legitimacy of Police, and Punishment*

Studies reveal differing views regarding the police among people of color and whites.<sup>263</sup> Relative to whites, blacks distrust police and believe that officers discriminate on the basis of race. They also believe that the legal system treats them unfairly, and they oppose harsh measures like the death penalty, supporting rehabilitation over inflexible punishment.<sup>264</sup> Furthermore, relative to whites, blacks strongly support public investments that could alleviate poverty, one of the primary causes of criminal behavior.<sup>265</sup> Thus, while Forman correctly observes that many blacks, like whites, endorsed stiff penalties for criminals during

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261. FORMAN, *supra* note 1, at 3-8.

262. Ramirez, *supra* note 39, at 352.

263. See *supra* text accompanying notes 141-143.

264. See Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENT'G PROJECT (Sept. 3, 2014), <http://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies> [<http://perma.cc/2LWG-DNWX>]; *Black, White, and Blue: Americans' Attitudes on Race and Police*, ROPER CTR., <http://ropercenter.cornell.edu/black-white-blue-americans-attitudes-race-police> [<http://perma.cc/6SU8-GC8Z>].

265. See David Lauter, *How Do Americans View Poverty? Many Blue-Collar Whites, Key to Trump, Criticize Poor People as Lazy and Content To Stay on Welfare*, L.A. TIMES (Aug. 14, 2016), <http://>

periods of heightened violent crime, empirical studies reveal that there are substantial racial differences.

Black punitiveness has consistently been lower than white punitiveness, including during the periods discussed in Forman's book. In line with Forman's findings, research on punitiveness confirms that black punitiveness increased substantially for nearly twenty years beginning in the mid-1970s.<sup>266</sup> This increase coincided with rising punitive sentiment among the general public.<sup>267</sup> Nonetheless, even as blacks' punitiveness increased, it lagged far behind the measure among whites.<sup>268</sup> Furthermore, since the mid-1990s, black support for punitive policies has decreased dramatically.<sup>269</sup> Although this decline follows general attitudes, black punitiveness remains much lower than the same measure among whites.<sup>270</sup> Available data shows that during the new millennium, with violent crime lower than it has been since 1970, blacks have exhibited a strong distrust of policing, disdain for high incarceration, and disapproval of harsh sentencing.<sup>271</sup> Additionally, blacks generally support the Black Lives Matter Movement, which opposes aggressive policing and the expanded U.S. carceral state.<sup>272</sup> Polls indicate that fewer than half of whites, by contrast, hold a favorable view of this movement and its goals.<sup>273</sup>

This data provides context for understanding black punitiveness. Blacks have not only supported a mixture of social welfare policies, along with strong law-enforcement responses rooted in the fear of crime, but they have also been consistently less punitive than whites and far more concerned with racial discrimination by the state. This remains true even if some blacks, as this Review

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[www.latimes.com/projects/la-na-pol-poverty-poll](http://www.latimes.com/projects/la-na-pol-poverty-poll) [<http://perma.cc/F5N6-VQ8U>] (describing more support for government anti-poverty programs among blacks and Latinos than whites).

266. See Ramirez, *supra* note 39, at 352. Ramirez measures punitiveness across four different categories, including support for death penalty, harsher sentencing by courts, expanding authority of law enforcement, and increased expenditures to toughen law enforcement. See *id.* at 336-42.

267. *Id.* at 352.

268. *Id.*

269. *Id.*

270. *Id.*

271. See sources cited *supra* note 264.

272. See Juliana Menasce Horowitz & Gretchen Livingston, *How Americans View the Black Lives Matter Movement*, PEW RES. CTR. (July 8, 2016), <http://www.pewresearch.org/fact-tank/2016/07/08/how-americans-view-the-black-lives-matter-movement> [<http://perma.cc/6346-ZADW>].

273. See *id.*

argues, might support anticrime measures due to racial bias. It appears that racial-justice concerns mitigate black support for harsh punitive measures. By contrast, among whites, racism strongly correlates with increased punitive sentiment.<sup>274</sup> Generally, whites have greater political power to enforce their perspectives. Taken together, these findings undermine any attempt to discount racism as a cause of mass incarceration and strongly suggest that reform efforts that do not include antiracist goals will likely have limited, if any, success.

*b. Black Politicians, Crime, and Punishment*

Moving beyond Forman's work to a wider examination of black attitudes allows for a more nuanced view of black politicians and their approaches to crime. For example, a study of 135 cities, which covers the same time period studied by Forman, finds that municipalities with black mayors were more likely to implement policies that establish civilian control over police departments.<sup>275</sup> Furthermore, research on 100 U.S. urban areas during the same period finds a negative relationship between the rate of arrest of blacks for violent crimes and the percentage of blacks living in the city; this pattern is stronger in cities that also had black mayors and predominately black city councils.<sup>276</sup>

Although blacks represent a minority of lawmakers nationwide, Forman correctly observes that they have supported draconian anticrime measures.<sup>277</sup> For example, twenty-four of the thirty-eight members of the Congressional Black Caucus (CBC) voted for the Violent Crime Control and Law Enforcement Act of 1994,<sup>278</sup> which has been highlighted by some legal scholars as a leading cause of mass incarceration, at least for the thirteen percent of inmates who are in federal custody.<sup>279</sup>

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274. Bobo & Johnson, *supra* note 40, at 171-72 (“[T]he most consistent predictor of criminal justice policy attitudes is, in fact, a form of racial prejudice. While racial resentment does not ever explain a large share of the variation in any of the attitudes we have measured, it is the most consistently influential of the variables outside of race classification itself.”); Green et al., *supra* note 40, at 444-45.

275. See Grace Hall Saltzstein, *Black Mayors and Police Policies*, 51 J. POL. 525, 541 (1989).

276. Thomas D. Stucky, *The Conditional Effects of Race and Politics on Social Control: Black Violent Crime Arrests in Large Cities, 1970 to 1990*, 49 J. RES. CRIME & DELINQ. 3, 22 (2012).

277. FORMAN, *supra* note 1, at 204-05 (discussing the evolution of black congressional opinion on drug laws).

278. Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022-23 (1994) (codified as amended in scattered sections of the U.S. Code).

279. See ALEXANDER, *supra* note 1, at 6-7; Yolanda Young, *Analysis: Black Leaders Supported Clinton's Crime Bill*, NBC NEWS (Apr. 8, 2016, 11:33 AM ET), <http://www.nbcnews.com/news/nbcblk>

Prior to the 1994 Act, black voting on federal crime statutes showed more mixed results, including far less support among black members of Congress than among all federal lawmakers. For example, over two decades before the passage of the 1994 legislation, Congress enacted the Comprehensive Drug Abuse and Prevention Act of 1970,<sup>280</sup> which created several new classes of drug crimes and penalties.<sup>281</sup> Two members of the CBC voted against the bill, representing one-third of the overall House opposition to the legislation. Furthermore, five members did not vote at all. Only three CBC members supported the measure – representing roughly one percent of the favorable House votes for the bill.<sup>282</sup> These facts support the general finding of lower levels of support for punitive policies among blacks. This additional context can reconcile any perceived conflict between Forman’s research and antiracist accounts of U.S. criminal law and enforcement.

*c. Black Police Officers*

Although Forman makes a persuasive case regarding the role black police played in the arrest of other blacks, additional research presents a more complicated picture of black policing. In particular, while Forman cites studies indicating antiblack racism among some black police officers, he concedes that the research indicates greater racial prejudice among white police.<sup>283</sup> Furthermore, other research indicates that in cities with black political leadership, police officers actually engage in fewer arrests. A study of every U.S. city with a population of at least 100,000 finds that maintenance-order arrests, a component of broken-

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/analysis-black-leaders-supported-clinton-s-crime-bill-n552961 [http://perma.cc/PEB3-NAEN].

**280.** Pub. L. No. 91-513, 84 Stat. 1236 (1970).

**281.** *Id.*

**282.** These figures were derived from a list of black Congress members and the roll call for each bill. History, Art & Archives, *Black-American Representatives and Senators by Congress, 1870–Present*, U.S. HOUSE OF REPRESENTATIVES (Jan. 23, 2008), <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress> [http://perma.cc/GY5P-6WBV] (showing a historical list of black members of Congress); *To Pass H.R. 18583, Comprehensive Drug Abuse Prevention and Control Act Of 1970*, GOVTRACK (2004), <http://www.govtrack.us/congress/votes/91-1970/h355> [http://perma.cc/F3ZK-KT55] (showing the votes on the bill by representative). The black members of the House of Representatives in 1970 were: William Dawson, Adam Clayton Powell, Jr., Charles Diggs, Robert Nix, Sr., Augustus Hawkins, John Conyers, Shirley Chisolm, Bill Clay, Louis Stokes, and James Collins. History, Art & Archives, *supra*.

**283.** FORMAN, *supra* note 1, at 108 (observing that the study indicated that “black officers were not as prejudiced as white ones”).

windows policing, are negatively correlated with black political representation in the city.<sup>284</sup> Some scholars have argued that statistics such as these represent underpolicing, which results from a lack of concern for black crime victims.<sup>285</sup> Regardless of the cause, the lower minor-crime arrest rates for blacks in majority-black political districts would suggest a more nuanced relationship between aggressive police practices and black political leaders.<sup>286</sup>

Additionally, historical accounts of black police attitudes add important context to Forman's findings. For example, in Chicago in 1968, a group of black male police officers founded the Afro-American Patrolman's League (AAPL).<sup>287</sup> Unlike most black police organizations, which focused on workplace conditions, AAPL acted as a community-based, antiracist entity.<sup>288</sup> AAPL, led by outspoken officer Renault Robinson, engaged in various forms of antiracist activism. The organization routinely condemned police brutality by white Chicago police against blacks,<sup>289</sup> and its members frequently intervened to protect blacks who were being attacked by white officers.<sup>290</sup> AAPL also helped blacks prepare complaints alleging police misconduct and offered to file such complaints with internal review boards.<sup>291</sup> AAPL members described their mission as "Black Power policing,"<sup>292</sup> and they frequently clashed with other officers, including blacks, who did not share the group's progressive ideology.<sup>293</sup> Due to repression and harassment from white Chicago police,<sup>294</sup> the more militant membership of the

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284. Elaine B. Sharp, *Minority Representation and Order Maintenance Policing: Toward a Contingent View*, 95 SOC. SCI. Q. 1155 (2014).

285. See, e.g., FORMAN, *supra* note 1, at 35 (discussing the "central paradox of the African-American experience: the simultaneous over-and under-policing of crime").

286. I do not wish to discount the real problem of misconduct and negative racial attitudes among black police officers. Instead, I contend that this problem is more complex and that when compared with white police officers, research suggests important differences, at least in attitudes if not practices. See also *infra* note 297 (explaining that black police officers' views of race and crime differ substantially from the attitudes of their white colleagues).

287. See Tera Agyepong, *In the Belly of the Beast: Black Policemen Combat Police Brutality in Chicago, 1968-1983*, 98 J. AFR.-AM. HIST. 253 (2013).

288. *Id.* at 258-59.

289. *Id.* at 259-60, 262.

290. *Id.* at 262.

291. *Id.* at 261.

292. *Id.* at 257.

293. *Id.* at 267.

294. *Id.* at 266-70, 271-72 (discussing repression of AAPL by Chicago and federal authorities).

AAPL dwindled.<sup>295</sup> Later, the organization evolved into a workplace advocacy group.<sup>296</sup> Nonetheless, the short-lived militancy of the AAPL can supplement standard accounts of black police. The AAPL's nationalism is a rare moment within the history of black policing. Nevertheless, examining this group's advocacy can help scholars to comprehensively analyze the influence of officer race on police conduct and the institutional constraints that limit antiracism among black police officers.<sup>297</sup>

### 3. *Black Prosecutors and Leniency*

Forman's work also details his frustration with black prosecutors who decline to extend leniency to offenders, particularly young individuals or persons without a serious criminal history. As explained above,<sup>298</sup> prosecutors' decisions shape the destiny of arrestees.<sup>299</sup> As such, the surge of incarceration in the United States can be traced largely to prosecutorial decisions.<sup>300</sup> The choices of prosecutors of any race can determine whether an individual faces incarceration or not.

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295. *Id.* at 271 (“By the 1980s the AAPL’s leadership reflected the government’s repression of the league’s activities, the firing of the group’s most vocal activists, and the movement of some of its leaders to other community activities.”).

296. *Id.* (observing that after militant members left the police force, the AAPL “began to channel most of its energy into making the police department a less hostile work environment for black officers” and that “eventually the AAPL abandoned its community activism and rarely spoke out about police brutality.”).

297. Recent polling data suggests a more complicated perspective of contemporary police attitudes. Specifically, black officers have expressed deep concerns over racial inequality and awareness and understanding of the strained relationship between police and blacks. Their views of race and crime differ substantially from the attitudes of their white colleagues. A 2017 Pew study found that ninety-two percent of white police officers believe that “the country has made the changes needed to assure equal rights for blacks,” compared to only twenty-nine percent of black officers who endorse this statement. Rich Morin et al., *Behind the Badge*, PEW RES. CTR. (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge> [<http://perma.cc/WLG6-2GUY>]. White officers also expressed hostility towards activists who protest police misconduct. Only twenty-seven percent of white police officers believed that protests following police killing of blacks are “motivated at least to some extent by a genuine desire to hold police accountable;” sixty-nine percent of black officers, however, think that the protestors seek accountability for law enforcement. *Id.* The Pew study also found that six-in-ten white and Hispanic officers believe that police have “excellent or good” relations with blacks, but only thirty-two percent of black officers hold this view. *Id.*

298. See *supra* text accompanying notes 250-256.

299. See PFAFF, *supra* note 3, at 130-34; Davis, *supra* note 250, at 178-83.

300. See PFAFF, *supra* note 3, at 127.

Scholars have not widely examined whether the race of prosecutors significantly impacts the treatment of black defendants. Some research, however, suggests that as the percentage of black prosecutors increases in a jurisdiction, the pervasive disparities between sentences received by black and white defendants diminishes. One such study analyzed the impact of racial diversity among judges, prosecutors, defense attorneys, and probation officers upon sentences that black defendants receive.<sup>301</sup> The study, which examined 51,782 cases during a two-year period, found that in at least eighty-nine of ninety-four federal districts, as the proportion of black prosecutors relative to the population of blacks increased, black defendants were less likely to face incarceration.<sup>302</sup> The findings in other studies that test the relationship between the race of criminal-justice personnel and outcomes for black defendants are mixed.<sup>303</sup> Nonetheless, this empirical research provides additional context for Forman's observations regarding aggressiveness among black prosecutors. Even if some black prosecutors exercise their discretion to pursue harsh punishment for black offenders, studies suggest that their presence could actually mitigate some of the racial disparities associated with sentencing. Examining the possible impact of race on prosecutorial decisions could help scholars develop a more comprehensive understanding of the racial dimensions of punitive sentiment. If, as some research indicates, race mitigates punitiveness among black prosecutors, then criminal law scholars should engage academic literature on race and professional identity in future research.

#### 4. *Black Judges and Leniency*

Although Forman expresses concern about aggressive sentences by black judges, the data on whether black judges are equally likely to give harsh sentences as other judges is mixed. As a preliminary matter, judges do not always have power during the sentencing process. Indeed, in some cases, judges lack discretion regarding sentencing. This was true in the federal system from 1984, when Congress created the Federal Sentencing Commission, which promulgated the Federal Sentencing Guidelines, until 2005, when the Supreme Court

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301. Amy Farrell et al., *Race Effects of Representation among Federal Court Workers: Does Black Workforce Representation Reduce Sentencing Disparities?*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 121 (2009).

302. *Id.* at 131 (“Black defendants are more likely to be sentenced to prison than their white counterparts, even after controlling for legally relevant variables, but when black defendants are sentenced in districts with increased representation of black prosecutors, they have a decreased likelihood of being imprisoned, which results in more racially equitable sentences.”).

303. See *id.* at 124-25 (discussing similar research).

held that the guidelines were advisory.<sup>304</sup> In cases where judges have discretion over sentencing, scholars have not compiled sufficient data to make firm conclusions regarding the effect of a judge's racial background upon sentencing.<sup>305</sup> Some studies validate Forman's concerns about aggressive sentencing by black judges. These studies show that a judge's racial background has little or no impact upon a decision to incarcerate an individual or the chosen length of the sentence.<sup>306</sup> Other studies, however, reach different results, finding that black judges are more lenient than white judges towards black offenders.<sup>307</sup> Furthermore, some of the studies that find only a slight correlation between a judge's

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304. *United States v. Booker*, 543 U.S. 220, 245-46 (2005) ("We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory . . . incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section . . . which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute . . . makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well . . .").
305. See Chris W. Bonneau & Heather Marie Rice, *Impartial Judges? Race, Institutional Context, and U.S. State Supreme Courts*, 9 ST. POLS. & POL'Y Q. 381, 382-83 (2009) (discussing disparate research results).
306. See Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 85 (2005) ("Despite large, persistent racial disparities in sentencing, the political, sex, and racial composition of a district's bench has no general effect on the punishment of black and Hispanic offenders."); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197, 1211 (1990) (finding that a judge's race has very little predictive power with respect to sentencing outcomes); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 884 (1978) (finding only small differences between the sentencing practices of black and white judges).
307. See, e.g., Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 133 (1988) (finding that white judges sentence black defendants to more severe sentences than do black judges). This study uses the same data as Uhlman, *supra* note 306, but controls for numerous factors that Uhlman neglects, including the defendants' criminal history, the judges' sex, time spent on the bench, and whether judges had a background as a prosecutor. *Id.* at 130. Welch et al., *supra*, also analyzed sentencing as a two-step process: the decision to incarcerate and the length of sentence. *Id.* at 128-30. Other studies have also found black judges to be more lenient towards black offenders. See Bonneau & Rice, *supra* note 305, at 396 (finding black judges more likely to reverse conviction or sentences in states without intermediate appellate courts); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 172 (1983) (finding black federal appeals judges more likely to favor criminal defendants); Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 CRIMINOLOGY 259, 290 (2006) ("Minority judges were significantly less likely than white judges to incarcerate black and Hispanic offenders, but still incarcerated them more often than they did white offenders."). Another study that employed cognitive

race and criminal decision making do not dismiss race altogether; instead, the impact of race is contextual and based on such factors as the seriousness of the crime.<sup>308</sup> While the body of research on black judges does not permit firm conclusions regarding the role of racial background and judicial decision making, it appears that in some instances, blacks' presence on the bench could possibly have mitigated – but by no means eliminated – racial inequities related to sentencing. Regardless, the paucity of black judges counsels against assigning to them a substantial role in the development and enforcement of mass incarceration policies.

### III. TOWARDS A LESS PUNITIVE CRIMINAL JUSTICE SYSTEM

Forman urges policymakers and reformers to imagine a legal system that replaces the severe punitive aspects of mass incarceration with mercy.<sup>309</sup> He recommends several policy reforms, including expanding the use of pretrial diversion, providing adequate funding for public defenders, eliminating mandatory minimum sentences, restoring voting rights for felons, and creating good schools in juvenile and adult prisons.<sup>310</sup> Access to education is Forman's most ambitious advocacy.

This Part analyzes some barriers to Forman's reconstructed criminal law and enforcement. White racism remains a substantial impediment to a less punitive U.S. crime policy. Studies consistently link white punitiveness with racial resentment and antiblack prejudice.<sup>311</sup> Furthermore, the election of Donald Trump and of Republican members of Congress, who are hostile to changes in criminal law and enforcement, also hinders federal reform.

Nonetheless, important avenues for change remain open, including in the states, where the vast majority of criminal convictions occur. In the state and local context, reform-minded individuals must utilize multidimensional advocacy that involves media strategies, legislative initiatives, litigation, support of nonprofits that provide social services to ex-offenders and to the families of incarcerated individuals, and advocacy of reform to executives – including elected

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psychological testing measures of implicit bias found greater leniency among black judges toward hypothetical black defendants. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

308. See, e.g., Schanzenbach, *supra* note 306, at 89 (“In addition, the proportion of minority judges on the bench had some effect on minority sentences. In the case of less serious crimes, having a greater proportion of black judges reduced black/white disparities in total sentence and in the probabilities of receiving jail time and downward departures.”).

309. FORMAN, *supra* note 1, at 217–39.

310. *Id.* at 236.

311. See *supra* note 41 and accompanying text.

prosecutors. Historically, these mobilization strategies have allowed social movements and organized citizenry to effectuate substantial social change – including the alteration of legal practices.<sup>312</sup>

### A. States

In order to attain a meaningful reduction in the level of incarceration in the United States, change must occur in state and local governments.<sup>313</sup>

#### 1. Prosecutors

In some jurisdictions, voters have signaled intolerance of the status quo. For example, in 2016, voters in Cook County, Illinois ousted State Attorney Anita Alvarez, who concealed a video showing a Chicago police officer fatally shooting a black male who did not appear to threaten officers.<sup>314</sup> Alvarez, who had a reputation as a heavy-handed prosecutor, also faced widespread criticism for her refusal to revisit the cases of inmates who had strong evidence undermining their convictions.<sup>315</sup> In stark contrast, Alvarez's successor – Kim Foxx – ran on a reform agenda<sup>316</sup> and has implemented changes designed to reduce incarceration and restore public trust in policing and prosecutors.<sup>317</sup>

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312. See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLAL. REV. 1235, 1312 (2010) (discussing “multidimensional advocacy” of social movement lawyers, which takes place “across legal and political domains”).

313. About eighty-seven percent of all inmates in the United States are housed in state facilities. PFAFF, *supra* note 3, at 13.

314. Monica Davey, *Prosecutor Criticized over Laquan McDonald Case Is Defeated in Primary*, N.Y. TIMES (Mar. 16, 2016), <http://www.nytimes.com/2016/03/16/us/prosecutor-criticized-over-laquan-mcdonald-case-is-defeated-in-primary.html> [<http://perma.cc/44CY-XTXT>].

315. See, e.g., Eric Zorn, *The Case Against Anita Alvarez*, CHI. TRIB. (Mar. 4, 2016, 4:34 PM), <http://www.chicagotribune.com/news/opinion/zorn/ct-anita-alvarez-primary-election-zorn-perspec-0306-20160304-column.html> [<http://perma.cc/9W86-9CGU>].

316. John Byrne & Hal Dardick, *Foxx: Cook County State's Attorney Win About “Turning the Page”*, CHI. TRIB. (Mar. 16, 2016, 7:05 AM), <http://www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-anita-alvarez-kim-foxx-met-0316-20160315-story.html> [<http://perma.cc/F4JH-VE6R>].

317. Megan Crepeau, *After Momentous Week, Prosecutor Kim Foxx Says “We Have To Right Wrongs”*, CHI. TRIB. (Nov. 20, 2017, 6:50 AM), <http://www.chicagotribune.com/news/local/breaking/ct-met-kim-foxx-wrongful-convictions-20171117-story.html> [<http://perma.cc/AVU6-H8KW>] (“In just four days, prosecutors at the Leighton Criminal Court Building dropped charges against 17 men in all, and two others claiming innocence won a new trial and their freedom after years in prison.”); Steve Schmadeke, *Foxx Agrees To Release of Inmates Unable To Post Bonds of up to \$1,000 Cash*, CHI. TRIB. (Mar. 1, 2017, 8:22 PM), <http://www>

Prosecutors in several states have embraced policies that take a more lenient approach to criminal law and enforcement. In Florida, for instance, State Attorney Aramis Ayala, the state's first black elected prosecutor, made a policy decision never to seek the death penalty.<sup>318</sup> Ayala's decision demonstrates the importance of local reform strategies, but it also serves as a reminder that backlash can occur. After Ayala publicly announced her decision, Florida Governor Rick Scott removed her from twenty-three death-penalty cases.<sup>319</sup> And recently, Ayala's office decided to pursue the death penalty in a pending prosecution.<sup>320</sup> It is likely that the political backlash to her decision not to seek capital punishment caused her to shift positions. Ayala's experience is a reminder that substantial results do not occur rapidly. However, historical and political science research demonstrates that long-term multidimensional mobilization strategies can lead to the types of structural reforms that Forman advocates.

## 2. Legislatures and Governors

State legislatures and governors have also embraced reform. Some of the most punitive states in the nation, including Texas and Louisiana, have adopted reforms to their criminal laws with the goal of reducing their prison populations.<sup>321</sup> Moreover, in 2016, former Virginia Governor Terry McAuliffe issued an executive order that restored voting rights to felons.<sup>322</sup> Although the Virginia

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.chicagotribune.com/news/local/breaking/ct-kim-foxx-bond-reform-met-20170301-story.html [http://perma.cc/SLF5-PUGZ]. *But see* Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, CHI. REP. (Dec. 7, 2017), <http://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected> [http://perma.cc/QM8F-CHZK].

318. Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), <http://www.nytimes.com/2017/03/16/us/orlando-prosecutor-will-no-longer-seek-death-penalty.html> [http://perma.cc/3DF6-HRHT].

319. Gal Tziperman Lotan, *Ayala Takes First Step in Fight for Death Penalty Cases*, ORLANDO SENTINEL (Apr. 7, 2017), <http://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-pam-bondi-20170407-story.html> [http://perma.cc/CUD9-LEDT].

320. Gal Tziperman Lotan, *Aramis Ayala's Office Will Seek Death Penalty in Murder Case*, ORLANDO SENTINEL (Oct. 26, 2017), <http://www.orlandosentinel.com/news/breaking-news/os-death-penalty-review-panel-decision-20171026-story.html> [http://perma.cc/MSK5-XNMA].

321. Lorelei Laird, *States Featuring Bipartisan Support Rally for Criminal Justice Reform*, ABA. J. (Dec. 2017), [http://www.abajournal.com/magazine/article/criminal\\_justice\\_reform\\_louisiana\\_alaska](http://www.abajournal.com/magazine/article/criminal_justice_reform_louisiana_alaska) [http://perma.cc/25LN-HZAE].

322. Laura Vozzella, *McAuliffe Restores Voting Rights to 13,000 Felons*, WASH. POST (Aug. 22, 2016), [http://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878-11e6-99bf-f0cf3a6449a6\\_story.html](http://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878-11e6-99bf-f0cf3a6449a6_story.html) [http://perma.cc/Z4ZW-P7EJ].

Supreme Court overturned McAuliffe's original executive order, he later issued a narrower order that restored rights to roughly 13,000 ex-offenders.<sup>323</sup> Substantial political and social barriers to comprehensive reform of criminal law and enforcement exist. Nonetheless, recent developments indicate that social movements, policymakers, and academics should continue to view states as opportunities for reform.

### 3. *Overcoming Punitive Sentiment and the Psychology of Racism*

Forman's vision of criminal law and enforcement will be constrained by the intersection of racism and punitiveness. Because punitiveness correlates strongly with racial resentment and with psychological categories associated with racial inequality, a successful reform effort must address racial prejudice. The psychological dimensions of racial inequality, however, will prove challenging to overcome. Studies indicate that implicit bias,<sup>324</sup> SDO,<sup>325</sup> and RWA<sup>326</sup> exist among criminal law professionals. Some jurisdictions have instituted implicit bias training for court employees,<sup>327</sup> police officers,<sup>328</sup> and other actors in the legal system. These efforts, however, remain embryonic, and it is unclear how helpful they will prove to be in the near future.<sup>329</sup> Indeed, because bias often operates on the unconscious level, potential participants in antibias training might resist or question reform.<sup>330</sup> Furthermore, the relative lack of awareness of and attention to SDO and RWA among legal scholars and criminologists means that reformers have not begun to propose policies that could minimize the impact of these psychological processes upon criminal law and enforcement outcomes. The strong punitive sentiment among high-SDO and RWA individuals, however, suggests that minimizing the influence of these psychological categories must occur before meaningful reform of U.S. crime policy can take root.

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323. *Id.*

324. See Hutchinson, *supra* note 9, at 57-65.

325. See *supra* text accompanying notes 197-202.

326. See sources cited *supra* note 222.

327. Natalie Carillo & Matthew Estes, *Teaching Implicit Bias to Court Employees: Lessons from the Field*, NAT'L ASS'N ST. JUD. EDUCATORS (Feb. 3, 2016), <http://nasje.org/teaching-implicit-bias-to-court-employees-lessons-from-the-field> [<http://perma.cc/G6XZ-3PD4>].

328. Tom James, *Can Cops Unlearn Their Unconscious Biases?*, ATLANTIC (Dec. 23, 2017), <http://www.theatlantic.com/politics/archive/2017/12/implicit-bias-training-salt-lake/548996> [<http://perma.cc/36U4-5P4W>].

329. See *id.*

330. See, e.g., *id.* (describing one participant's skepticism in implicit bias training).

### B. Federal Government

Although reform in state practices will have the most meaningful impact on the rate of incarceration in the United States, changes in federal policy are not unimportant. Nonetheless, the likelihood that the substantive criminal law reforms Forman advocates will occur within the federal system in the near future are very low. Significant barriers to systemic changes in U.S. criminal law and enforcement exist within all branches of the federal government.

#### 1. Presidential Politics

It is highly unlikely that President Donald Trump will propose any policies that would reduce the rate of incarceration in the United States. During his presidential campaign, Trump made appeals to white nationalism and law and order.<sup>331</sup> He also praised the New York City Police Department's aggressive "stop and frisk" policy,<sup>332</sup> which had previously been held to violate the Fourteenth Amendment because it was employed in a racially discriminatory fashion – a fact that Trump denied during a presidential debate.<sup>333</sup> Generally, Trump's positions on immigration imply a rigid law-and-order approach. Trump launched his campaign with a speech that described Mexican-Americans as "rapists," and, after he was elected, he implemented an immigration policy that he once described as a "ban" on Muslims entering the United States.<sup>334</sup> The only notable act of

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331. Henry A. Giroux, *White Nationalism, Armed Culture and State Violence in the Age of Donald Trump*, PHIL. & SOC. CRITICISM 887, 891 (2017) (arguing that Trump used "a nativist language that targeted the most vulnerable in American society – unauthorized immigrants, Blacks, Muslims and Syrian refugees," and also "provoked society's darkest impulses which served to energize a range of extremist racist and anti-Semitic groups including the alt-right, white nationalists and other breeding grounds for a new authoritarianism").

332. Jim Dwyer, *What Donald Trump Got Wrong on Stop-and-Frisk*, N.Y. TIMES (Sept. 27, 2016), <http://www.nytimes.com/2016/09/28/nyregion/what-donald-trump-got-wrong-on-stop-and-frisk.html> [<http://perma.cc/AU5J-U57S>].

333. *Id.*

334. *Trump's Travel Ban: Who Does It Affect?*, BBC (Feb. 10, 2017), <http://www.bbc.com/news/world-us-canada-38781302> [<http://perma.cc/C3XY-6325>] (discussing the Trump Administration's initial executive order). Although Trump has denied that his executive orders constitute a ban on Muslims, during his presidential campaign, he released a statement advocating such a ban. See Miriam Valverde, *Trump Stalls on Promise for "Total and Complete Shutdown" of Muslims Entering the United States*, POLITIFACT (Apr. 20, 2017), <http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1401/establish-ban-muslims-entering-us> [<http://perma.cc/H2SS-VSA6>] ("Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.").

leniency Trump has engaged in was a pardon of former Arizona Sheriff Joseph Arpaio, who was convicted of contempt for failing to comply with a federal court injunction ordering his department to discontinue unconstitutional racial profiling of Latinos.<sup>335</sup> Trump's pardon of Arpaio demonstrates his racial prejudice towards persons of color and his tolerance of unlawful police practices.

## 2. Department of Justice

It is also unlikely that the Department of Justice will promulgate policies that bring greater leniency to criminal law and enforcement in the near future. Attorney General Jeff Sessions has taken similarly tough law and order stances as President Trump. For example, Sessions ordered a Department of Justice review of all consent decrees mandating structural reform of police departments;<sup>336</sup> he also tried, unsuccessfully, to delay enforcement of a consent decree that required systemic reform of the Baltimore police department.<sup>337</sup> Sessions has stated that DOJ's structural reform of law enforcement agencies interferes with the effectiveness of policing.<sup>338</sup> Sessions has also instructed federal prosecutors to pursue lengthy sentences for drug offenders, and has described drug crimes as "inherently violent."<sup>339</sup> These developments indicate that progressive and antiracist criminal law reform will not become an aspect of federal executive policy in the near future.

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335. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <http://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> [http://perma.cc/BT7Y-CY2Y].

336. Sari Horwitz et al., *Sessions Orders Justice Department To Review All Police Reform Agreements*, WASH. POST (Apr. 3, 2017), <http://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08> [http://perma.cc/43SA-A5Z8].

337. Kevin Rector & Luke Broadwater, *Judge Denies DOJ Request for Pause in Baltimore Consent Decree; Hearing To Proceed as Scheduled Thursday*, BALT. SUN (Apr. 5, 2017), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-consent-decree-hearing-20170405-story.html> [http://perma.cc/EPS6-PVDY].

338. Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), <http://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html> [http://perma.cc/B9X5-28LN].

339. Joseph Tafani, *With Tough Sentencing Policy, Atty. Gen. Sessions Pledges Redoubled War on Drugs*, L.A. TIMES (May 12, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-sessions-drugs-1494603521-htmlstory.html> [http://perma.cc/M64A-5DK4].

### 3. Congress

The national debate regarding criminal law and enforcement has influenced many members of Congress. In 2010, Congress responded to longstanding criticism of federal sentencing policies by reducing the sentencing disparity between crack and powder cocaine.<sup>340</sup> Broader reform efforts have been unsuccessful despite bipartisan support.<sup>341</sup>

### 4. Federal Courts

Legal scholars are skeptical of the possibility of judicially-mandated reform, citing numerous procedural and substantive legal doctrines and policy constraints that make courts ineffective sites of structural change; these scholars advocate instead for democratic reforms.<sup>342</sup> Although some scholarly critiques of judicial reform are legitimate, scholars who advocate democratic reforms of criminal law and enforcement often fail to acknowledge the influence of the political process upon judicial decisions. A wide body of research demonstrates that

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340. Jim Abrams, *Congress Passes Bill To Reduce Disparity in Crack, Powder Cocaine Sentencing*, WASH. POST (July 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072802969.html> [<http://perma.cc/TJ2K-5W5Y>].

341. Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), <http://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> [<http://perma.cc/WZ8W-UDZW>]; Carl Hulse, *Bipartisan Criminal Justice Overhaul Is Haunted by Willie Horton*, N.Y. TIMES (Jan. 4, 2016), <http://www.nytimes.com/2016/01/05/us/politics/bipartisan-criminal-justice-overhaul-is-haunted-by-willie-horton.html> [<http://perma.cc/ZTY3-WGCN>]; Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [<http://perma.cc/4FPP-NX4Q>].

342. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1865 (2015) (arguing that “constitutional judicial review is [a] completely inadequate” response to police abuses); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 2-3 (2009) (arguing that civil litigation and prosecution are ineffective in reforming police practices).

federal and state judicial decisions correlate with public opinion, for reasons related to the involvement of elected officials in the appointment of judges,<sup>343</sup> judicial ideology,<sup>344</sup> public opinion,<sup>345</sup> and, in the case of elected judges, campaign activities, such as contributions.<sup>346</sup> The relationship between the political process and judicial outcomes warrants continued skepticism regarding the possibility of judicially mandated reform of criminal law and enforcement.

Despite the multiple barriers to reform of criminal law and enforcement, room for optimism exists. Presently, members of Congress, state legislatures, and social movement organizations are committed to the creation of policies that reduce the incarceration rate. Furthermore, the public has become less punitive since the mid-1990s.<sup>347</sup> If politicians and social movement actors continue to advocate reform of criminal law and enforcement, courts could become open to greater enforcement of civil liberties.

## CONCLUSION

Forman's research is challenging, but he has shifted the dialogue on race and U.S. crime policy in a better direction. Forman is primarily concerned with blacks' fear of crime and their punitive response. Although Forman recognizes the pervasive racism within U.S. criminal law and enforcement, he has chosen to give voice to blacks, particularly blacks who are vulnerable to criminal conduct because they are locked in poverty. Forman's attention to their struggle is just as important to racial justice as a focus on white supremacy. These discussions, however, are not mutually exclusive.

Using Forman's powerful work as a point of departure, this Review argues that white supremacy could influence black punitive attitudes. Although many blacks Forman analyzes framed their support of punitive measures in racial

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343. Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 716 (1994) (discussing the relationship between the appointments process and Supreme Court decisions).

344. Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 824 (1995).

345. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–07 (2003) (“Yet, there are enough data points to reach the conclusion that in the main the results of Supreme Court decisionmaking comport with the preferences of a majority or at least a strong plurality, something that many political scientists now take as a given.”).

346. See Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161 (2015).

347. Ramirez, *supra* note 39, at 338 (finding that punitive sentiment “increased during the 1970s, plateaued in 1994, and declined afterward”).

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equality terms, social psychology research tells us to look beneath the surface of stated purposes, because implicit bias and psychologically based intergroup dynamics arising from SDO and RWA likely impact human behavior substantially. This Review seeks to join a conversation on race and crime made richer by Forman's contributions. As the United States continues to reexamine and debate punitive policy, it will become more compelling that other scholars enter this dialogue as well.