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## FOREWORD: WHEN WORDS FAIL: CONFRONTING THE CARCERAL STATE

Hope Metcalf<sup>†</sup>

Every so often, hyperbole is justified. How are we to express the full volume and distorted shape of the American carceral system? Approximately 1 in 100 Americans is behind bars.<sup>1</sup> That amounts to 2.5 million people in prisons or jails at any given moment. If one were to imagine everyone gathered into one enormous penal colony—it would rank just below Chicago as the fourth largest city in America.<sup>2</sup> Welcome to Prison City, USA.

While the sheer volume of “mass incarceration” is overwhelming, still more difficult to express is the extent of “hyperincarceration”—that is, the effect of the criminal justice system on poor communities and communities of color.<sup>3</sup> Racial disparities reverberate throughout the carceral system. Nationwide, African Americans and Latino/as comprise approximately 30% of the population<sup>4</sup> but amount to approximately 60% of sentenced prisoners.<sup>5</sup> African American

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1. See PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

2. See Haya El Nasser, *Most Major U.S. Cities Show Population Declines*, USA TODAY (June 27, 2011, 6:27 PM), [http://www.usatoday.com/news/nation/census/2011-04-07-1Acities07\\_ST\\_N.htm](http://www.usatoday.com/news/nation/census/2011-04-07-1Acities07_ST_N.htm).

3. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74.

4. SONYA RASTOGI ET AL., U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, THE BLACK POPULATION: 2010 3 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (noting that African Americans account for 13.6% of the U.S. population); SHARRON ENNIS ET AL., U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, THE HISPANIC POPULATION: 2010 3 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (noting that Hispanics account for 16.3% of the U.S. population).

5. See PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE

men are incarcerated at a rate seven times higher than White males (3,074 per 100,000 vs. 459 per 100,000) and the rate for Latino men (1,258 per 100,000) is nearly three times higher than for White men.<sup>6</sup> African Americans are drastically overrepresented at all levels—arrest, parole, probation, jails, and prisons.<sup>7</sup> Not only are people of color more likely to encounter law enforcement—they are also punished more harshly. African Americans account for “56.4 percent of those serving life without parole, though they are 37.5 percent of prisoners in all state prisons.”<sup>8</sup> They are five times more likely to be sentenced to death.<sup>9</sup>

The effects of our national obsession with punishment do not stop at the prison gate. Although people in prison are “out of sight, out of mind” for much of society, the effects of mass incarceration are intensely felt in communities of concentrated poverty, which often tracks lines of race and ethnicity.<sup>10</sup> Given the cascade of negative effects that even short periods of incarceration have on life outcomes,<sup>11</sup> it is no wonder that Michelle Alexander has described the overpolicing and overincarceration among communities of color as “the New Jim Crow.”<sup>12</sup>

The geography of race, poverty, and incarceration is stark. Take my home state of Connecticut as an example. In addition to regularly topping national lists of the wealthiest towns in America,<sup>13</sup>

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STATISTICS, PRISONERS IN 2010 app. 12, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>

6. *Id.* at app. 14.

7. CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 3 (2009), available at <http://www.nccd-crc.org/nccd/pdf/CreatedEqualReport2009.pdf> (explaining that rates for African Americans of arrest, probation, parole, and incarceration in state prisons are respectively 2.5, 3, 5, and 6 times the comparable rates for Whites).

8. *The Misuse of Life Without Parole*, N.Y. TIMES (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/opinion/the-misuse-of-life-without-parole.html>.

9. HARTNEY & VUONG, *supra* note 7, at 3.

10. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 20.

11. See generally Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15–36 (Marc Mauer & Meda Chesney-Lind, eds., 2004), available at [http://www.urban.org/UploadedPDF/1000557\\_invisible\\_punishment.pdf](http://www.urban.org/UploadedPDF/1000557_invisible_punishment.pdf)

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

13. See, e.g., *25 top-earning towns*, CNNMONEY, [http://money.cnn.com/gallery/2008/moneymag/0807/gallery.bplive\\_top earners.moneymag/](http://money.cnn.com/gallery/2008/moneymag/0807/gallery.bplive_top earners.moneymag/) (last visited Apr. 7, 2012).

Connecticut has the dubious distinction of having the largest racial disparity in its incarceration rates for African Americans and Hispanics.<sup>14</sup> A 2003-2004 study by the state's Commission on Racial Disparity in the Criminal Justice System found that in 2000 African American men in Connecticut were incarcerated at a rate eighteen times higher than White, non-Hispanic men.<sup>15</sup> Nearly all of the prisons in Connecticut are located in mostly rural, predominantly White counties;<sup>16</sup> yet almost 50% of the people in the prison system in 2000 came from just three urban communities of Bridgeport, Hartford, and New Haven.<sup>17</sup> It also appears that people of color are treated more harshly; every person in Connecticut serving a sentence of life without parole for offenses committed as a juvenile is African American.<sup>18</sup> This dynamic is borne out by personal experience: I work with law students to serve people in long-term solitary confinement. Of our fifteen clients, all but one has been Latino or African American.

Yet viewing mass incarceration *solely* as a matter of its racially disparate impact can itself distort the conversation. As James Forman, Jr., argues, at the same time that the analogy of "the New Jim Crow" powerfully expresses the intolerable inequality of the current system, it also obscures some key drivers of that system, such as the role of class within and outside the African American community, differing attitudes about crime within the African American community, and the damaging consequences of both

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14. *Annual Report & Recommendations 2003-2004*, COMMISSION ON RACIAL AND ETHNIC DISPARITY IN CRIM. JUST. SYS., 9 (Sept. 2004), <http://www.ct.gov/redcjs/lib/redcjs/reports/redexecutivesummary2004.pdf> [hereinafter *Annual Report & Recommendations*].

15. *Id.* In that same year, Latino men were almost twice as likely to be incarcerated in Connecticut than the national average. *Id.* ("Connecticut incarcerates 1,439 per 100,000 Latinos/Hispanics compared to the national average of 759 per 100,000 of the population.")

16. *See Facilities*, DEP'T OF CORRECTIONS, <http://www.ct.gov/doc/cwp/view.asp?a=1502&q=265422> (last modified Aug. 8, 2011). Of Connecticut's nineteen prisons and jails, the only three jails are located in the urban communities of Bridgeport, Hartford, and New Haven; the majority of Connecticut's prisons are clustered in the Northern and Eastern parts of the state, *see id.*, which have small percentages of racial minorities. *See, e.g., State & County Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/09/09015.html> (last visited Apr. 7, 2012) (noting that African Americans account for only 2.2% of the population of the Northeastern county of Windham).

17. *Annual Report & Recommendations*, *supra* note 14, at 9.

18. LEGAL CLINIC, QUINNIPIAC UNIV. SCH. OF LAW, A SECOND LOOK: REVIEW OF LIFETIME INCARCERATION OF CONNECTICUT CHILDREN (2012) (on file with Quinnipiac University School of Law).

incarceration and crime on all communities.<sup>19</sup> Mark Kleiman and others have similarly urged reformers to take seriously reducing both incarceration and crime.<sup>20</sup>

There is cause for cautious optimism. If the United States has been addicted to punishment, perhaps we have finally hit bottom. The year 2010 marked the first year since 1972 that the overall U.S. prison population declined.<sup>21</sup> One cause for the decline appears to be the growing recognition that the race to incarcerate is not cost-free.<sup>22</sup> Nonpartisan sentencing commissions in some jurisdictions have established rules to force lawmakers to internalize costs of increased punishments.<sup>23</sup> Meanwhile, alternatives to incarceration have proliferated,<sup>24</sup> and States ranging from Mississippi to Maine have revisited their policies on long-term segregation, which are both costly and cruel.<sup>25</sup> How far the cost-based arguments will carry reformers remains to be seen,<sup>26</sup> but it is encouraging to see a renewed flourishing of ideas and experimentation after several decades of a criminal justice policy marked primarily by its

19. See generally James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101 (forthcoming 2012), available at [http://www.law.yale.edu/documents/pdf/Faculty/Forman\\_RacialCritiques.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Forman_RacialCritiques.pdf).

20. See generally MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009).

21. GUERINO ET AL., *supra* note 5, at 1.

22. See, e.g., Inimai Chettiar, *ACLU Joins Right on Crime, Prison Ministries, Bipartisan Legislators, and the ABA to Prioritize Criminal Justice Reform*, ACLU (May 12, 2011, 2:45 PM), <http://www.aclu.org/blog/prisoners-rights-racial-justice/aclu-joins-right-crime-prison-ministries-bipartisan-legislators>. Right on Crime, comprised of self-proclaimed conservatives, has proposed criminal justice reforms that would, among other things, reduce overall prison population and rely on evidence-based sentencing and punishments. See *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/wp-content/uploads/2012/03/RightOnCrime-Statement-of-Principles.pdf> (last visited Apr. 7, 2012). In 2010, the prison systems in nineteen states were operating above capacity, including Alabama, which was operating its prison system at 196% capacity. GUERINO ET AL., *supra* note 5, at 7.

23. See, e.g., VA. CODE ANN. § 30-19.1:4 (2012) (providing that the Virginia Criminal Sentencing Commission will prepare a fiscal impact statement “for any bill which would result in a net increase in periods of imprisonment in state adult correctional facilities”).

24. See, e.g., Liz Robbins, *Staying With Children, and Out of Prison*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/2011/09/22/nyregion/for-mothers-facing-prison-drew-house-in-brooklyn-offers-alternative.html>

25. Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), [http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?\\_r=1&pagewanted=1&hpw](http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?_r=1&pagewanted=1&hpw).

26. See generally Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DAEDALUS, Summer 2010 at 124.

nihilism.<sup>27</sup> Each article in this volume proposes pragmatic responses to the enormous challenges and injustices described above. Views and emphasis may differ—sometimes sharply—but one thing is clear: there will be no silver bullet to correct the present state of incarceration in the United States.

Margaret Colgate Love and Giovanna Shay give a quietly optimistic account of changing norms toward gender and sexuality in prison. The 2010 ABA Standards on the Treatment of Prisoners—the first major statement by the legal profession since 1981—take far more seriously the endemic sexual abuse experienced by all prisoners, and especially that experienced by female and LGBT people in prison. This is not by accident, but the result of a hard-fought, bipartisan movement to de-normalize prison rape.<sup>28</sup> As Love and Shay remind us, the ABA Standards represent not only a step forward in developing more humane standards, but are also a reminder that the problems of people in prison demand the attention of the legal profession due to “the Bar’s institutional commitment to the rule of law, to equality, and to human dignity.”<sup>29</sup>

Peter Wagner describes how redistricting reflects and perpetuates carceral policies. Prison has often been described as a form of contemporary exile.<sup>30</sup> Under Wagner’s accounting, this is not metaphor but fact. Disproportionate numbers of people in prison are of color and from urban communities, but they “reside”—for purposes of the U.S. Census—in rural and mostly White communities where they happen to be incarcerated. Dollars and political power follow this reverse flow from urban to rural areas. Wagner notes the need for changes by the Census Bureau in order to prevent “prison-based gerrymandering” and provides practical reforms for state governments, which are not bound to follow federal missteps in the meantime.

Exile and integration are themes repeated by Lynn Branham,

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27. Here I refer to the “Nothing Works” view among administrators and lawmakers that became mainstream in the 1970s-1990s. See generally Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313 (2001).

28. Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL’Y REV. 489 (2011).

29. Margaret Colgate Love & Giovanna Shay, *Gender & Sexuality in the ABA Standards on the Treatment of Prisoners*, 38 WM. MITCHELL L. REV. 1216, 1239 (2012).

30. See, e.g., Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237 (2009).

who also approaches reform from a community-based perspective. In a sort of reverse broken-windows theory, she reorients restorative justice as the flow of duties between an individual and his community, rather than between defendant and victim. Because both crime and people convicted of crimes are concentrated in the same communities, restorative efforts should be directed at redressing communal harms and reinvigorating the social compact between individual and community. In direct counterpoint to the common view of people in prison as exiled from society, Branham proposes to weave together societal and individual rehabilitation—literally, as prisoners and parolees would tend gardens and rehabilitate houses for the community’s benefit.<sup>31</sup>

Ken Strutin also sees the “[t]he prison model of punishment” as something that “is overdue for deconstruction or at least a major overhaul.”<sup>32</sup> Strutin names a truth identified by the Supreme Court in its recent decision in *Brown v. Plata*<sup>33</sup>: Sentencing and prison conditions are intimately linked. Yet *Plata* shows the promise, the tenuousness, and even the perils of reform. Strutin presents a conundrum: The Supreme Court in *Plata* upheld an order by a three-judge panel to reduce California’s prison population. Yet the order has not resulted in a single release, due to the quick-stepping by California lawmakers to shift most low-level offenders to county jail systems, which now operate as “one room jailhouses.”<sup>34</sup> Untouched remain some of the policies—three strikes laws, lengthy drug sentences—that have driven the enormous growth of California’s prisons. Whether *Plata* and California’s legislative response will ultimately decrease populations and improve conditions in California remains to be seen, but Strutin demonstrates that reforms require participation by all stakeholders and argues for the more explicit discussion and consideration of the role of prison conditions in the meting out of punishment.

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31. Branham suggests that accommodating the political fallout expected from incorporating one cast-out segment of society—former prisoners—will require drawing even stricter boundaries against another marginalized segment—undocumented immigrants. Branham recognizes that this proposal will draw criticism from some quarters; I suggest that her recommendations for a restorative-based corrections system may—and should—be considered as distinct from the political tradeoffs she suggests may be necessary to achieve such transformation.

32. Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313, 1313 (2012).

33. 131 S. Ct. 1910 (2011).

34. Strutin, *supra* note 32, at 1340.

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The range and diversity of the suggestions offered in these articles is both a testament to the authors' creativity as well as a reflection of the scale and entrenchment of the U.S. carceral state. Each of the following contributions addresses one step on the path toward improving the present system of incarceration in the United States.