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# THE JIM CROW EFFECT: DENIAL, DIGNITY, HUMAN RIGHTS, AND RACIALIZED MASS INCARCERATION

PROFESSOR CECIL J. HUNT, II<sup>1</sup>

*“...[W]e will not end mass incarceration without a recommitment to the movement-building work that was begun in the 1950’s and 1960’s and left unfinished. A human rights nightmare is occurring on our watch. If we fail to rise to the challenge, and push past the politics of momentary interest convergence, future generations will judge us harshly.”<sup>2</sup>*

## INTRODUCTION

Denial can be a powerful toxin on the soul of a nation. Right now, the United States of America is lost in a thick fog of denial regarding the uncomfortable truths about racialized mass incarceration.<sup>3</sup> The United States has only “5% of the world’s population, but houses 25% of the world’s prisoners.”<sup>4</sup> Among that 25%, “[B]lacks and Hispanics, together account for about two thirds of the state prison population,”<sup>5</sup> and this figure does not even include those in local jails and federal prisons. Considering the total number of the nation’s incarcerated, blacks alone account for “more than 40% of the current prison population, while making up only 12% of the U.S. population.”<sup>6</sup> The black-white disparity in imprisonment is especially large. Black men are six to eight times more likely to be in prison than whites.<sup>7</sup> It is clear that the practice of racialized mass incarceration has dramatically changed “the racial and economic caste of

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<sup>2</sup> Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES (May 14, 2011), [http://www.nytimes.com/2011/05/15/opinion/15alexander.html?\\_r=4](http://www.nytimes.com/2011/05/15/opinion/15alexander.html?_r=4).

<sup>3</sup> Throughout this paper, I use the words “racialized mass incarceration,” rather than merely, mass incarceration, in order to emphasize the especially racialized nature of this phenomenon.

<sup>4</sup> GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 5 (2008).

<sup>5</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16 (2006).

<sup>6</sup> DEVAH PAGER, MARKED: RACE CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 3 (2007).

<sup>7</sup> WESTERN, *supra* note 5, at 16.

the prison population.”<sup>8</sup> Something is wrong with this picture; and America is “just beginning to reflect upon the political and cultural meaning of this new [prison] institution, upon what it means for America to be a mass imprisonment society.”<sup>9</sup>

The issues of race, mass incarceration, dignity, and human rights in the United States are beginning to get some academic attention, as they should.<sup>10</sup> A new report from the Economic Policy Institute concluded that, in America, “[t]he disproportionate incarceration rate of minorities in general, and blacks in particular, is one of the most pressing civil rights issues of our time.”<sup>11</sup> Thus, it is clear to many scholars that racialized mass incarceration in the American criminal justice system has become a debilitating “modern plague”<sup>12</sup> on the social, political, and economic fabric of America. But the plague of mass incarceration is not simply about putting large numbers of people behind bars, but rather:

[I]t’s about law enforcement using the power of criminal sanctions to target, isolate, demonize, and oppress an entire group of people and their communities based simply on race. Imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population. In the case of America, the group concerned is, of course, young black and brown males in large urban centers. For these sections of the population, imprisonment has become normalized. It has come to be a regular, predictable part of experience, rather than a rare and infrequent event.<sup>13</sup>

Therefore, the primary drivers of mass incarceration in America are race and class. For poor urban Black and Brown youths, “imprisonment has become one of the social institutions that structure this group’s experience. It becomes part of the socialization process. Every family, every household, every individual in these neighborhoods has direct personal knowledge of

<sup>8</sup> WESTERN, *supra* note 5, at xii.

<sup>9</sup> MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 2-3 (David Garland ed., 2001).

<sup>10</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (for primary examples of this literature); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, (David Garland ed., 2001); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION* (2006); WESTERN, *supra* note 5; TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* (2009); PAUL BUTLER, *Let’s Get Free: A Hip Hop Theory of Justice*, 99 GEO. (2009).

<sup>11</sup> Press Release, Economic Policy Institute, Mass Incarceration is One of the Most Pressing Civil Rights Issues (Jan. 16, 2015), <http://www.epi.org/press/mass-incarceration-is-one-of-the-most-pressing-civil-rights-issues-today/>.

<sup>12</sup> ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* 40 (2013).

<sup>13</sup> Garland, *supra* note 9, at 2.

the prison . . . .”<sup>14</sup> It has not always been like this; the prison boom in America began to increase in 1975,<sup>15</sup> and has continued apace to the present day. As one scholar observed, “[t]he prison boom opened a new chapter in American race relations, [t]he punitive turn in criminal justice disappointed the promise of the civil rights movement and its burdens fell heavily on disadvantaged African Americans.”<sup>16</sup>

It is important to note that the racialized imprisonment of hundreds of thousands of young Black and Brown men is not the result of individual racist beliefs by so-called, “guilty perpetrators.” Rather, it is institutionalized in every aspect of the American criminal justice system.<sup>17</sup> But, most Americans are in almost complete denial of the reality that the entire criminal justice system is infected with institutionalized racism. But such denial melts in the face of reality. Stanley Cohen has described such denial “as an unconscious defense mechanism for coping with guilt, anxiety, or other disturbing emotions aroused by reality.”<sup>18</sup> He argues that this type of denial “blocks off information that is literally unthinkable or unbearable. False[w]e are vaguely aware of choosing not to look at the facts, but not quite conscious of just what it is we are evading. We know, but at the same time we don’t know.”<sup>19</sup>

Many have argued that the rise of the racialized carceral state in America was race neutral, and instead the direct result of great spikes in crime rates in the 1980’s.<sup>20</sup> However, as one scholar has observed, “the United States did not face a crime problem that was racialized, it faced a race problem that was criminalized.”<sup>21</sup> However, it is true that there were rising crime rates in the 1960’s, but it “was not racialized as a conservative strategy to conflate civil rights with black criminality; rather the race ‘problem’ of the civil rights movement from the 1940’s onward was answered with pledges of carceral state development—from racially liberal and conservative lawmakers alike.”<sup>22</sup>

The overarching theme of this paper is that the racialization of mass incarceration in America, which has been taking place since the latter part

14 *Id.*

15 WESTERN, *supra* note 5, at 13.

16 *Id.* at 7.

17 See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 12 (1999) (noting that white America and its judicial system refuse to acknowledge the racism in the criminal justice system).

18 STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 5 (2001).

19 *Id.*

20 See WESTERN, *supra* note 5, at 38.

21 NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 3 (2014).

22 *Id.*

of the last century, and continues to this very day, is characterized by what I term, the “Jim Crow effect.” Michelle Alexander has eloquently described this effect as “a stunningly comprehensive and well disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”<sup>23</sup> She goes on to describe this modern version of Jim Crow as functioning “[t]hrough a web of laws, regulations, and informal rules, all of which are powerfully reinforced by social stigma, [the victims of this stigma] are confined to the margins of society and denied access to the mainstream economy.”<sup>24</sup> Moreover, I argue that this “Jim Crowing” of America has not taken place in secret. Most Americans are, at some level, totally aware of the pernicious and suffocating effects of racialized mass incarceration, but they have turned a collective blind eye to it. In short, most of the American public and its officials are in deep denial about this racialized plague, which is disastrously impacting so many Black and Brown lives. In addition, the existential cost of this process is a deep affront to the dignity and human rights of its victims, and ripples out into both their families and communities. In addition, there are also enormous costs to society at large, in terms of the huge financial drain on the American economy caused by the establishment and maintenance of such a large and complex system of racialized punitiveness. I conclude by arguing that in order to begin to unwind the tragic consequences of this system, we must first address the almost complete denial of its existence by so many Americans. Then we must begin to see this system in moral terms as a complete repudiation of the principles upon which this country was founded, and as a direct assault on the dignity and human rights of the victims that are ground under its oppressive institutionalized boot every day.

I begin this examination in section I, with a brief review of the many shades of meaning and consequence which is at the heart of America’s historical obsession with Jim Crow. In Section II, I examine the subtle but significant interplay between social denial and racialized mass incarceration. In Section III, I focus my attention on explicating the phenomenon of racialized mass incarceration. In Section IV, I discuss the “Drivers of Mass Incarceration,” and in Section V, I conclude with a warning.

<sup>23</sup> ALEXANDER, *supra* note 10, at 4.

<sup>24</sup> *Id.*

## I. JIM CROW IN AMERICA

The current racialized mass incarceration threatens to re-impose many of the same social and political burdens that were characteristic of a period of American history commonly referred to as “Jim Crow.”<sup>25</sup> This period established the domination of white supremacy and the inferiority of all Blacks in every aspect of southern society and maintained by a complex myriad of violence.

Jim Crow was not merely about the physical separation of blacks and whites. Nor was the segregation strictly about laws. . .[i]n order to maintain dominance, whites needed more than statutes and signs that specified “whites” and “blacks” only; they had to assure and reiterate black inferiority with every word and gesture, in every aspect of both public and private life. A white supremacist society must not only “array all the forces of legislation and law enforcement, it must falsify the facts of history, tamper with the insights of religion and religious doctrine, editorialize and slant news and the printed word. On top of this it must keep separate schools, separate churches, separate graveyards, and separate public accommodations—all this in order to freeze the place of the Negro in society and guarantee his basic immobility. . . the measure of a man’s estimate of your strength is the kind of weapons he feels that he must use in order to hold you fast in a prescribed place.” (Citing Howard Thurman, *The Luminous Darkness*, (1965)). . . the arsenal of weapons white southerners felt it necessary to use against black southerners was truly prodigious [there were many] stories of rapes and beatings, of houses burned to the ground and land stolen, of harrowing escapes in the middle of the night to evade lynch mobs or to avoid the slower, grinding death of perpetual poverty and indebtedness on southern tenant farms.<sup>26</sup>

The precise origins of the term “Jim Crow” are lost to history.<sup>27</sup> But it is traditionally attributed to a man named Thomas “Daddy” Rice, who in 1832 wrote a minstrel song and a dance called “Jim Crow,” that contained the lyrics, “I jump’ jis so, An’ ev’y time I turnabout I jump Jim Crow.”<sup>28</sup>

<sup>25</sup> See generally REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH 4 (William H. Chafe et al. eds., 2014) (describing the Jim Crow south as a “citadel of oppression...[and explaining that Jim Crow was a system] establishing and maintaining [the] domination...of white supremacy...creating the system of racial segregation and African American disfranchisement known as Jim Crow.” And noting that, “[a]s the epigraph from Daddy Rice suggests, Jim Crow was at bottom a social relationship, a dance in which the wary partners matched their steps, bent, and whirled in and unending series of deadly serious improvisations.”).

<sup>26</sup> *Id.*

<sup>27</sup> Richard A. Epstein, *Race and the Police Power: 1890 to 1937*, 46, WASH. & LEE L. REV. 741 (1989).

<sup>28</sup> JUMPIN’ JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS 1 (Jane Dailey et

We also know that “the term had become an adjective by 1838,” that was frequently used to describe the inferior nature of slaves in the old American South.<sup>29</sup>

Historically, the American era of Jim Crow began soon after the end of the American Civil War in 1865, during what was widely known as “Reconstruction.”<sup>30</sup> Reconstruction is a term used to describe the ten or so years after the end of the American civil war, 1865-1877.<sup>31</sup> During this period, newly freed slaves and free Blacks were lifted up from their previous condition of slavery and subservience, and were allowed to run for public office, sit on juries and testify in court against white men, start businesses, build homes, and engage in all of the civil rights accorded to free citizens of the United States.<sup>32</sup> However, Reconstruction ended in 1877 when the election for President of the United States essentially ended in a tie.<sup>33</sup> Southern Democrats then made a deal with Northern Republicans, which essentially said that the Republican candidate could be elected as President in exchange for the government moving all federal troops out of the South, and to then let the whole problem of the Negro “be left to the disposition of the dominant Southern white people.”<sup>34</sup> The period after Reconstruction was referred to by white southerners as Redemption, referring to their efforts to “redeem” the south from northern oppression, which regarded the freed slaves as wards of the nation, whose civil and political equality were enforced by federal troops.<sup>35</sup> However, despite, at times herculean efforts by white southerners to maintain and enforce white supremacy in every aspect of contact between Blacks and Whites, there were in fact various forms of constant resistance from southern Blacks. As one scholar has accurately observed, “the Age of Segregation [was] constantly beleaguered. . .the grid lines of power were never drawn neatly on the ground, and no single event marked either the birth or the death of Jim Crow.”<sup>36</sup>

al. eds., 2000).

<sup>29</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (2002).

<sup>30</sup> See *Reconstruction and the Rise of Jim Crow*, GALE CENGAGE LEARNING (1999), <http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/DocumentToolsPortletWindow?displayGroupName=Reference&jsid=b832448b1ab547877a635b3ac246fb04&action=2&catId=&documentId=GALE%7CEJ2152000667&u=multesd&zid=efa12aaff3416887f7fc3260bb653974>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> WOODWARD, *supra* note 29.

<sup>35</sup> *Reconstruction vs. Redemption*, NATIONAL ENDOWMENT FOR THE HUMANITIES (Feb. 11, 2014), <http://www.neh.gov/news/reconstruction-vs-redemption>.

<sup>36</sup> CHAFE ET AL. EDS., *supra* note 25, at 5.

During the early stages of the Jim Crow period white southerners engaged in all forms of physical and psychological terrorism against the newly freed slaves, involving murdering, burning out, and lynching<sup>37</sup> innocent Blacks in order to enforce the common white resolve that the south, “shall be and remain a white man’s country.”<sup>38</sup> Nell Irvin Painter captured some of the gory reality of the lynching of usually innocent Black people, both men and women, by comparing southern lynching to the Jewish holocaust, in the sense that both involved ordinary people committing ghoulish acts of barbarism. She noted that “[G]ermans from all walks of life tortured and degraded Jews with zeal and energy. As though proud of the slaughter, assailants photographed the carnage, creating images that sometimes captured wives and girlfriends looking on.”<sup>39</sup> Comparing the German holocaust to southern lynching, Nell Irvin Painter wrote:

Gory souvenirs remind me of similar but southern images: the charred tortured black body, often naked, often burned beyond recognition; the proud perpetrators, posing like big game hunters beside their victim; the crowd staring at the body, looking straight into the camera, sometimes bearing the smiles that greet a camera in happier circumstances. Like Goldhagen’s ordinary Germans, these ordinary white southerners documented their deeds for the benefit of lovers and friends.<sup>40</sup>

By comparing the anti-Semitic atrocities committed against Jews in Nazi Germany by ordinary German citizens, many of whom were not even in the German army, with the racist atrocities committed by ordinary southern Whites against southern Blacks, Painter emphasizes ordinariness of racism in a racist society. She writes that:

When historians and other Americans face the fact that violence under-girded southern society after emancipation, as before, we will be better able to measure the weight of institutionalized hatred. Racism will no longer appear as an individual, personal flaw, but rather as a way of life, as an ideology. The everyday racism of ordinary people will come into view. The very ordinariness of

<sup>37</sup> Lynching involved the capture of innocent black men and women by mobs of whites who then hung the blacks from trees, and burned the bodies on large bonfires, after which the mobs would engage in the butchery of cutting off pieces of the burned bodies to save as souvenirs.

<sup>38</sup> WOODWARD, *supra* note 29, at 8.

<sup>39</sup> CHAFE ET AL. EDS., *supra* note 25, at 308 (citing DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996)).

<sup>40</sup> DAILEY ET AL. EDS., *supra* note 28, at 308.



racism. . .needs to be faced and admitted.<sup>41</sup>

To drive home the southern message of complete white supremacy over Blacks, with the sanction of the law, a whole series of laws were enacted throughout the south with the express purpose of driving the newly freed blacks completely out of southern society. They erected “public symbols and constant reminders of [Blacks’] inferior position. . .and ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. . .to all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.”<sup>42</sup> Under Jim Crow laws and customs, the “Negro was made painfully and constantly aware that he lived in a society dedicated to the doctrine of white supremacy and Negro inferiority.”<sup>43</sup>

Jim Crow became “synonymous with a complex system of racial laws and customs. . .that ensured white social, legal, and political domination. Blacks were segregated, deprived of their right to vote and subject to abuse, discrimination, and violence without redress in the courts.”<sup>44</sup> This period was epitomized by a plethora of “White Only” signs on virtually every form of public convenience. This period of legalized Jim Crow in the South, and Jim Crow by custom in the North, lasted from 1877 to 1964, and ended with the Congressional passage of the Civil Rights Laws of 1964 and the Voting Rights Bill of 1965.<sup>45</sup> These two revolutionary Congressional laws were the direct result of what has come to be known as the Civil Rights Movement which began in the 1940’s. Despite many states’ efforts to get around or avoid enforcement of these laws, for the first time in over 100 years, black people could legally come out of the social, political, and economic shadow of legalized white supremacy.

## II. DENIAL, RACE, AND MASS INCARCERATION

America lectures the world on correcting and preventing international human rights abuses and punishes those countries it perceives as having violated those standards. It also enters into conventions and treaties to ban and discourage such abuses. Simultaneously, America turns a blind eye to

<sup>41</sup> *Id.* at 310.

<sup>42</sup> WOODWARD, *supra* note 29, at 7.

<sup>43</sup> *Id.* at 18.

<sup>44</sup> RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* 11 (2003).

<sup>45</sup> See *The Truth About Jim Crow*, THE AMERICAN CIVIL RIGHTS UNION (2014), <http://www.theacru.org/wordpress/wp-content/uploads/2014/07/ACRU-the-truth-about-jim-crow.pdf>.

the massive human rights abuses in its own criminal justice system at home. Despite all of the racial progress in America over the past fifty years, the issue of race remains an open wound in American social and political discourse. It is still a difficult conversation for many Americans to have. Many whites, both personally and institutionally, refuse to engage in candid conversations regarding the existence, implications, and costs of the serious issues that result from the continuing “problem of . . . the color line”<sup>46</sup> in America. As a consequence, America is either willfully ignorant, willfully callous, or in deep and “collective denial”<sup>47</sup> regarding the systemic, stunning, and deeply distressing human rights abuses that are inflicted on whole communities of racial minorities all over the country, through its national policies of predatory racialized mass imprisonment.

This collective cultural denial of the human rights abuses inherent in racialized mass incarceration is not particularly benign. Instead, as Stanley Cohen has observed, “denial is indeed conscious. Self-deception refers to keeping secret from ourselves the truth we cannot face. . . . one has to assume that she knew or knows about what it is that she claims not to know. . . . we notice and simultaneously don’t notice.”<sup>48</sup> This is important because there can be little doubt that “the phenomenon of mass incarceration has filtered into the public consciousness through cycles of media coverage and political debates.”<sup>49</sup>

Although some academics have written about the phenomenon of racialized mass incarceration, the vast majority of people and politicians in America have chosen to turn a blind eye to the suffering of young Black and Brown men that is occurring right in front of them. Cohen observed that, “the psychology of ‘turning a blind eye’ or ‘looking the other way’ is a tricky matter. These phrases imply that we have access to reality but choose to ignore it, because it is convenient to do so.”<sup>50</sup> While denial is a very powerful personal and cultural force, this phenomenon in some ways tends to mitigate against intentionality. In this context, Cohen observes, “[d]enial may neither be a matter of telling the truth nor telling a lie. The statement is not wholly deliberate and the status of “knowledge” about the truth is not wholly clear. There seems to be states of mind, or even whole cultures, in which we know and don’t know at the same time.”<sup>51</sup>

<sup>46</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* 1 (1903).

<sup>47</sup> COHEN, *supra* note 18, at 6.

<sup>48</sup> *Id.* at 6-7.

<sup>49</sup> PAGER, *supra* note 6, at 4.

<sup>50</sup> COHEN, *supra* note 18, at 5.

<sup>51</sup> *Id.*

This dichotomy is part of the phenomenology of mass cultural denial.<sup>52</sup> How can the whole American culture, “know and not know” about the plague of mass incarceration “at the same time.” Cohen describes this as the, “denial paradox.”<sup>53</sup> He explains by observing that, “this might be simple fraud: the information is available and registered, but leads to a conclusion that is knowingly evaded.”<sup>54</sup> By this logic, the American criminal justice system, and much of its white citizens, “knowingly evade” the truth about the vast personal and community devastation caused by racialized mass incarceration. He goes on to observe that this kind of “mass denial [is] characteristic of repressive, racist, and colonial states. Dominant groups seem uncannily able to shut out or ignore the injustice and suffering around them. In more democratic societies, people shut out the results not because of coercion but out of cultural habit.”<sup>55</sup> Cohen goes on to describe this paradox theory in terms of cognitive psychology and decision making: “[t]his approach emphasizes the normality of the process, and lays down its emotional component. [From this perspective,] [d]enial is a high-speed cognitive mechanism for processing information, like the computer’s command to ‘delete’ rather than ‘save.’”<sup>56</sup> He also suggests that this process could be explained by the “neurological phenomenon of ‘blindsight’ as a model: one part of the mind can know just what it is doing, while the part that supposedly knows, remains oblivious to this.”<sup>57</sup> More insidiously, “information is selected to fit existing perceptual frames and information which is too threatening to shut out altogether. The mind somehow grasps what is going on-but rushes a protective filter into place. Information slips into a kind of ‘black hole of the mind, a blind zone of blocked attention and self-deception.”<sup>58</sup>

A nation cannot credibly claim to try to solve a problem, the significance and implications of which, it will neither fully acknowledge nor face. Regardless of any feigned sense of a good will discussion of this problem, by some self-described liberal whites, and some of the 2016 Presidential candidates, as a whole, a nation cannot hit a target that it either cannot or refuses to see; and it cannot see the target without opening its social, political and legal eyes. In fact, in some ways, the more they know about

<sup>52</sup> *Id*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> COHEN, *supra* note 18, at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 6.

this problem the more they pretend not to know. This psychological phenomenon is what Cohen described as “knowing and not knowing at the same time.”<sup>59</sup> Denying that such a serious social problem even exists much less is a cause of pressing national concern, or tentatively approaching it with eyes wide shut is not a strategy for success, but rather a guarantee of failure and the perpetuation of a distressing status quo that has already created a lost generation of young Black and Brown men and threatens more to come. Any meaningful cure to this plague will require America, as a people and as a nation, to wake-up and face the truth about its denial of the existence, significance, implications and costs of racialized mass incarceration. It will have to reconcile the two halves of its national brain, to gain access to the “blind zone,” that Cohen described.

### III. RACIALIZED MASS INCARCERATION

The term “mass incarceration” was originally coined by David Garland, who wrote that this relatively recent social phenomenon is characterized by two essential features, “[o]ne is sheer numbers. Mass imprisonment implies a rate of imprisonment and a size of the prison population that is markedly above the historical and comparative norm for societies of this type.”<sup>60</sup> However, Loic Wacquant has taken exception to the use of the term “mass incarceration.” Instead, he argues that the term “mass incarceration, is a mischaracterization, mass incarceration suggests that confinement concerns large swaths of the citizenry. . . [b]ut the expansion and intensification of the activities of the police, courts, and prison over the past quarter-century have been finely targeted by class, ethnicity, and place.”<sup>61</sup> This analysis has led Wacquant to conclude that mass incarceration is “better referred to as the *hyper*-incarceration of one particular category, lower-class black men in the crumbling ghetto . . . the rest of society—including middle-class blacks—is practically untouched,”<sup>62</sup> by the burdens of racialized hyper-incarceration.

As Michelle Alexander has observed, “[t]he United States now has the highest rate of incarceration in the world.”<sup>63</sup> As Loury goes on to note, “[m]ass incarceration has now become a principal vehicle for the

<sup>59</sup> *Id.* at 5.

<sup>60</sup> GARLAND ED., *supra* note 9, at 2.

<sup>61</sup> LOURY, *supra* note 4, at 59.

<sup>62</sup> *Id.*

<sup>63</sup> ALEXANDER, *supra* note 10, at 8.

reproduction of racial hierarchy in [American] society.”<sup>64</sup> Michele Alexander has also observed that: “the racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.”<sup>65</sup>

The brute facts about the scale of racialized mass incarceration in America are, “stark. . . today a total of 7.3 million individuals are under the control of the U.S. criminal justice system: 2.3 million prisoners behind bars, 800,000 parolees, and another 4.2 million people on probation. If this population had their own city, it would be the second largest in the country.”<sup>66</sup> However, it is important to note that “in 2010, after thirty-five years of relentless growth. . . we see the first decline in the U.S. prison population—a sign that this phase of the epidemic may have peaked.”<sup>67</sup> Maybe. But the verdict is still out on this one.

From 1968 to the early 2000’s, the amazing speed and significance of “mass incarceration in the United States. . . in fact emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”<sup>68</sup> As Professor Alexander has noted, the changes in American society since the end of the Jim Crow segregation rules, “has less to do with the basic structure of our society than with the language we use to justify it.” In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we do not. “Rather than rely on race, we use our criminal justice system to label people of color as ‘criminals’ and then engage in all the practices we supposedly left behind.”<sup>69</sup>

Professor Alexander’s characterization of racialized mass incarceration as the new Jim Crow is a sobering and insightful analysis. In addition, it does ring true, because as Loic Wacquant has observed:

[U]nlike Jim Crow. . . the ghetto was not dismantled by forceful government action. It was left to crumble onto itself, trapping lower-class African Americans in a vortex of unemployment, poverty, and crime, abetted by the joint withdrawal of the wage-labor market and

<sup>64</sup> LOURY, *supra* note 4, at 36-37.

<sup>65</sup> ALEXANDER, *supra* note 10, at 8.

<sup>66</sup> DRUCKER, *supra* note 12, at 38.

<sup>67</sup> *Id.* at 40.

<sup>68</sup> ALEXANDER, *supra* note 10, at 4.

<sup>69</sup> *Id.* at 2.

the welfare state. . . . As the ghetto lost its economic function and proved unable to ensure ethnoracial closure, the prison was called upon to help contain a population widely viewed as deviant, destitute, and dangerous. In so doing it returned to its original historical mission: not to stem crime, but to manage dispossessed and dishonored populations marginalized by economic transformation.<sup>70</sup>

Some scholars in the field refer to the concentration of young Black and Brown men in America's jails and prisons, as a "racial disproportionality."<sup>71</sup> This is a mild academic characterization of what is really a racial catastrophe for these young men and their communities. However, it is clear in the statistics that the cross hairs of mass incarceration are aimed precisely at young Black and Brown men. As one scholar pointed out, "on any given day more than one of every three black men between the ages of eighteen and twenty-nine are either incarcerated, under the authority of a judge or a parole officer overseeing the terms of a sentence, or waiting to appear before a criminal court. In the big cities, this proportion commonly exceeds one half, with spikes of around 80% at the heart of the ghetto."<sup>72</sup> This focus on young Black and Brown men is so extreme that, "[o]ne observer of the penal scene goes so far as to describe the operation of the American judicial system—using an idiom borrowed from the dark days of the Vietnam War—as a 'search-and-destroy' mission against lower-class black youth."<sup>73</sup>

One cannot explain the vast differences between young White and Black and Brown men on the basis of disparate criminal behavior. As it has been noted:

The rapid and continuous deepening of the gap between whites and blacks does not result from a sudden divergence of their relative propensity to commit crimes. . . it betrays first and foremost the fundamentally discriminatory implementation of the police and judicial practices carried out within the framework of the 'law-and-order' policy of the past two decades.<sup>74</sup>

The stark evidence of this fact is again, in the numbers. We know that "African Americans represent 13 percent of consumers of drugs, but one-third of the persons arrested and three-fourths of those imprisoned for drug related offenses. In ten states, Black men are twenty-five times more likely

<sup>70</sup> LOURY, *supra* note 4, at 4.

<sup>71</sup> LOÏC WACQUANT, PRISONS OF POVERTY 76 (2009).

<sup>72</sup> *Id.* at 77.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

than white men to be sent to prison on a narcotics charge.”<sup>75</sup> These ten states are expectedly in areas of the country that have large cities with largely poor, underprivileged, under-educated, Black and Brown people. But by far, the state of “Illinois. . . holds the national record for black/white disparity with a ratio of 57 to 1, non-whites are estimated to make up 28 percent of the drug-using population in the state but contribute 70% of drug arrestees and 86 percent of those admitted to state prison following a drug conviction.”<sup>76</sup>

These racial disparities put enormous and disproportionate pressure on young Black and Brown males living in the inner core of major cities. For example, as one scholar has noted, “[a]t any given time, roughly 12 percent of all young black men between the ages twenty-five and twenty-nine are behind bars, compared to less than 2 percent of white men in the same age group.”<sup>77</sup> These enormous racial disparities in prison populations around the country are fed by, and feed into the popular white mythology of Black criminality. As one scholar put it rather bluntly when she noted that:

... widespread assumptions about the criminal tendencies among blacks affect far more than those actually engaged in crime. Blacks have long been regarded with suspicion and fear; associations between race and crime have changed little in recent years. Survey respondents consistently rate blacks as more prone to violence than any other American racial or ethnic group, with the stereotype of aggressiveness and violence most frequently endorsed in ratings of African Americans. The stereotype of blacks as criminals is deeply embedded in the collective consciousness of white Americans, irrespective of the perceiver’s level of prejudice or personal beliefs.<sup>78</sup>

This “deeply embedded” white collective consciousness regarding the criminality of Black and to a lesser extent, Brown young males, is part of the reasons that America turns a blind eye to the enormity of the racial disparities in mass incarceration. It strikes me that there are only a few, limited possibilities, either (1) many whites just do not know; but given the media images of Blacks associated with crime and prisons, this is an unlikely option; or (2) they know but they do not want to think about it, which is consistent with Cohen’s theories of denial, of knowing and not knowing at the same time, mentioned earlier in this article; or (3) they

<sup>75</sup> *Id.*

<sup>76</sup> HUMAN RIGHTS WATCH, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (1999), available at <https://www.hrw.org/reports/2000/usa/>.

<sup>77</sup> PAGER, *supra* note 6, at 3.

<sup>78</sup> *Id.*

know and they just do not care; because it is a reality that fits their world view of the inherent criminality of Blacks in general, and young Black men in particular. Unfortunately, the final option appears to be a highly viable choice. This choice is reflected in the old saying by white supremacists that, “whites commit crimes, but blacks *are criminals*.” As one scholar wrote, “the problem was racial criminalization: the stigmatization of crime as ‘black’ and the masking of crime among whites as individual failure. The practice of linking crime to blacks, as a racial group, but not to whites. . . reinforced and reproduced racial inequality.”<sup>79</sup> The startling statistics of racialized mass incarceration have no effect on whites who think along these lines; from their perspective the disproportionate numbers of Blacks in prison just “reaffirms” their belief that, as one scholar observed, “the statistical evidence of black criminality remained rooted in the concept of black inferiority or black pathology, [in every age] blacks have borne the stigma of criminality.”<sup>80</sup> And the modern plague of racialized mass incarceration is just the latest version of the weight of that stigma that has shadowed America, from before there even was an America.

However, this is not to suggest that there was some type of explicit white conspiracy, where white people—still caught in the thrall of their perceived sense of the natural order of white supremacy, righteousness and social segregation—got together and hatched a plan of racial suppression disguised as a war on crime. It was not as conscious and deliberate as that. The problems of racialized mass incarceration:

[D]o not stem from explicit and intentional race or class discrimination, but they are problems of inequality nonetheless. . . we have established two systems of criminal justice: one for the privileged, and another for the less privileged. Some of the distinctions are based on race, others on class, but in no true sense can it be said that all are equal before the criminal law.<sup>81</sup>

The social turn to racialized mass incarceration has become an institutionalized racial dynamic within our criminal justice system. This did not happen in a day, rather, it was an evolving social and political response, resistance, and resentment to judicially imposed racial equality in America. It can be fairly characterized as a form of, what I term, a type of

<sup>79</sup> KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 9, 11 (2011).

<sup>80</sup> *Id.*

<sup>81</sup> COLE, *supra* note 17, at 5.



“white racial revenge,” exacted by whites collectively, step by step, for their perceived loss of the power of explicit white supremacy and the loss of the power of ubiquitous white privilege. This suggests that denial can also manifest itself when a dominant group has lost social and political control of a minority group. To be sure, as David Garland points out,

Mass imprisonment was not a policy that was proposed, researched, costed, debated, and democratically agreed. America did not collectively decide to get into the business of mass imprisonment, in the way that it decided to build the institutions of the New Deal, or the Great Society, or even the low-tax, low spending, free-market institutions of Reaganomics. Instead, mass imprisonment emerged as the over determined outcome of a converging series of policies and decisions. Determinate sentence structures; the war against drugs; mandatory sentencing; truth in sentencing; the emergence of private corrections; the political events and calculations that made everyone tough on crime – these developments built upon one another and produced the flow of prisoners into custody. These developments may have been a part of a general realignment of politics and culture. . . . America has drifted into this situation, with voters and politicians and judges and corporations willing the specific means without anyone pausing to assess the overall outcome.<sup>82</sup>

Garland further observed that racialized mass imprisonment, “may have been a part of a general realignment of politics and culture,”<sup>83</sup> and is worthy of particular note, because of the timely juxtaposition between the end of the civil rights movement and the beginning of America’s prison boom and a pattern of racialized hyper-incarceration. As one scholar has concluded in this context, “. . . the prison boom helps us understand how racial inequality in America was sustained, despite great optimism for the social progress of African Americans. From this perspective, the prison boom is not the main cause of inequality between blacks and whites in America, but it did foreclose upward mobility and deflate hopes for racial equality.”<sup>84</sup>

In addition, racialized mass incarceration has been a colossal fiscal drain on the nation. It has been estimated that the average cost of maintaining one inmate in prison is “over \$25,000 per year or about \$85 billion annually. . . with several billion more to build all these prisons.”<sup>85</sup> Only

<sup>82</sup> GARLAND ED., *supra* note 9, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> WESTERN, *supra* note 5, at 7.

<sup>85</sup> DRUCKER, *supra* note 12, at 46.

recently has the enormity of the financial burden on the states and localities to maintain a racialized system of mass incarceration begun to filter into the consciousness of the taxpaying public. As a result, there has been a noted movement in many states to engage in various forms of disincarceration, to limit the size of their prison population. However, despite the current trend to lessen the cost of incarceration by finding alternative diversion options short of prison, it is important to note that even if these efforts bear some fruit, the individuals involved will still be legally characterized as convicted felons. As Devah Pager has concluded:

Within the employment domain, the criminal credential has indeed become a salient marker for employers, with increasing numbers using background checks to screen out undesirable applicants. The majority of employers claim that they would not knowingly hire an applicant with a criminal background, [and this]. . . mark of criminality. . . [is] accessible to employers, landlords, creditors, and other interested parties. . . and can be used as the official basis for eligibility determination or exclusion. . . the ‘credential’ of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains. In addition, credentials may affect certain groups differently than others, with the official marker of criminality carrying more or less stigma depending on the race of its bearer.<sup>86</sup>

So even if diversion or disincarceration programs are successful, while that may result in fewer Black and Brown bodies in prison, having the “mark of criminality,” by virtue of being a convicted felon, can be a virtually disqualifying condition to get a job, housing, credit, and a host of other important assets to be able to participate fully in organized society. But the reality of the relationship between prison and employment is actually deeply distorted by the issue of race. In her groundbreaking study of the effects of a criminal record with the chances of getting a job, Professor Pager found that, “[i]n the present study, black job seekers presenting identical credentials to their white counterparts received callbacks from employers at less than half the rate of whites.”<sup>87</sup> Despite the significance of this racial difference between similarly situated White and Black felons, she surprisingly, even shockingly, found that:

<sup>86</sup> PAGER, *supra* note 6, at 4-5.

<sup>87</sup> *Id.* at 146.

[t]he results show that *even a black applicant with no criminal background fares no better—and perhaps worse—than does a white applicant with a felony conviction.* (emphasis added) The impact of race could be as large, or larger, than that of a criminal record. Where for whites a criminal background represents one serious strike against them, for blacks it appears to represent almost total disqualification.<sup>88</sup>

As Michelle Alexander has observed, “Despite the absence of specific intent, racialized “mass incarceration is metaphorically, the New Jim Crow.”<sup>89</sup> She goes on to argue that:

The popular narrative that emphasizes the death of slavery and Jim Crow and celebrates the nation’s “triumph over race,” with the election of Barak Obama, is dangerously misguided. The colorblind public consensus that prevails in America today –i.e. the widespread belief that race no longer matters—has blinded us to the realities of race in our society and facilitated the emergence of a new caste system. . . [t]he new caste system lurks invisibly within the maze of rationalizations we have developed for persistent racial inequality. . . there is no inconsistency whatsoever between the election of Barack Obama to the highest office in the land and the existence of a racial caste system in the era of colorblindness. The current system of control depends on black exceptionalism; it is not disproved or undermined by it. . . racial caste systems do not require racial hostility or overt bigotry to thrive. They need only racial indifference.<sup>90</sup>

When Alexander says that “racial cast systems do not require racial hostility or overt bigotry to thrive. They need on *racial indifference*, (emphasis added)”<sup>91</sup> she is echoing Cohen’s analysis on denialism, discussed earlier in this paper, which focuses on the ability of dominant societies to just “turn a blind eye”<sup>92</sup> to the suffering of minorities. Under this “new caste system,” the message to young Black and Brown males who have served their time and been released from prison is that, as a convicted felon, you are now exiled from civil society. The significance of this exile is that you cannot rejoin society as a full citizen; you cannot participate in society by voting in local, state or national elections; you cannot serve on juries; you cannot receive social government benefits and if you live with someone who does, they will be cut off of whatever

<sup>88</sup> *Id.* at 146-47.

<sup>89</sup> ALEXANDER, *supra* note 10, at 11.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 89 (emphasis added).

<sup>92</sup> COHEN, *supra* note 18.

program they are on; you cannot improve your prospects or your station in life by getting federal loans to go back to school to obtain the education or skills that you need to improve your chances of getting a job. These are sobering messages indeed to send to the hundreds of thousands of young Black and Brown men who get out of prison every year.<sup>93</sup> In fact,

[i]n many respects, release from prison does not represent the beginning of freedom but instead a cruel new phase of stigmatization and control. Myriad laws, rules, and regulations discriminate against ex-offenders and effectively prevent their meaningful re-integration into the mainstream economy and society. . . the shame and stigma of the “prison label” is, in many respects, more damaging to the African American community than the shame and stigma associated with Jim Crow. The criminalization and demonization of black men has turned the black community against itself, unraveling community and family relationships, decimating networks of mutual support, and intensifying the shame and self-hate experienced by the current pariah caste.<sup>94</sup>

The real life consequences of racialized mass incarceration has clearly reintroduced the reality of racial caste back into American society, and created what amounts to a permanent underclass – a new class of untouchables – with devastating effects on both them and their communities. While it is clear that the source of contemporary racial stereotypes of Black male criminality, lies deep in American history and the social consciousness of White Americans, it is also clear that the contemporary stereotypes has been stoked by the mass media, which has “likely played an important role. Experimental research shows that exposure to news coverage of a violent incident committed by a black perpetrator not only increases punitive attitudes about crime but further increases negative attitudes about blacks generally.”<sup>95</sup> There is a clear cause and effect relationship between media images of Black criminality and White community attitudes towards Blacks. It has been demonstrated that “the more exposure we have to images of blacks in custody or behind bars, the stronger our expectations become regarding the race of assailants

<sup>93</sup> DRUCKER, *supra* note 12, at 39. The author noted that as recently as 2009, over 700,000 individuals were discharged from prisons, which is not an unusual number of annual discharges from prison. Since 70% of prison inmates are Black and Brown, it is reasonable to presume that the same racial percentages are reflected in the prisoners released from prison as the prisoners already in prison. This is truly a startling number of disenfranchised and marginalized young men of color that re-enter society every year.

<sup>94</sup> ALEXANDER, *supra* note 10, at 17.

<sup>95</sup> PAGER, *supra* note 6, at 4.

or the criminal tendencies of black strangers.”<sup>96</sup> In fact Professor Pager has further concluded “the criminal justice system may itself legitimize and reinforce deeply embedded racial stereotypes, contributing to the persistent chasm in this society between black and white.”<sup>97</sup> No one should be surprised by the frequency with which media portrayals of criminal perpetrators of crime that are Black, tend to show the face of the Black suspect; but when the suspect is white, no picture is shown at all, leaving the subliminal impression that only Blacks commit violent crimes. Clearly, “[t]he phenomenon of mass incarceration has filtered into the public consciousness through cycles of media coverage and political debates,”<sup>98</sup> where the political call for more ‘tough on crime’ policies, implicitly mean ‘tough on Black criminals.’ Given this widespread media and political focus on race, crime, and prison, it is hard to imagine, as contemplated earlier in this paper, that some whites “just don’t know” that this social problem even exists.

#### IV. AN AFFRONT TO HUMAN RIGHTS AND HUMAN DIGNITY

The first and most basic human right, and the basis from which all other unenumerated rights proceed, is the right to human dignity. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in the shadow of the depravity displayed in World War II, opens with the statement that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>99</sup> But from the dawn of human history, man has found that there is in nature, a special and fundamental difference between itself and all other creations on the earth. Thus, the species centered conception of human specialness, emerged as what the ancients called the natural rights of man. The concept of “human dignity has a wide range of historical, political, theological and philosophical foundations. Its development was influenced by ancient and Cristian-biblical ideas as well as Humanism, Natural Law and the political

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; see Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet the Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001) (where the author discusses what he calls a “deadly symbiosis” between prison and the inner city ghetto, and the interdependent and reciprocal nature of racial disproportionality in punishment).

<sup>98</sup> PAGER, *supra* note 6, at 4.

<sup>99</sup> Universal Declaration of Human Rights, G.A. Res. 217a (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

philosophy of the modern era, especially the Enlightenment.”<sup>100</sup> In addition, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, together with the Universal Declaration of Human Rights, “comprise the International Bill of Rights, go one step further and declare that the inalienable rights of all persons derive from the inherent dignity of the human person. The concept of human dignity also plays a major role in the debate over the ‘universalism’ or ‘relativism’ of human rights.”<sup>101</sup>

However, it must be noted that while many international human rights instruments, and many national constitutions recognize the centrality of human dignity, “there is surprisingly little agreement on what the concept actually means.”<sup>102</sup> In fact, “there is no moral consensus in favor of human rights as a set of basic moral values even though such rights have an extremely important place in paradigm cases of international law.”<sup>103</sup> Guarantees of human dignity are mentioned in the preamble of many international state constitutions in a variety of contexts. For example, “in the German Basic Law, dignity has been interpreted as referring to the most fundamental of the rights of man, a right that must not be violated in any circumstances.”<sup>104</sup> While at the same time, “in developing Israeli jurisprudence the concept of human dignity has become a kind of ‘super-right,’ which contains in it the kernel of all the other rights recognized in international instruments and modern constitutions.” But the Israeli courts, “have not accepted the German approach that human dignity must never be violated. Like most other rights it may be limited in certain circumstances in order to cater to other clashing values.”<sup>105</sup> While in the relatively new South African national constitution, “the notion of human dignity plays a dual role: as a general underlying value and as a right that must be respected and protected.”<sup>106</sup> But notwithstanding these various legal differences, as subtle as they are, “the concept of ‘human dignity’ is

<sup>100</sup> See Glenn Hughes, *The Concept of Dignity in the Universal Declaration of Human Rights*, 39 J. RELIGIOUS ETHICS 1, 6 (2011).

<sup>101</sup> *Id.* at 5.

<sup>102</sup> THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE vi (David Kretzmer & Eckart Klein eds. 2002) (containing a wide range of scholar’s writings on Human Dignity and its role in understanding Human Rights from a broad range of perspectives. For example, religious origins, historical roots, comparative constitutional perspectives, philosophical aspects, and concepts of dignity and honor).

<sup>103</sup> PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW 115 (2009).

<sup>104</sup> *Id.* at vi.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

obviously not confined to legal discourse. It has deep roots in the theology of many religions, moral political philosophy and anthropology.”<sup>107</sup>

While the American Constitution nowhere even mentions the terms, ‘human dignity’ or ‘human rights,’ there are shadows of these concepts in our most important national documents. For example, the American Declaration of Independence specifically states that, “[w]e hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the Pursuit of Happiness.”<sup>108</sup> Although it is clear that at the time our founding fathers originally wrote these words, they were literally referring only to men and not women, only to White men and not to Black men, only to White men of property, and not to common men who owned neither land nor slaves, the language does base the rights of man as coming not from the state, but from their Creator—a kind of natural right of people just because they are people. It took over 200 years for this promise to encompass all Americans within its ambit but it was sufficiently adaptable to largely accomplish these inclusions. It must also be noted that even the Charter of the United Nations explicitly recognized this same kind of fundamental rights to humans, by stating in its Preamble, “[w]e the Peoples of the United Nations Determined. . .to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and smallFalse”<sup>109</sup>

From a philosophical perspective it can be said that, “human dignity has two characteristics: (i) human beings have dignity when they can exercise freedom, or more specifically, autonomy; and (ii) autonomy is protected by a series of rights which every human being has because they are a human being.”<sup>110</sup> It is this concept of “autonomy” that lies at the heart of the concept of human dignity. While autonomy is often confused with the general ideal of “freedom,” for example being free to make one’s own choices about their own lives, freedom is more accurately defined, “in terms of an absence of unjustified coercion or constraint by the actions of others. This lies alongside substantive rights to well-being. Jointly, freedom and well-being constitute the conditions by which human beings can have dignity. Having dignity means that agents have autonomy to

<sup>107</sup> *Id.*

<sup>108</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>109</sup> RICHARD B. LILlich, ET AL., INTERNATIONAL HUMAN RIGHTS: 2009 DOCUMENTARY SUPPLEMENT 3 (2009).

<sup>110</sup> CAPPS, *supra* note 103, at 108.

achieve their self-chosen purposes.”<sup>111</sup> Thus, from ancient times to the Enlightenment, to today’s modern societies, the essence of dignity is the autonomy.

In stark contrast to the “tough on crime” and “war on drugs” political policies that drove mass imprisonment in the first place, now the national mood on these issues has begun to soften, primarily because of the national epidemic of a “heroin crises” among White middle and upper class young people.<sup>112</sup> When the drug problem was largely a Black and inner-city problem, most Whites, just did not care about urban ‘junkies.’ But now that the drug problem, largely revolving around heroin, involves White suburban young men and women, they suddenly care a great deal and urge the drug problem of “their kids,” be treated by law enforcement as a disease and not a crime. In fact one White parent whose child died from an overdose of heroin was quoted in the above referenced article, as saying, “[w]hen I was a kid, junkies were the worst. . .he recalled in their comfortable home . . .in southeastern New Hampshire. . .I used to have an office in New York City. I saw them. [but now] ‘junkies’ is a word he would never use, these days they’re working right next to you and you don’t even know it. They’re in my daughter’s bedroom—they are my daughter.” The author goes on to observe:

When the nation’s long-running war against drugs was defined by the crack epidemic and based in poor, predominately black urban areas, the public response was defined by zero tolerance and stiff prison sentences. But today’s heroin crises is different. While heroin use has climbed among all demographic groups, it has skyrocketed among whites; nearly 90% of those who tried heroin for the first time in the last decade were white.<sup>113</sup>

This new national concern with White drug addicts burdened and often dying from overdoses has gone so far that many police departments around the country have begun new policies regarding heroin addicts, aimed directly at White youth. These new policies involve telling addicts that if they come to the local police station, even with heroin on their person, and ask for help, they will be given medical attention and referred to a drug treatment program.<sup>114</sup> Now “34 Police Departments in nine states”<sup>115</sup> have

<sup>111</sup> *Id.*

<sup>112</sup> Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES, Oct. 30, 2015, [http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html?\\_r=0](http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html?_r=0).

<sup>113</sup> *Id.*

<sup>114</sup> *The Last Word with Lawrence O’Donnell*, (MSNBC television broadcast Oct. 15, 2015).



begun this new drug policy. One Police Chief who has this policy defended it by saying, “it is cheaper to divert them into treatment programs than to put them into the criminal justice system.”<sup>116</sup> Is this a new math that did not exist when the face of heroin addiction was Black? How do the police fund these new diversion programs into drug treatment rather than the criminal justice system? One Police Chief answered this question very curtly, “we use money seized from arrested drug dealers.”<sup>117</sup> I shudder at the implications. Presumably, given current policing practices, most of these drug dealers are Black. So those who are arrested carrying cash, or from whom civil forfeiture results in assets being seized and sold at auction, have their money used to fund drug treatment programs for White drug addicts. What is wrong with this picture? Before this White epidemic, if a Black heroin addict walked into a police station with drugs on his person and asked for help, there is no doubt that he would have been immediately arrested and thrown in jail. The police would not have considered him as sick, but rather as a criminal and treated him accordingly.

This contrast in the treatment of White and Black drug addicts makes it clear that Black people swept up by predatory policing practices in the urban core, and churned in the racialized mass incarceration machine, are not being treated with dignity and respect. In fact, their human dignity is assaulted by racialized mass incarceration at “every stage of the criminal justice process.”<sup>118</sup> The recognition of the inherent dignity of every human must be at the center of all morally justifiable policing. As the great philosopher Immanuel Kant has argued, it cannot be rationally denied, “that there are certain categorical moral obligations to respect the fundamental interests of others which arise from our capacity to will and act.”<sup>119</sup> For Kant, “autonomy is . . . the ground of the dignity of human nature and of every rational player.”<sup>120</sup> The essential value of Kant’s theories is his conception of ‘ends and means.’ He refers to his ideal world as ‘the kingdom of ends’ because. . . the laws enjoin that every member should treat himself and all others, never merely as a means, but at the same time as an end.”<sup>121</sup> In Kant’s terms, dignity is a constraint on the

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> COLE, *supra* note 17, at 4.

<sup>119</sup> CAPPS, *supra* note 103, at 116.

<sup>120</sup> See generally IMMANUEL KANT, THE MORAL LAW: GROUNDWORK OF THE METAPHYSICS OF MORALS 30 (H. J. Paton trans., 1948) (1785).

<sup>121</sup> H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY 187

actions of others toward each other, by respecting them as ends in themselves and never merely as a means.

Racialized mass imprisonment and the social, legal, and law enforcement maxims by which it is achieved and maintained, by its very nature treats young Black and Brown men as means and not as ends. They are the means of advancement in the police department through the number of arrests made, they are means by which the highly racialized inner city is controlled and contained by the powers that be; they are the means by which private for profit prisons are kept in business, and thereby all the many people employed by the prisons in primarily rural white communities where the prison is the largest employer in town; they are the means of disrespecting and dishonoring entire communities of color, where law enforcement is seen by the residents as an ‘occupying force,’ not there to ‘serve and protect,’ but rather to harass and arrest; they are the means by which “crime policy has emphasized containment and harsh punishment as a primary strategy of crime control,”<sup>122</sup> in the inner city. Dignity is “a form of empowerment,”<sup>123</sup> and every aspect of racialized mass incarceration is expressly designed to ‘disempower’ its victims. Thus disempowered, these young men can then be easily disrespected, devalued, and treated as means to an end and never as an end in themselves. This process allows these young men to be stripped of their sense of their humanness, before, during, and even after incarceration. It is no wonder that young Black men swept up in racialized mass incarceration, thereby becoming felons and virtually unemployable, have a very negative: This should all be up higher as a block quote, but somehow Word would not cooperate with me and my efforts to change this. Psychic disposition, resulting from the frustration and disappointment from nearly continuous rejection. Expecting and fearing rejection, people who have been [incarcerated] may act less confidently and more defensively or they simply avoid a potentially threatening contact altogether. The result may be strained and uncomfortable social interactions with potential stigmatizers, more constricted social networks, compromised quality of life, low self-esteem, depressive symptoms. . . As stigmatized individuals come to expect disapproval or rejection, their internal defenses become activated. The tension caused by such interactions can be resolved either by dropping out of the labor market altogether. . . or by internalizing the negative attributions, with associated lowering of

(1948).

<sup>122</sup> PAGER, *supra* note 6, at 2.

<sup>123</sup> CAPPS, *supra* note 103, at 123.

expectations for success.<sup>124</sup>

The natural consequences of this process constitute an assault on their dignity as humans and as men, thus literally forcing them to survive only by reoffending and returning to prison. As Professor Pager has observed, once these young men are released from prison with the stigma of “felon” on their back, “many do not remain out for long. Of those recently released, nearly two-thirds will be charged with new crimes, and more than 40% will return to prison within three years.”<sup>125</sup> But that also means that 60% will not, and somehow overcome all the assaults, rejections, and social banishment that stem from racialized mass imprisonment, at least for three years. After that, who knows?

## V. DRIVERS OF MASS INCARCERATION

### 1. *The War on Drugs*

The overwhelming majority of Black and Brown men that have been caught up in America’s obsession with racialized mass incarceration, have been imprisoned for minor and non-violent low level drug offences as part of this nation’s so-called “War on Drugs.” The timing of the declaration of America’s War on Drugs is very interesting and very telling. Although some scholars attribute the beginning of the war to President Ronald Reagan in 1982, the more accurate account is that this War on Drugs began in 1968 with President Richard Nixon’s speech to Congress, officially declaring America’s War on Drugs. The year 1968 also marked the end of the civil rights struggle for racial equality in America. Glenn Loury observed that this incredible expansion of the black prison population has been significantly fueled by the so-called War on Drugs. He notes that:

The incarceration rate for violent crime almost tripled, despite the decline in the level of violence. The incarceration rate for non-violent drug offenses increased at an even faster pace: between 1980 and 1997 the number of people incarcerated for non-violent offenses tripled, and the number of people incarcerated for drug offences increased by a factor of eleven. . . and none of the growth in incarceration between 1980 and 1996 can be attributed to more crime. . . the growth was entirely attributable to a growth in punitiveness.<sup>126</sup>

<sup>124</sup> PAGER, *supra* note 6, at 147.

<sup>125</sup> *Id.* at 2.

<sup>126</sup> See LOURY, *supra* note 4, at 8.

Marc Mauer has observed that “on a proportional basis [between violent crime and drug offenders] the increase in incarcerated drug offenders is more dramatic, with a 546 percent rise during [the period 1985-2000].”<sup>127</sup> Michelle Alexander also observed that, “[a]lthough the majority of illegal drug users and dealers nationwide are white, three fourths of all people imprisoned for drug offenses have been black or Latino.”<sup>128</sup> She goes on to say that, “people of all races use and sell illegal drugs at remarkably similar rates. If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in illegal drug dealing than people of color.”<sup>129</sup> One national study on the racial dynamics of drug use found significantly larger racial disparities and concluded that, “white students use cocaine at seven times the rate of black students, use crack cocaine at eight times the rate of black students, and use heroin at seven times the rate of black students.”<sup>130</sup>

This racial dimension in racialized mass incarceration is so stark that Marc Mauer observed that, “for African American males, the rates of incarceration can only be described as catastrophic.”<sup>131</sup> America’s prisons are literally, “overflowing with black and brown drug offenders. In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.”<sup>132</sup> What explains this vast disparity in imprisonment rates? It can only be understood through a racial lens. “In major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.”<sup>133</sup> Bruce Western has also observed that, “[t]he black – white disparity in imprisonment is especially large. Black men are six to eight times more likely to be in prison than whites.”<sup>134</sup>

Just a few years after President Nixon’s declaration of a war on drugs, as Marc Mauer observed:

The number of inmates in U.S. state and federal prisons... skyrocketed from 196,000 in 1972 to 1,410,000 by 2004, a 600 percent increase. Thus there are now six times as many U.S. citizens

127 MARC MAUER, *RACE TO INCARCERATE* 41 (2006).

128 ALEXANDER, *supra* note 10, at 98.

129 *Id.* at 99.

130 *Id.*

131 MAUER, *supra* note 127, at 20.

132 ALEXANDER, *supra* note 10, at 7.

133 *Id.*

134 WESTERN, *supra* note 5, at 16.

locked up as there were thirty years ago, for an overall rate of incarceration of 726 inmates per 100,000 population, or about one of every 138 Americans.<sup>135</sup>

Mauer goes on to conclude that “in [America’s] zeal to imprison. . . in 1994. . . half of the more than one million people imprisoned. . . were African American,” which was the “price to be paid for the economic and social changes that the nation [was] undergoing in the late twentieth century.”<sup>136</sup>

Some have argued that the dramatic rise in the

Rate of incarceration in itself might merely be a reflection of a high crime rate. . . [however] [a]n analysis of the growth in the use of prisons from [the 1980’s] until the present undermines the contention that the continuing race to incarcerate in the United States is a result of higher rates of violent crimes.<sup>137</sup>

In fact, “research has demonstrated that changes in criminal justice policy, rather than changes in the crime rates, have been the most significant contributors leading to the rise in state prison populations.”<sup>138</sup> In fact, it has been observed that “both official crime rates and prison rates may be affected by the level of punitiveness in a society.”<sup>139</sup> It has been decisively concluded by many experts in the field that “[t]he correlation between incarceration and crime is statistically insignificant.”<sup>140</sup> Statistics like these have led some commentators to “discount any relationship between crime and punishment.”<sup>141</sup> However, one commentator makes the case for the disassociation between hyperincarceration and any increase in the crime rate, more “bluntly,” when he wrote that, “the explosion in the number of prisoners in the USA cannot be explained as “caused by increases in crime. It has to do with penal policy.”<sup>142</sup> This analysis helps to explain why the vast increases in incarceration “. . . is concentrated among the disadvantaged and the large race and class disparities in imprisonment reinforce lines of social disadvantage. High incarceration rates among less educated, less skilled, and financially disadvantaged, and minority men is

<sup>135</sup> MAUER, *supra* note 127, at 20.

<sup>136</sup> *Id.* at 22.

<sup>137</sup> *Id.* at 30.

<sup>138</sup> *Id.* at 33.

<sup>139</sup> *Id.* at 37.

<sup>140</sup> *Id.*

<sup>141</sup> WESTERN, *supra* note 5, at 15.

<sup>142</sup> *Id.* at 35.

unmistakable.”<sup>143</sup> The black –white disparity in imprisonment is especially large. “Black men are six to eight times more likely to be in prison than whites.”<sup>144</sup> These numbers and their social implications are striking, unprecedented, and politically unacceptable to most of the Western World, and should be equally unacceptable for any fair minded and reasonable American citizen.

## 2. Racial Profiling

The current national tragedy of mass incarceration, especially of young men of color, is intimately bound up with contemporary stop and frisk policies of urban policing, racial profiling, and human rights. The deliberate targeting by the police of Black and Hispanic young men, as being criminally suspicious, otherwise known as “racial profiling,” is nothing new in America. It has been official state policy dating back to Reconstruction, when vast numbers of young black men were arrested for the “crime” of vagrancy and idleness. However, what has changed in recent years is that this policing tactic has grown tremendously in its predatory intensity, personal invasiveness, demeaning effect, and in its ability to act as a direct pipeline for massive numbers of young Black and Hispanic men to state and federal prisons for relatively minor, nonviolent crimes, and for longer periods of incarceration than their similarly situated white counterparts.

Deliberate state sanctioned racial profiling of young men of color has been a virtually universal experience by most young Black and Brown men who live in the urban core, and many others who do not. Although the experience of being stopped usually only takes only a few minutes, when you are singled out as criminally suspicious on the basis of race, it is a demeaning and humiliating affront to personal dignity and social respect – that rightly creates a feeling of anger, or even rage, over what is essentially a type of “public shaming.” The experience of racial profiling is so widely shared that, most black men, of whatever socio-economic status, have a story to tell. In fact on Tuesday, July 16, 2013, in an address to the national convention of the NAACP, then Attorney General Eric Holder related several similar incidents in his life when he was stopped by the police for no other reason than being what the police considered to be a “suspicious black man,” which translates into simply “a Black male of any age.” In the

<sup>143</sup> *Id.*

<sup>144</sup> ALEXANDER, *supra* note 10, at 8.

first two incidences, Holder described himself as driving at the speed limit and breaking no traffic laws and twice he was stopped on the New Jersey turnpike and his car searched. In the third incidence, Holder described himself as “simply running to catch a movie, in Georgetown, in Washington D.C. and said that, at the time, I was a federal prosecutor.”<sup>145</sup> As Bruce Western observed on this point, “[i]n the era of mass imprisonment, to be young, black, and male, even if never having gone to prison, is to arouse suspicion and fear.”<sup>146</sup>

A New York Federal Court Judge recently ruled that such targeted practices, known as “stop and frisk,” as practiced by the New York City police, and as an officially sanctioned and encouraged policy, “violated their constitutional rights in two ways: (1) they were stopped without a legal basis in violation of the Fourth Amendment [of the American Constitution], and (2) they were targeted for stops because of their race in violation of the Fourteenth Amendment” to the American Constitution.<sup>147</sup> As a result, the judge did not order the police department to end its practice of stop and frisk, but instead ordered them to stop conducting the program in a racially discriminatory way. She also “ordered the installation of the department’s first ever independent monitor to oversee changes to its practices.”<sup>148</sup> Even though, by its terms, the ruling only affects the New York City police department, it is expected to be a wake-up call to police chiefs all around the country. As evidence of the racialized nature of the way stop and frisk was being used in New York to racially profile Black and Brown youth, the judge noted that the evidence showed that, “the NYPD made 4.4 million stops between January 2004 and June 2012. Over 80% of these. . . were of blacks or Hispanics.”<sup>149</sup> In a fashion evocative of Cohen, Judge Scheindlin observed in her opinion that, “I also conclude that the City’s highest officials have *turned a blind eye* [emphasis added] to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy of targeting “the right people,” is racially discriminatory and therefore violates the United States

<sup>145</sup> *Attorney General Eric Holder’s Remarks on Trayvon Martin at NAACP Convention*, WASH. POST (July 16, 2013), [https://www.washingtonpost.com/politics/attorney-general-eric-holders-remarks-on-trayvon-martin-at-naACP-convention-full-text/2013/07/16/dec82f88-ee5a-11e2-a1f9-ea873b7e0424\\_story.html](https://www.washingtonpost.com/politics/attorney-general-eric-holders-remarks-on-trayvon-martin-at-naACP-convention-full-text/2013/07/16/dec82f88-ee5a-11e2-a1f9-ea873b7e0424_story.html).

<sup>146</sup> WESTERN, *supra*, at 5.

<sup>147</sup> *David Floyd et. al. v. The City of New York*, Opinion and Order, 08 Civ. 1034 (SAS).

<sup>148</sup> Sean Gardiner, *Judge Rules NYPD Stop-and-Frisk Practice Violates Rights*, WALL ST. J. (Aug. 13, 2013), <http://www.wsj.com/articles/SB10001424127887324085304579008510786797006>.

<sup>149</sup> *David Floyd et. al. v. The City of New York*, Opinion and Order, 08 Civ. 1034 (SAS), at 1.

Constitution.”<sup>150</sup> She also observed that some members of the New York Police Department were in such denial about the unconstitutionality of their stop and frisk policies that, “one NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason—in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional.”<sup>151</sup>

On April 14, 2013, in the midst of a national uproar over the shooting death of an unarmed young teenager named Trayvon Martin, Brent Staples published an editorial in the *New York Times* that featured a picture of a torso of a dummy with a hoodie over its head, and a bull’s eye on its chest. The article observed that many white people in America experience young Black males as the other, and it noted that:

Society’s message to black boys is – we fear you and view you as dangerous – and is constantly reinforced. Boys who are seduced by this version of themselves end up on a fast track to prison or the graveyard. But even those who keep their distance from this deadly idea are at risk of losing their lives to it. The death of Trayvon Martin vividly underscores that danger.<sup>152</sup>

In fact, one of the primary drivers of the prison boom in the last thirty years in America is due to what Devah Pager describes as the “widespread assumptions about the criminal tendencies among blacks, [which] affects far more than those actually engaged in crime.”<sup>153</sup> Pager went on to observe that:

Blacks in this country have long been regarded with suspicions and fear. . . [and] associations between race and crime have changed little in recent years. Survey respondents consistently rate blacks as more prone to violence than any other racial group, with the stereotype of aggressiveness and violence most frequently endorsed in ratings of African Americans.<sup>154</sup>

She then concludes dramatically, and in agreement with Cohen, that “[t]he stereotype of blacks as criminals is deeply embedded in the collective

<sup>150</sup> *Id.* at 13-14.

<sup>151</sup> *Id.* at 14.

<sup>152</sup> Jonathan Capeheart, *Trayvon Martin and the Stolen Youth of Black Children*, WASH. POST (July 15, 2013), <http://www.washingtonpost.com/blogs/post-partison/wp/wp/2013/07/trayvon-martin-and-the-stolen-youth-of-black-children>.

<sup>153</sup> PAGER, *supra* note 6, at 3.

<sup>154</sup> *Id.*



consciousness of white Americans, irrespective of the perceiver's level of prejudice or personal beliefs."<sup>155</sup> She might well have added, "and degree of denial." This is a clear example of what Cohen described as "cultural denial."

As Loic Wacquant has observed:

the relatively recent mass incarceration of black men and boys is no longer based on a white supremacist sense of black "unworthiness" but [on] dangerousness, that stamps the hegemonic biased cognition about blacks, precisely because the prison has become the primary machine for signifying and enforcing a class-graduated conception of race in th[is] country.<sup>156</sup>

Illustrating this recent racial phenomenon, CNN recently reported that a high school psychologist tweeted to his friends that, "young black thugs should be put down like the dogs they are. We have been invaded by an army of young black thugs who are holding our country hostage."<sup>157</sup> One is left to wonder how this high school psychologist relates to the Black and Brown students in his charge. Moreover, it is equally consequential, given his attitude regarding what he terms as "young black thugs," what messages is he sending to the white youth in his charge by his example and his inflammatory language? Most alarming as well, is what racial messages of unworthiness and dangerousness he is sending to his white colleagues who are charged with teaching and disciplining these young Black children. As a consequence, young Black males are targeted as potential criminals, not only by the very people who are supposed to teach and advise them in school, but also by society at large, the police and the entire American criminal justice system. This contemporary white narrative regarding the inherent dangerousness of Black and Brown young men, generally but especially, even in school, is one of the primary factors that led to and continues to fuel the great American tragedy of racialized mass incarceration. As a result of this conception of race, in which young Black and Brown males are considered dangerous predators, it is no wonder that the focus of America's obsession with incarceration is targeted at young Black and Brown men.

In addition, it is of particular note that the American public has

<sup>155</sup> *Id.*

<sup>156</sup> LOURY, *supra* note 4, at 67.

<sup>157</sup> CNN News, *Anderson Cooper 360 Degrees*, May 22, 2012, available at <http://www.cnn.com/TRANSCRIPTS/1205/22/acd.02.html>.

essentially tolerated and thereby ratified the contemporary connections between race and mass incarceration. One of the most important reasons for this public toleration is, as was observed earlier, the association between black men and criminal dangerousness, and thereby that they are considered to be a threat to public safety. Moreover, although it is more subtle, the public fear, held mostly by the white American public, is also tied inextricably to a sense of white racial revenge or a white backlash<sup>158</sup> to the Civil Rights Movement of the 1960's and its accomplishments in achieving unprecedented levels of racial equality and a dismantling, at least publically, of the social, political, educational, and cultural dominance of white privilege in American society. Most importantly the widespread tolerance of most white Americans in the devastation wrought by racialized mass incarceration is due to the fact that as Stanley Cohen noted, “[d]ominant groups seem uncannily able to shut out or ignore the injustice and suffering [of oppressed racial minorities] around them. . .out of cultural habit.”<sup>159</sup> Unfortunately, “shut[ting] out or ignoring of. . .injustice and suffering around them,”<sup>160</sup> is a deeply embedded cultural habit of most white Americans when it comes to the suffering of Black people,<sup>161</sup> and has continued from almost the first arrival of African slaves to the American colonies in 1619, and continues to the present day. Just imagine what the White reaction in this country would be if their sons were stopped and frisked in disproportionately high numbers when they went out into public, were arrested and incarcerated in huge numbers for non-violent drug crimes, and were the object of social and institutional fear and loathing just because of the color of their skin. No doubt they would have a totally different view of mass incarceration than they do now.

We do not have to “just imagine it,” because something rather like that is happening now, in 2016 with the emergence of a veritable epidemic of heroin use and overdose induced deaths, primarily among upper class white privileged youth. This epidemic has brought the scourge of drug addiction and all of its associated individual, family, and community tragedies to the front doors of many whites, and it has made them see this once solely Black problem with new eyes. Now among the fallen and devastated are ‘their’ children, or at the very least, children who look like their children.

<sup>158</sup> Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032 (2010).

<sup>159</sup> COHEN, *supra* note 18, at 5.

<sup>160</sup> *Id.*

<sup>161</sup> See ALEXANDER, *supra* note 10, at 204. This process of insensitivity to pain and suffering of black bodies began during slavery (1619 to 1865); and Jim Crow laws and segregation in all forms of public life (1877 to 1965); and now continues with racialized Mass Incarceration (1975 to 2015).

Once drug addiction and death became a ‘White’ problem, it was no longer considered as a criminal matter, rather it was instantly converted into a ‘public health problem,’ that called not for prison but for drug treatment facilities.

## VI. CONCLUSION

It is way past time for the American public and political elite to stop looking the other way denying the human rights plague of racialized mass incarceration and acknowledge its insidious and destructive effects on the dignity and human rights of millions of its black and brown citizens. As a nation, America must, ‘come to terms with its past’<sup>162</sup> and its present social, political, and economic sin of racialized mass incarceration. For too long it has, “circumvented the issue with the narrative skills befitting a psychopath.”<sup>163</sup> America’s mass denial of this terrible reality clearly has not worked as either a political or social strategy and has only exacerbated an already destructive, insidious, and distressing reality. This in turn incurs another great cost of this terrible domestic policy against its racial minorities, in the form of the disapproval and disrespect of the rest of the civilized industrial world for whom respect for the human rights of a nation’s ethnic minorities has become an increasingly categorical imperative.

This widespread and massive national denial regarding the reality and social costs of racialized mass incarceration, has already cost America a generation of young Black and Brown men, and the destruction of countless Black and Brown families and communities. It now threatens to destroy yet another generation of young Black and Brown men, their families and communities with little or no hope for any relief in the foreseeable future. If America is to make any headway in even beginning to solve this problem, it must first open its collective social, political, and societal eyes and free itself from its willful racial blindness, and from what Stanley Cohen describes as ‘the mass denial so characteristic of repressive, racist . . . states.’<sup>164</sup>

Founding father, former President of the United States, and author of the Declaration of Independence, Thomas Jefferson, while contemplating the state of slavery in America, is apocryphally known to have said, “[w]hen I

<sup>162</sup> Courtney Angela Brkic, *The Wages of Denial*, N.Y. Times, July 11, 2005, at A21.

<sup>163</sup> *Id.*

<sup>164</sup> COHEN, *supra* note 18, at 7.

consider that God is just, I weep for my country.”<sup>165</sup> Until America, as a people and as a nation, ceases to engage in deliberate indifference, willful callousness, and denial of the reality of racialized mass incarceration and the vastness of its destructive power to human lives and human rights, we should all weep for the human rights nightmare that is occurring in America.<sup>166</sup>

<sup>165</sup> See JOHN CHESTER MILLER, *THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY* 43 (1991). Jefferson described slavery in these terms: “We have the wolf by the ears; and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.” *Id.* at vii.

<sup>166</sup> Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES (May 14, 2011), [http://www.nytimes.com/2011/05/15/opinion/15alexander.html?\\_r=4](http://www.nytimes.com/2011/05/15/opinion/15alexander.html?_r=4).