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Why We Need a Progressive Account of Violence

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James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev., 101 (2012).



Aya Gruber

It seems fair to say that in current criminal law and criminology discourse, Jim Crow analogies are all the rage. The dialogue, and especially Michelle Alexander's book, *The New Jim Crow*, is an important and necessary intervention in the national conversation about crime and punishment. Alexander's book makes the case that the modern U.S. criminal system operates to impose de jure and de facto second class citizenship on African Americans in a strikingly similar manner to Jim-Crow-era laws. *The New Jim Crow* has received an enormous amount of publicity and has successfully inserted questions of racial hierarchy into what are often insular debates over desert, deterrence, and appropriate crime management. As much as the Jim Crow dialogue illuminates often ignored or deliberately down-played racial aspects of the U.S. penal state it, like all analogies, is an imperfect comparison. It therefore has a tendency to obscure other factors important to the understanding and critique of mass incarceration—factors like cultural discourses of violence that transcend race, the relationship between incarceration and class and labor, and the role of criminal law in perpetuating and maintaining neoliberal political and economic structures.

This is where James Forman Jr.'s article comes in. In a move that many of his friends and colleagues viewed as head-scratching, Forman, a staunch critic of the American carceral state, decided to set forth a critique of the Jim Crow critique of mass incarceration. Many progressives have a strong instinct that they should stand by the Jim Crow narrative, especially now that it is gaining so much traction. Despite this, Forman makes the case that understanding the limits of the analogy explains why the racial critique of mass incarceration, which has existed for decades, has not succeeded in radically changing support for tough-on-crime measures, even among many African Americans. Forman also argues that concentrating solely on a reductionist racial picture of the criminal system deflects attention from the many other ways that system reflects and reproduces social inequality. In the article, Forman lists six objections to the analogy, but here I want to concentrate on two larger themes of his paper, antiessentialism and accounting for violence.

Turning to antiessentialism, Forman urges progressive incarceration critics to understand that African Americans do not share monolithic views on the criminal justice system, to understand that blacks are not uniformly affected by criminal policies, to recognize mass incarceration's effects on certain groups of white Americans, and indeed to move past the black-white binary altogether. One might argue that racial critiques of harsh criminal justice will be more persuasive when they ignore prosecution-oriented blacks or write off their attitudes as a product of an unjustly constrained choice between continual victimhood and supporting mass incarceration. Yet Forman says that the cost of this persuasiveness is the perpetuation of an incomplete vision of the relationship between African-Americans and crime control. To make the case that critics cannot dismiss

black support for harsh anticrime policies, Forman starts with the anecdote that the Harlem NAACP supported the Rockefeller drug laws and moves to his experiences as a public defender in D.C., fighting to control the upwardly ratcheting criminal system against black prosecutors, judges, and D.C. Council members. The fact that D.C. public defenders like Forman and myself (James was my training director when I was a public defender in D.C.) have had to fight so hard against the tough-on-crime wave in a majority African-American city belies any claim of a uniform African American distaste for prosecutorial policies.

Of course, the question is: Why, if you are an opponent of the oppressive and racist U.S. penal state, would you highlight this weakness in the Jim Crow analogy? One might convincingly argue that Forman's description of black support for incarceration actually bolsters the familiar "underpolicing" argument that African American communities want and need more, not less, criminal enforcement and punishment. Forman, however, is saying something very different—he is claiming that in order to combat mass incarceration we must understand criminal law, policy, and narrative as a complex tyrannical structure that enlists groups in their own oppression. The importance of this argument cannot be understated. When one makes a simplistic racial case against criminal policies, it is vulnerable to the trump card argument: "Minorities do it." For example, when critics claim that the LAPD engages in rampant black racial profiling in certain neighborhoods, a common response is that the claim cannot be true because the police in those neighborhoods are predominantly African American. This response can only be undercut by a larger understanding of the how the racialized institution of policing transcends the race of any particular police officer. However, I believe that a critique of both the Jim Crow analogy and the underpolicing argument can be fully achieved only with an account of how the institution of criminal justice in the United States is racially subordinating—despite the existence of black support for it. Given that this article is primarily a response to Jim Crow analogists, it is understandable that Forman stops before the substantive account. Nonetheless, I think his critique will be stronger if read together with other articles that provide such an account or when Forman formulates his own institutional analysis.

While the antiessentialism argument is very important, I think the greatest contribution of this article is Forman's exhortation for progressives to account for real criminal violence in their critiques of the criminal system. Forman rightly notes that the Jim Crow narrative (and, I might add, other progressive narratives) tends to concentrate on the role of drug laws in constructing the penal state. Such narratives also tend to describe in detail how defendants are subjected to sadistic incarceration, suffer debilitating collateral consequences, and have their rights denied, without mentioning what the defendant did. (Compare this to victims' rights and prosecution cases and articles that describe heinous crimes in exacting detail.) While this might be a persuasive tactic, it obscures reality and thus makes the critique vulnerable to attack. The fact of the matter is that the majority of people under penal supervision were convicted for acts of violence. Having ignored this inconvenient reality, many progressive criminal justice critics, when faced with questions about violent criminals, murderers, and, more troubling, those who perpetrate bias crimes, either have nothing to say or effectively switch sides. Concerns over mass incarceration quickly recede when feminists, critical race theorists, and others weigh in on whether to eliminate the defense of extreme emotional distress, remove the force requirement from rape law, or narrow self-defense because broad murder defenses give a pass to people like George Zimmerman.

Perhaps this is just the way it is. Maybe the best progressive stance is that certain offenses merit decriminalization (drugs) and other offenses merit more criminalization (domestic violence and hate crimes). But I don't think so. I think that this position demonstrates that many progressives have internalized the larger cultural sensationalization and cathartic condemnation of violence, which is itself racially oppressive in nature and plays no small part in constructing and maintaining mass incarceration. Forman's article highlights why we need a progressive account of violence. Critics of incarceration need a way to be able to stare instances of violence, even race and gender-based violence, in the face and unwaveringly maintain an opposition to the carceral state. Forman says that inserting violence into the mix raises "supremely difficult questions that I do not attempt to answer in this Article."

Nevertheless, he hints at some facets of what a progressive answer might involve, including focusing on prevention over retribution, engaging in the hard/soft determinism debate about responsibility for violent crime, and understanding the role of mass incarceration and tough-on-crime narratives in perpetuating violent behavior. I might add some others like problematizing cultural narratives of the harms of violence, focusing on the political deployment of violence narratives, and understanding condemnation of violence as a distinctly racialized and gendered phenomenon. Defending lenity in the face of violence is a difficult endeavor, but some intrepid scholars have begun to travel down this challenging road. *See, e.g.*, Alice Ristroph, *Criminal Law in the Shadow of Violence*. I'd like to see more scholars, including Forman, become fellow travelers.

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