Confronting Mass Incarceration: Lecture from the 2018–2019 Jorde Symposium

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INTRODUCTION

Thank you. It’s a real honor to be at any event that is sponsored by the Brennan Center. I read your tweets, your emails, your policy reports, and your articles in the Atlantic. You are a vital institution. Thank you for doing the work that you are doing. I had a chance to spend some time with Tom Jorde earlier this afternoon, and Tom, I want to tell you how much I appreciate you putting your name, energy, and heart behind this lecture series. I’m especially grateful to the commentators that we have.1

I want to start by talking to you all about what propelled me to want to write this book, Locking Up Our Own.2 Fundamentally, it grew out of my experiences working in the criminal legal system. I used to call it, and I call it in the book,
the criminal justice system, but more and more I’ve started to call it the “criminal legal system” because, like a lot of people, I’m starting to wonder if there’s even enough justice in the system to earn the title “criminal justice system.” In this lecture, I’ll go back and forth between the two phrases.

One of the stories that I tell in the book is of a young man I represented who I’ll call Brandon. Brandon was a teenage client of mine: 15 years old. He had been charged with, and pled guilty to, possession of a gun and possession of a small amount of marijuana. He was facing sentencing in Superior Court, and I was the public defender appointed to represent him. I had taken the job of being a public defender because I viewed it as the civil rights work of my generation.

My parents met in the Student Nonviolent Coordinating Committee (SNCC), one of the major civil rights groups of the 1960s. My dad was the executive secretary; my mom was a member of the organization. My dad is black; my mom is white. They were an interracial couple at a time when those marriages were illegal in many states in this country. Their generation changed and transformed this nation. Theirs was the generation that got us the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. In school we learn that Congress passed those laws and the President signed them, and that’s true. But don’t kid yourself: the reason those laws got passed was that people mobilized, fought, and marched.

Despite this progress, when I was graduating from law school, I could see that there was unfinished business in the civil rights movement. The place that I saw that unfinished business—I’m not saying it’s the only place—was our criminal legal system. At the time, we didn’t have the term “mass incarceration,” but we already knew some of the underlying facts. We already knew that one in three young black men was under criminal justice supervision.3 The same report from the Sentencing Project revealed that black women were the largest single growing demographic in the prison system.4 We had already passed Russia and South Africa to earn the dishonor of being the world’s largest jailer.5 We already had 5 percent of the world’s population and 25 percent of its prisoners.6

I had personally seen some of the changes and transformation in American society that produced those numbers. I grew up in Atlanta in a mostly black neighborhood: it was working-class with middle-class pockets. I could see disparities in policing even as a child. I’m black, but I’m so light that the police didn’t always know it. I could see differences in how I was policed when I was

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4. Id.
by myself in my neighborhood compared to when I was with my friends who were more immediately identifiable as black.

And consider this: two blocks in either direction from my childhood house were two enormous institutions. Huge, hulking structures. If you walked one way, you got to a General Motors plant. If you walked the other way, you got to the Atlanta Federal Penitentiary. That’s when I was a kid. Now fast forward fifteen years to when I was graduating from law school and deciding on a career. One of those buildings had shut down, its jobs shipped overseas. The other building had built an extra wing. I don’t think I need to tell this audience which is which.

My desire to fight this fight brought me to Superior Court, standing next to Brandon and asking for probation. I had a letter from a teacher and counselor at his school. His mother and grandmother were there in court. They were in the front row, asking for him to come home. The prosecutor in the case was asking the judge to send Brandon to Oak Hill.

Oak Hill is like a lot of juvenile facilities in this country. It combines a very nice sounding name—oak tree on a hill—with a brutal reality. Drugs and violence were rampant; there were no programs; kids got out worse off than they went in. The judge who had to make the decision whether to send Brandon there—I’ll call him Judge Curtis Walker—was African American. That wasn’t unusual. I remember that about 40 percent of the bench in the District of Columbia was black.

When Judge Walker looked out in the courtroom, he saw a young black man facing sentencing, a black defense attorney, and a black prosecutor. Then the Judge looked at Brandon and said, “Son, Mr. Forman has been telling me that you’ve had a tough life . . . that you deserve a second chance. Well, let me tell you about tough. Let me tell you about Jim Crow segregation.”

The judge, who was a child under segregation, proceeded to lecture Brandon on what it was like. Then he started to wrap up, but not before saying:

So here’s the thing son. People fought; people marched; people died for your freedom. Dr. King died for you. He didn’t die for you to be running and gunning and thugging and carrying on, embarrassing your family and your community, carrying that gun. No, that was not his dream at all. So I hope Mr. Forman is right. I hope that one day, you turn it around. But today in this courtroom, actions have consequences. Your consequence is Oak Hill.

He locked him up.

I was so angry and so furious. Think about it: the judge had taken the same history, the same decade, the same heroes that I told you made me become a public defender, and he used those as a twisted moral justification for why Brandon needed to be locked up.

As I began to work through my anger at the judge, I realized that he wasn’t alone. I told you that 40 percent of the judges were African American. Well, the
legislature that passed the gun and the drug laws that Brandon was sentenced under was a majority black City Council. The mayor was black, the police chief was black, and the police force was majority black. The chief prosecutor in the city was none other than Eric Holder, long before he became Attorney General of the United States.

I began to reflect on the question that haunted me since that day and led to this book: why was this majority-black community doing the same thing as the rest of the country? Why were they enacting the same practices like mandatory minimum sentences and aggressive police tactics? What was so powerful, so overwhelming, so all-encompassing that a majority-black community couldn’t resist locking up its own?

I. LOCKING UP OUR OWN

To answer this question, we have to immerse ourselves in the rising crime, violence, and fear in black communities around this country over the last fifty years. The story of black communities and crime is the first big theme in the book. I focus especially on two key decades: the 1960s and the 1980s to early 1990s. The ‘80s and ‘90s were the crack years, and some of you may know that history. The ‘60s are less well known but just as important. That was the decade when heroin did to black communities what crack would do two decades later. In D.C., for example, they tested everybody entering the jail for heroin. Before 1966, they found that less than 3 percent of the people entering the jail were heroin addicts. By 1969, the 3 percent had become 45 percent. That’s an epidemic. That same decade saw a dramatic rise in homicide. The murder rate in many cities doubled in the 1960s. In D.C., it tripled.

Concerns about violence and addiction produced a strong response from besieged black communities. In researching this book, I spent a summer in archives reading letters that Washington, D.C. residents sent to their elected officials in the 1970s. Most of the letter writers and the recipient elected officials were African American; back then, the city was often called Chocolate City. These letters reveal enormous pain and anguish. People wrote, “We just fought the Civil Rights Movement, but I’m afraid to take my kids to school. I’m afraid because there are drug dealers on the corner. I’m afraid because they’re shooting in the park.” Over and over these letters said things like, “I feel like a stranger on my own streets. I feel like a prisoner in my own home.” Many of them end with some version of “Do something!”

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8. Id.
9. See FORMAN, supra note 2, at 1, 50.
10. Id. at 48.
11. Id. at 29.
Now, who’s receiving these letters? African American elected officials. Their story is the second big theme in the book. The people receiving these letters make up the first generation of black officials to be elected in any number in this country since Reconstruction. In the 1970s and 1980s, there was an 800 percent increase in black elected officials nationwide.12 That’s an 800 percent increase over almost 0, but it’s still an enormous increase. These new black elected officials had the chance to win office because of the Voting Rights Act of 1965.

What do we know about this generation? Many of them were from the South. Some of them were in the Civil Rights Movement. All of them remembered the long history of under-protection and underenforcement of the law that has been part of the black experience during and after slavery. My dad used to tell me about this. He grew up in Jim Crow Mississippi and Jim Crow Chicago. He used to tell me, “We didn’t call the police in a black neighborhood. When there was a crime, the police weren’t going to come. And if they came, the only thing you could be sure of is: they were gonna make matters worse.” This generation remembered Southern sheriffs in cahoots with the Klan; sheriffs who, when asked about a homicide in a black neighborhood, would respond, “That’s not a homicide, that’s another dead black person.” And they didn’t use the words “black person.”

This generation of black elected officials was shaped by this history. So once in office, holding some power, they were determined to make the law enforcement apparatus respond to those citizens who wrote those letters pleading for protection.

But all of this raises the question: why did these first black elected officials overwhelmingly turn to law enforcement as the answer? Why police, prosecutors, and prisons?

To answer this question, we must confront some of the constraints on the ability of black elected officials to act. That’s because even though my book is about what black communities wanted and what black elected officials did, any book about those choices must also be a book about the limitations on black communities’ ability to choose. So, let me mention three constraints.

The first constraint is historical. Black elected officials represent communities that have been disempowered by a history of racism. That history begins with slavery, which—we shouldn’t forget—we’ve had in this country for longer than we haven’t. Slavery gave way to Jim Crow and its laws and policies that ripped wealth from black communities and black families. The result of the accumulation of centuries of discrimination was black neighborhoods being

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denied the resources to protect themselves. This left, and still leaves, them over-
reliant on the state and over-reliant on police and prosecutors.

The second constraint is political. I focus on local elected officials, which is where African American political power has always been concentrated. One of my core arguments is that local government was instrumental in how we got mass incarceration. But there are limits to the power of local government, and you see them in the book. For the last fifty years, black elected officials have had what I call an “all-of-the-above” strategy to fighting crime and violence. They’ve said, “We want more police and more prosecutors” and sometimes, unfortunately, they’ve said, “We want more prisons.” But they’ve also said, “We want more money for housing, for job training, for education, for drug treatment and mental health treatment. We want national gun control to go alongside the local gun control that we’re passing in cities. We want a Marshall Plan for urban America. We want the United States government to do for black communities what it did for Europe after World War II; to rebuild, to reinvest, to revitalize.” For fifty years, they’ve been going to Congress asking for all of the above and for fifty years, they’ve been coming back with money for just one of the above: law enforcement.

The last constraint is lack of imagination, something that we still suffer from to this day. Students, including some of you, are beginning to liberate us from it. But the generation I write about was constrained by their ability to imagine creative responses to real and pressing social problems. There are a lot of examples of this in the book, but let me mention just one.

One of the people that I write about is a city council member by the name of David Clarke. David Clark was one of the two white members of D.C.’s original City Council (eleven out of thirteen members were African-American). Clarke had a distinctive biography. He attended Howard Law School in the 1960s, worked for Dr. King when he got out, and then became a lawyer for poor people before ultimately running for City Council. Now, David Clarke was not a drug warrior. In fact, the first thing he fought for when he got into office in 1975 was marijuana decriminalization.

By the early 1980s, Clarke had become the chair of the City Council. Heroin, which had done so much damage in the 1960s, reemerged in the early 1980s, and overdose deaths began to spike. These same years saw an increase in the number of letters from citizens asking that the city council address the problem. The letters complain that addicts are gathering on stoops, leaving dirty syringes in the alleys, sleeping on park benches, and congregating on corners. The letters end with demands that local leaders do something, anything, about the problem.

David Clarke gets these letters and he forwards them to the head of the relevant government agency. But who does this non-drug warrior, marijuana-decriminalizer ask for help on this problem? Remember that the problem is addicts in public space. That’s the stated issue in the letters. Does Clarke contact
mental health officials? Public health officials? Addiction services experts? No. He sends them to the police chief. He’s not a drug warrior, but he’s an American. And like so many of us, he’s constrained by his imagination because he can’t think of the problem of ‘addicts in public space’ as a problem that requires a public health solution. He can only think of it as a criminal justice problem, a problem that you address by sending somebody whose only tools are a gun and a pair of handcuffs.

Decisions like David Clarke’s are so important to notice, I argue, if we are going to understand the history of mass incarceration. We normally focus on statements of presidents and acts of Congress. Yes, those matter. But it’s just as crucial to look at the tiny decisions made by local elected officials. These are often invisible decisions that have been made over fifty years across the fifty states and three thousand counties that make up this nation. Those decisions, I argue, are the individual bricks that have collectively built the prison nation that America has become.

II.

WHERE DO WE GO FROM HERE?

When I was a student, I attended a lot of talks on social justice issues. One thing that I always found frustrating was that people would come and they would talk about their area of passion and they would have data and stories and they would paint a very compelling problem. After they had finished depressing us completely, they were like, “Okay, I’m done” and would leave. I’m not going to do that. I’d like to offer some thoughts about how to respond to the civil and human rights crisis that is mass incarceration.

I’m not saying my ideas are the only ones worth pursuing. My goal in what follows is to stimulate your thinking.

First, I want to talk about voting. You are probably used to being told that voting is important. But I want to encourage you to vote not just in national elections, but in local ones as well. Almost 90 percent of our prisoners are in state and local prisons and jails, not federal ones. So, the people with the most power to dismantle mass incarceration are state legislators, and the people with the most power to end the “school to prison pipeline” are members of your local school board.

Perhaps the single most powerful actor in the criminal system is the local prosecutor. For most of the past forty years, elections for local prosecutor were dominated by claims about which candidate could lock up more people and get longer sentences.

That’s now changing. A couple of years ago, new groups of progressive activists started saying that it doesn’t have to be like that. Community groups started noticing how much power the local prosecutor had and organizers started knocking on doors for local prosecutor elections. The result has been the election of change-minded prosecutors all over the country, including in some places that
you wouldn’t expect, like Georgia, Alabama, Florida, and Texas. In Texas, there was a candidate with the words “Not Guilty” tattooed on his chest. That guy ran for local prosecutor and won. In Philadelphia, Larry Krasner ran on a campaign of having spent his whole career suing cops for police brutality. His opposition treated him like a joke when he said he was going to run for local prosecutor. But the activists in that community knew it wasn’t a joke and they got behind him. He got elected, and the size of the local jail has already been reduced 20 percent in just a year. Twenty percent is not enough, but it’s progress.

Second, there’s another kind of voting that matters too, even if we don’t normally think of it when we talk about going to the polls. Here I’m talking about jury service. One of my great frustrations is people who say in one breath that the criminal system is racist and rigged but in the next breath say they don’t want to serve on a jury. I saw this so often when I picked juries as a public defender. Time and time again, people who would come to a lecture like this, who oppose mass incarceration, would be the first ones trying to figure out how they could get off the jury and not serve. They would say, “I can’t be fair,” or “I can’t judge,” or “I don’t believe police officers and I never will,” and then they were gone. You know what we were left with? A room full of people who thought the system we had was okay. But if you have the largest prison system in the world, it’s not okay. And if you have a jury that’s full of people who think it’s okay, then you are going to keep getting the same results: the same guilty verdicts on unnecessary, overblown charges.

Remember that the jury service is a right that our ancestors fought for. It is a political right. During Reconstruction they understood it to be a right alongside the right to vote. It was another place to vote: you voted at the ballot box and you voted in the jury box. So, what I want to say to you is this: when you get that grand jury notice, or when you get that petit jury notice, don’t throw it away, don’t run and hide, and don’t ask for a deferment for two years from now and then hope that the courthouse burns down. Go and serve.

Third, I want to stress the importance of judges. Federal judges make the rules by which all the players in the system operate. They’re the ones that allowed for the racial profiling in Whren v. United States.13 They’re the ones that allowed for, in United States v. Lyons, the choke hold of which Paul Butler writes.14

Conservatives have mobilized around judicial appointments for decades. They get what it means to have control of all of these appointments. Progressives haven’t ignored the issue entirely, but we haven’t paid as much attention to it as we should. In her wonderful book, Prisoners of Politics, Rachel Barkow emphasizes the urgency of the situation.15 According to Barkow, 43 percent of

the federal judges are former prosecutors and 10 percent are former public defenders.\textsuperscript{16} For me this number all by itself explains a lot about the decisions you see coming from federal courts, because some of those opinions were written by people who have never been inside a prison and have never seen the world from the perspective of the accused. Unfortunately, as Barkow points out, those numbers weren’t very different under President Obama. He did some good things on appointments, but he didn’t do much to increase the number of former public defenders on the bench. Forty percent of Obama’s appointees were former prosecutors and only 15 percent had been defense attorneys.\textsuperscript{17} As for the Supreme Court, let’s start thinking about defense attorneys for the highest court: Bryan Stevenson, founder of Alabama’s Equal Justice Initiative, would be number one on my list.

Fourth, let’s keep educating people about the urgency of the issue that brings all of us together today. Here’s one way I’m trying to do that. I teach a class every semester that meets inside a prison. The class is part of a national program called the Inside Out Prison Exchange. Inside Out trains professors from every discipline to teach their class inside of a prison instead of at your home university. My class is made up of ten students who are incarcerated and ten students from Yale. Our topic is the criminal legal system, and we meet for thirteen weeks, just like a seminar that would meet on campus.

The class transforms my Yale students. The structure of the class disrupts a fundamental tenant of our prison system. One of the incarcerated students—not in my class—but an incarcerated man who participated in another Inside Out class wrote, “These walls aren’t just to keep me in there, they are there to keep you out.” And he’s right. By keeping us out, prisons keep us ignorant. They make the issue impersonal.

But when we go inside, we develop a personal connection. When we go inside, we begin to challenge the stigmas and assumptions that we have of people who are behind bars. And we all hold these prejudices, including those of us who consider ourselves opponents of mass incarceration. For example, my Yale students—they’re like students at NYU or Berkeley—they think pretty highly of themselves. They’re law students. They won’t admit they think less of the intellectual capacity of people behind bars. They might not even know it, but they do. It’s natural; that’s what we’ve all been taught to think.

That’s why it is so powerful when, about seven or eight minutes into our first week’s discussion, one of the incarcerated students raises his voice or her voice and says the smartest, most impactful, most incisive thing imaginable. You can see the Yale students take it in like, “Oh okay, this is about to be serious.” I think that projects like this are essential to helping to cultivate new generations

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  \item \textsuperscript{17} Id.
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of freedom fighters: people who are willing to prioritize this issue and make it part of their life’s work.

It’s also transformative for my incarcerated students. One of them wrote me at the end of last semester. He said, “I like the law and policy you taught us. But most of all, most of all, what I really liked was that when I came into the classroom every week, I entered a space where I was treated like I was smart. I was treated like I had ideas. On some days I even felt like an intellectual, and that has never happened to me before.” That experience is liberating, it is humanizing, and it can help somebody survive the horror that is a prison sentence in this country.

Thinking of the words of one of my incarcerated students brings me to my final suggestion, which is that lastly, we should center the experiences and voices of justice-involved people and their families in our advocacy. For too long we haven’t done this, and those of us who are fighting against mass incarceration share in the responsibility.

When I was a public defender in the ‘90s at the Public Defender Service (PDS), a fabulous organization, we would go and we would lobby down at the D.C. City Council to try to get horrific laws rolled back or reversed. But our clients and their families almost never testified. When I would ask why, the answer that I always got was, “Our clients are stigmatized and reviled. If they are the public face of the issue, nobody will take us seriously.” There was, of course, some truth to that. But our position then reinforced the problem: by not centering those voices, we made it seem like they weren’t worth our attention.

This needs to change, and slowly, it is changing. People who had been directly affected by the justice system are gaining prominence in the movement to transform it. But I think we have to push it further. I think that’s going to mean that people in advocacy positions and organizations are going to have to face some hard questions. It’s not going to be enough to have a formerly incarcerated person on staff. They need to be leaders and Executive Directors of our non-profits. They need to give lectures like this one.

**CONCLUSION**

I’d like to conclude with a suggestion that isn’t a concrete policy idea, but is instead a way to think about creating change in hostile conditions. I want to talk about hope, and in particular remaining hopeful, even when the conditions don’t seem to call for it and the odds seem stacked against you.

I came to understand this from my father, who was relentlessly hopeful. I remember one conversation we had a couple of years before he passed away. We had watched a movie about the Civil Rights Movement and when it was over, I said, “Well, you were there. What did you think of the film?” He responded that he liked that they showed the history on film because more people watch films than read books. But then he went on to say that he didn’t like the way the movie suggested that the Civil Rights Movement had been popular, that everybody had
been marching. He said that it wasn’t like that, and that he and the other civil rights workers had been unpopular. He said that Martin Luther King, Jr., was unpopular when he died, and that even the famous March on Washington had been unpopular when it happened. Then he said, “Look, I’m not saying this because I want credit for being there first. I’m saying this because it’s really disempowering for future generations to constantly be told that everybody was marching in the Civil Rights Movement.”

The problem with this history, my dad said, is that today, if you have a meeting and only six people show up, you feel like something is wrong with your cause. My dad said that change is always unpopular at the time. He said that when you are facing an obstacle that appears insurmountable—he was talking about slavery or Jim Crow in his case, and I would say mass incarceration in our case—people are going to tell you that change is impossible. But if you ignore them—if you stay true to your beliefs—then one day you will create the change you dreamed of.

So, I don’t know what idea to confront mass incarceration will come out of this gathering or will come out of your time at Berkeley or NYU. But I know that the people and the ideas are here in this room. Remember, SNCC was started on a college campus. I know the power that comes from universities. Somewhere here there’s an idea that is bigger and bolder, more profound and transformative, than anything that I’ve said.

What I’m telling you is that if you get together with one another and pursue that idea—and if you ignore the people who tell you that it won’t work—you will one day be the generation that takes down mass incarceration and replaces it with a justice system that actually deserves, unequivocally, to have the word ‘justice’ in its name. A system that repairs, that restores, and that redeems. A system that truly keeps communities safe. And when you do that, you can bet they’ll make a movie about you. When it releases, I’ll be there at the premiere, sitting next to Professor Carbado, Professor Sklansky, Professor Butler, Professor Barkow, Dean Richardson, and Dean Chemerinsky. We will be all be there, with popcorn in hand, cheering you on. Thank you.