

# THE STRUCTURAL DIMENSIONS OF RACE: LOCK UPS, SYSTEMIC CHOKEHOLDS, AND BINARY DISRUPTIONS

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*Disrupting traditional conceptions of structural inequality, state decision-making power, and the presumption of Black criminality, this Essay explores the doctrinal and policy implications of James Forman Jr.'s Pulitzer Prize winning book, Locking Up Our Own, and Paul Butler's evocative and transformative book, Chokehold. While both books grapple with how to dismantle the structural components of mass incarceration, state-legitimized police violence against Black bodies, and how policy functions to reify oppressive state power, the approaches espoused by Forman and Butler are analytically distinct. Forman locates his analysis in the dynamics of decision-making power when African American officials wield power to combat crime with unintended consequences. He argues for incremental change focusing on discrete aspects of the system. By contrast, Butler offers a full conceptual attack on the oppressive machinery of mass incarceration—he seeks to break the grip of the systemic Chokehold that threatens to strangle the life prospects of communities of color. Both books disrupt binary conceptions of the criminal justice system in the wake of Michelle Alexander's The New Jim Crow and its progeny. Certainly, race and structural inequality are defining features of the criminal justice system, but this systemic proposition is much more complex than the evolution of chattel slavery to mass incarceration. Moving beyond race and the disproportionate impact of the carceral state, Locking Up Our Own offers a nuanced exploration of Black political power and how it actually escalated mass incarceration. Chokehold disrupts traditional conceptions of Black male masculinity and the presumption of criminality. Both texts break new ground in conceptualizing disproportionate impact and the criminal justice system.*

*Integrating these two distinct conceptual approaches, The Structural Dimensions of Race: Lock Ups, Systemic Chokeholds, and Binary Disruptions offers a comprehensive critique while unpacking the complexities of structural inequality and race in the criminal justice system. Concluding with an argument centering on the Thirteenth Amendment to eradicate all of the oppressive features of mass incarceration, this Essay*

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*offers a starting point to envision a system that moves from a disproportionately punitive response to one based on fundamental principles of substantive justice and proportionality.*

## I. INTRODUCTION

The permanence and adaptability of systemic racism<sup>1</sup> is evinced throughout all levels of society in segregated schools and housing, weakened anti-discrimination laws, and dilution of voting rights protection and political disempowerment. Perhaps no other societal system underscores the devastating impact on African Americans and other communities of color than the criminal justice system. The general prison population has increased more than four-fold since 1980; African American males represent over a third of that total (2.3 million, or 34% of the total 6.8 million correctional population in 2014).<sup>2</sup> African Americans and Latinos comprise approximately 32% of the United States population, yet make up 56% of all incarcerated people.<sup>3</sup> Essentially, the United States is an incarceration nation, as it represents about 5% of the world's population while imprisoning nearly 21% of the world's prisoners.<sup>4</sup> This is a defining feature of the prison industrial complex that continues to undermine basic principles of democracy and justice, disproportionately impacting and displacing people of color.

These devastating disparities of mass incarceration<sup>5</sup> and legitimized state police violence against African American males<sup>6</sup> mask the underlying complexities of structural inequality.<sup>7</sup> Certainly, disproportionate impact is

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<sup>1</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992).

<sup>2</sup> *Criminal Justice Fact Sheet*, NAACP, <http://naacp.org/criminal-justice-fact-sheet/> (last visited Sept. 24, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Jonathan Wood, *The Old Boss The Same As the New Boss?: Critiques and Plaudits of Michelle Alexander's New Jim Crow Metaphor*, 7 *GEO. J. L. & MOD. CRITICAL RACE PERSP.* 175, 186 (2015) ("The issue of mass incarceration has escalated beyond color or gender lines and affects each group in unique ways; however, what is common amongst all of these groups is the dehumanization and humiliation faced on a daily basis with little to no legal form of redress."); James Forman, Jr., *Racial Critiques of Mass Incarceration Beyond The New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 22 (2012) ("As the United States has become the world's largest jailer and its population has exploded, black men have been particularly affected. Today, black men are imprisoned at 6.5 times the rate of white men."); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>6</sup> Kimberly Jade Norwood, *The Far-reaching Shadow Cast by Ferguson*, 46 *WASH. U. J. L. & POL'Y* 1, 1-7 (2014).

<sup>7</sup> Structural inequality "includes 'the institutional defaults, established structures, and social or political norms that may appear to be . . . neutral, non-individual focused, and otherwise rational but that taken together create and reinforce' segregation and inequality." Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and Pics*, 16 *MICH. J. GENDER & L.* 397, 399 (2010) (quoting Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting*

a defining feature of the criminal justice system and its enforcement apparatus, but there are salient elements beyond the conceptualized binary of Blacks and the criminal justice system. In other words, race is complicated by the structure of the criminal justice system itself.<sup>8</sup>

Conceptually, two extraordinarily searing books—*Locking Up Our Own: Crime and Punishment in Black America* by Yale law Professor James Forman Jr. and *Chokehold: Policing Black Men* by Georgetown law Professor Paul Butler—disrupt this binary and explore the structural aspects of disproportionality.<sup>9</sup> Both books illuminate not only disproportionate impact, but also how decisional power and the procedural and punitive architecture of the criminal justice system actually advance inequality as a societal norm.<sup>10</sup> As Butler observes, “the system is broke on purpose.”<sup>11</sup>

Forman’s Pulitzer Prize winning book uncovers how African American elected officials, through a series of ostensibly neutral and incremental decisions, inadvertently help to erect the edifice of mass incarceration.<sup>12</sup> Essentially, locking up [our] own. Taken literally, the title, *Locking Up Our Own*, could lead the reader to conclude derisively that Forman is airing the African American community’s “dirty laundry,” but this conclusion does not acknowledge the complexity of the structural dimensions of race. Without question, neutral rhetoric is indispensable in the maintenance of white supremacy and structural inequality;<sup>13</sup> this effect is especially pronounced in the criminal justice system.

*Locking Up Our Own* and *Chokehold* chart a course forward on different conceptual paths: *Locking Up Our Own* unpacks structural inequality as a series of incremental decisions by African American policymakers and offers an incrementalist approach to dismantling mass incarceration;<sup>14</sup> by contrast, *Chokehold* advances an argument for transformative social change through a

*Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1016 n.3 (2008)); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1536 n.42 (2011) (summarizing and cataloguing scholarship on structural inequality). The criminal justice system is a structure that has a neutral purpose—the protection of the public through law enforcement and prosecution of crimes—which has been pursued in a manner that actually reinforces caste-based oppression disproportionately on the African American community.

<sup>8</sup> See ALEXANDER, *supra* note 5.

<sup>9</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

<sup>10</sup> BUTLER, *supra* note 9, at 1–15; FORMAN, *supra* note 9, at 9–14.

<sup>11</sup> BUTLER, *supra* note 9, at 5.

<sup>12</sup> FORMAN, *supra* note 9, at 17–46, 55–57, 60–64, 71–74, 78–80, 106–11 (discussing the decision not to decriminalize marijuana, the passage of the nation’s strictest gun control laws in Washington, D.C., and the rise of African American police).

<sup>13</sup> Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2067–100 (2016).

<sup>14</sup> FORMAN, *supra* note 9, at 238 (“But mass incarceration, as we have seen, was constructed incrementally, and it may have to be dismantled the same way.”).

radical restructuring of the criminal justice system.<sup>15</sup> It would be a mistake, however, to view these provocative and insightful works as two extreme poles in the scholarly discourse.

Illuminating the structural dimensions of race, *Locking Up Our Own* and *Chokehold* expand a central tenet of Critical Race Theory: intersectionality.<sup>16</sup> Specifically, the move is away from the limited conception of discriminatory intent<sup>17</sup> to a structural critique of how the criminal justice system functions to disproportionately oppress African Americans. Within this systemic analysis, the focus is on race, the criminal justice system, and the multi-dimensional components of identity. In *Locking Up Our Own*, Forman identifies how racial identity and assumptions about political solidarity are often disrupted by how the system itself subordinates on the basis of race: “But in focusing on the actions of black officials, I do not minimize the role of whites or of racism in the development of mass incarceration. To the contrary: racism shaped the political, economic, and legal context in which the black community and its elected representative made their choices.”<sup>18</sup>

This intersectional analysis rejects race as a simple white-Black binary,<sup>19</sup> and refocuses the inquiry on the structural dimensions of race, by eschewing an essentialist view of Black political and policy-making power. Black power “does not mean *merely* putting black faces into office. Black visibility is not Black Power. Most of the black politicians . . . are not examples of Black Power. The power must be that of a community, and emanate from there.”<sup>20</sup> Thus, it is not only that the disproportionate impact of the carceral

<sup>15</sup> BUTLER, *supra* note 9, at 228 (“Racial subordination has simply been refashioned from slavery to convict leasing to segregation to mass incarceration. Now is the time to disrupt the wretched cycle once and for all. Let this be the last time blacks reinvent this country without crushing white supremacy.”).

<sup>16</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989). While acknowledging intersectionality, some scholars have concluded that it is limited, in some respects, because it does not conceptualize beyond gender as female and its intersection with race: “But it is certainly not accurate to portray the history of Black men as bestowing a set of gender privileges that is on par with white male gender privileges. In fact, gender may burden Black men in ways that are comparable to the ways it burdens Black females, in both public and private spheres. For instance, it is arguable that a patriarchal and racist society requires a discourse and practice of domination that constructs Black men as competition, objects of fear and terror, who must be emasculated, incarcerated, and/or exterminated.” Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L. L. REV. 81, 84 n.6 (2015).

<sup>17</sup> Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 523 (citing *Washington v. Davis*, 426 U.S. 229, 238–39 (1976)) (noting that “[s]tructural inequality denotes the complexity of discrimination beyond the formalistic doctrinal boundaries set by the Court in doctrines such as the requirement of discriminatory intent”).

<sup>18</sup> FORMAN, *supra* note 9, at 11–12.

<sup>19</sup> Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1200 (2004).

<sup>20</sup> KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* 46 (Vintage Books 1967 & 1992).

state falls on African Americans, but also that this structural outcome is further deployed by African Americans with decision-making power.

More expansively, *Chokehold* breaks ground by re-envisioning intersectionality as race and the Black male body.<sup>21</sup> Without marginalizing the devastating oppression of African American women in history and by the present day carceral state,<sup>22</sup> Butler posits that gender matters for Black men as well; that is, stereotypical depictions of the Black male as hyperbolized predator, societal menace, and perpetual threat lead to the legitimization of state police violence against the African American male.<sup>23</sup> This is the systemic Chokehold.

Part II of this Symposium Essay offers a discussion and analysis of *Locking Up Our Own* with an emphasis on race and structural decision-making. The ostensibly neutral law enforcement rhetoric espoused by Black activists and policymakers, and a series of small incremental choices, ultimately led to the explosion of mass incarceration.<sup>24</sup> Part II highlights the structural dimensions of race—it is a system premised on slavery, Jim Crow, and the modern carceral state that perpetuates subjugation, not the racial identity of the policymaker. This is precisely why the analytical move away from discriminatory intent, identifiable discrimination, and the discriminatory perpetrator is imperative. Disproportionate impact is systemic. Drawing upon recent book reviews critiquing the theoretical limitations of Forman's exposition of the causes of Black punitiveness,<sup>25</sup> Part II concludes with an exploration of the paradox of race.

Part III analyzes Butler's evocative metaphor—the Chokehold. Here, legitimized state police violence and the life crushing procedural apparatus of the criminal justice system come together.<sup>26</sup> *Chokehold* is an important work because it unpacks the systemic disproportionalities that impact not only African American males in particular, but also people of color generally in the criminal justice system. It is also a provocative critique of the current neutral rhetoric used to advance the massive punitive power of the state.<sup>27</sup>

There has been a profound shift from law enforcement to social control. The Chokehold is brutal and literal. It is why Eric Garner can't breathe and

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<sup>21</sup> See BUTLER, *supra* note 9, at 7–9.

<sup>22</sup> See Stephanie Hong, *Say Her Name: The Black Woman and Incarceration*, 19 GEO. J. GENDER & L. 619 (2018); see also BUTLER, *supra* note 9, at 7–9.

<sup>23</sup> See *supra* note 15 and accompanying text; see also BUTLER, *supra* note 9, at 9.

<sup>24</sup> FORMAN, *supra* note 9, at 9–11, 13–14.

<sup>25</sup> See Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979 (2018); see also Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L. J. 2388 (2018).

<sup>26</sup> See BUTLER, *supra* note 9, at 5–7, 9–10.

<sup>27</sup> See *id.* at 56–61.

his murder is legitimized by the presumption of Black male criminality and threat, but it also symbolizes the death grip that structural inequality has on people of color and the poor as evidenced by segregated housing, re-segregated education, food deserts, gentrification and displacement, water poisoning and other forms of environmental racism, disparate mortgage lending, and, last but not the most lethal, state-sanctioned and legitimized violence against Black bodies.<sup>28</sup> As Butler points out, “A chokehold is a process of coercing submission that is self-reinforcing.”<sup>29</sup>

We are well past the time when we should entertain arguments for neutrality, post-racialism, and incremental reform. As Butler insightfully concludes, “reform has a pacification effect.”<sup>30</sup> Fifty years after the assassination of Martin Luther King Jr., we are still confronted with the question: “Where Do We Go From Here?”<sup>31</sup>

Finally, Part IV attempts to answer this question, posed in varying degrees in both books, by offering a structural theory rooted in the Thirteenth Amendment.<sup>32</sup> The Thirteenth Amendment—a constitutional mandate abolishing caste-based oppression and its supporting edifice—is an indispensable analytical starting point in addressing the mechanics of state-based oppression embodied in structural inequality.

Indeed, all of the present day badges and incidents of slavery<sup>33</sup> are directly traceable to the odious institution of slavery. Dismantling structural inequality means translating this constitutional ideal<sup>34</sup> into a societal reality.

## II. LOCKING UP OUR OWN: RACE AND STRUCTURAL DECISION-MAKING

In the opening pages of his book, Forman poses the question that is at the core of his comprehensive history of the criminal justice system in Washington, D.C.:<sup>35</sup> “How did a majority-black jurisdiction end up

<sup>28</sup> See *id.* at 4–7.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 197.

<sup>31</sup> See Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community*, in *A TESTAMENT OF HOPE 555–633* (James M. Washington ed., 1986).

<sup>32</sup> U.S. CONST. amend. XIII, § 1 (“Neither slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>33</sup> See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012) (“[A] badge and incident of slavery . . . is public or widespread private action, based on race or previous condition of servitude, that mimics the law of slavery and has significant potential to lead to the de facto re-enslavement or legal subjugation of the targeted group.”).

<sup>34</sup> Here, I mean to suggest that while formalized racial caste-based oppression has been eradicated, there have been many doctrines and structures designed to perpetuate inequality from Jim Crow to mass incarceration.

<sup>35</sup> FORMAN, *supra* note 9, at 9. Forman employs Washington, D.C. as a model for national policy-

incarcerating so many of its own?”<sup>36</sup> To answer this question, Forman draws upon a number of contextual factors such as: Black punitive attitudes calling for harsher sentencing; class dynamics which favored protection of the Black middle class with tough-on-crime measures; and a series of incremental decisions which, when taken over time and reinforced by punitive fervor, led directly to the explosion of mass incarceration.<sup>37</sup>

Forman also attempts to expose the fallacy of arguments advanced to neutralize protests against police violence, specifically, that African Americans focus on police violence “while ignoring violence by black criminals.”<sup>38</sup> To the contrary, African American communities and their elected representatives have been “consumed” by the issue of Black crime, and have taken punitive policy steps to ensure the safety of the community from this threat.<sup>39</sup> The problem, as Forman conceptualizes it, is that no one could anticipate the massive disproportionalities that would be visited upon the African American community by those who were elected to represent and protect them.<sup>40</sup> Here, Forman expands the intersections between race and political identity<sup>41</sup> by moving beyond the narrow conception of discriminatory actions taken by white officials against African Americans to an ostensibly neutral set of crime-policy initiatives, driven by African American officials, with devastating effects on the very communities they were elected to represent and protect.<sup>42</sup>

But in recounting this forgotten history, unpacking its complexities, and disrupting the old binary of Black and white racism in the criminal justice system through an analysis of structural decision-making by African Americans, Forman does not fully highlight the context in which these decisions were made. While noting the structural dimensions of race, he does not fully explore how the structure itself impacted decision-making power.<sup>43</sup> That is, it is not only how African Americans advanced policies to lock up [our] own, but also who gets locked up disproportionately and why. This is a structural question that remains largely unanswered.<sup>44</sup>

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making trends, which led to mass incarceration.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 9–11, 13–14.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.* at 11, 13, 35, 165–66.

<sup>40</sup> *See id.* at 10–11.

<sup>41</sup> *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

<sup>42</sup> *See* FORMAN, *supra* note 9, at 10.

<sup>43</sup> Olatunde C.A. Johnson, *Disparity Rules*, 107 *COLUM. L. REV.* 374, 377 (2007) (defining the structural dimensions of race as “the way in which government decisions perpetuate racial inequality”).

<sup>44</sup> *See supra* note 7 and accompanying text. For example, one germinal question of significance is how did these African American policymakers, some with deep roots in radical and progressive

### A. *The Structural Inequality Paradox*

Thus, *Locking Up Our Own* is limited on three distinct conceptual levels: (i) there is a structural inequality paradox; that is, by highlighting decisions made by African Americans that led, in some part, to mass incarceration, it may appear that there is no issue of inequality because a conscious decision was made to lock up African American criminals who posed a threat to the community;<sup>45</sup> (ii) the neutral enforcement rhetoric employed by African American policymakers obscures the disproportionate impact on the African American community and reinforces the absence of a more explicit analysis of structural inequality;<sup>46</sup> and (iii) there is the paradox of race which means it cannot be assumed, simply because of a shared racial and political identity, that African Americans will adopt policies in their best interests.<sup>47</sup> There is an analytical pitfall in exaggerating individual political agency into a comprehensive theory of Black political power that led to mass incarceration of its own constituency.

*Locking Up Our Own* is a provocative title; it invokes notions of power, agency, and participatory decision-making that belie the contextual significance of structural inequality. There is a structural dimension of race. *Who* is locked up is a function of this.<sup>48</sup> Indeed, Forman acknowledges the structural dimensions of race:

This book tells a story about what African Americans thought, said, and did. But in focusing on the actions of black officials, I do not minimize the

communities, nevertheless choose to sponsor laws and initiatives that would ultimately decimate their own communities? Of course, Forman mentions pursuit of law and order (criminal law enforcement) and an urban Marshall Plan that was never realized but what does this say about Black political power when the end result was a disproportionately punitive approach imposed on African Americans and mass incarceration? See FORMAN, *supra* note 9, at 13.

<sup>45</sup> Hutchinson, *supra* note 25, at 2412–13 (“[U]sing Forman’s work to undermine antiracist critiques of U.S. criminal law and enforcement in this way would be terribly misguided. Forman’s research implicates but does not give attention to three important issues that help alleviate any conflict a reader might find between his observations and antiracist analysis of U.S. criminal law and enforcement: the possible influence of white supremacy on black punitive sentiment, geographical limitations of black political power, and the pervasiveness of antiblack racism as a motivator of punitiveness among whites.”).

<sup>46</sup> Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 391 (2002) (noting that in October 1982, President Reagan declared a “war on drugs” with a specific rhetorical purpose: “such rhetoric allows presidents to appear as strong leaders who are tough-on-crime and concerned about domestic issues and is strategically ambiguous to portray urban minorities as responsible for problems related to the drug war and for resolving such problems”). Forman documents how several African American mayors and political figures adopted identical “war on drugs” language. FORMAN, *supra* note 9, at 165–67.

<sup>47</sup> Carbado & Richardson, *supra* note 25, at 1981 (invoking DuBois’ theory of double consciousness and stating that “African American police officers have to negotiate and reconcile two historically distinct strivings—the strivings to be ‘blue’ and the strivings to be ‘black’—in one ‘dark body’”).

<sup>48</sup> See Hutchinson, *supra* note 25.



role of whites or of racism in the development of mass incarceration. To the contrary: racism shaped the political, economic, and legal context in which the black community and its elected representatives made their choices. From felon disenfranchisement laws that suppress black votes, to exploitative housing practices that strip black wealth, to schools that refuse to educate black children, to win-at-all-costs prosecutors who strike blacks from jury pools, to craven politicians who earn votes by preying on racial anxieties, to the unconscious and implicit biases that infect us all, it is impossible to understand American crime policy without appreciating racism's enduring role.<sup>49</sup>

Yet, he does not fully unpack the scope of Black criminal policy-making power and how it is exercised. Concededly, this is a difficult conceptual task because Forman offers an historical account of the decisions while simultaneously exploring the structural dimensions of the present-day effects of past discrimination.<sup>50</sup> Forman advances a compelling narrative that reveals the devastating impact of the criminal justice system on African Americans who are enmeshed in its vast reach, but he must also engage the systemic underpinnings of this disparate impact.<sup>51</sup> While *Locking Up Our Own* is powerful in its depiction of how the criminal justice system impacts individuals, its structural focus is limited to discrete instances of policy choices by African American officials and community leaders.<sup>52</sup>

The structural dimensions of race underscore a paradox in the structural inequality analysis; that is, Forman foregrounds African American decision-makers so that the focus is on who is making the decision, not how the criminal policy structure and racism shaped the decisions that were made. Nevertheless, Forman does pinpoint what he identifies as “the central paradox of the African American experience: the simultaneous over- and under-policing of crime.”<sup>53</sup>

Forman vividly describes and explains the 1975 political fight against decriminalizing marijuana led by Douglas Moore, an African American D.C. councilman and proponent of black nationalism, who rejected the arguments of liberal white councilman, David Clarke, who reasoned that decriminalization would eradicate the disproportionate impact and “lifelong stigma” on African Americans who represented 80% of those arrested on

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<sup>49</sup> FORMAN, *supra* note 9, at 11–12.

<sup>50</sup> See FORMAN, *supra* note 9 (discussing an historical account of policy decisions made regarding marijuana, gun control, and the police).

<sup>51</sup> See *id.*

<sup>52</sup> *Id.* at 165–70, 177, 194–96, 213–15.

<sup>53</sup> *Id.* at 35.

marijuana-related charges.<sup>54</sup> Paradoxically, because African American citizens' lives were devalued, they were ignored or received very little law enforcement protection in their own communities; while, on the other hand, the system was fixed to mete out disproportionate punishments for crimes.<sup>55</sup> A number of factors doomed the D.C. decriminalization legislation: whites were the face of the decriminalization movement; there was no participation by those who were actually arrested or convicted under the hyper-aggressive marijuana enforcement regime; and there was strong distrust by African Americans, who had just gained D.C. Home Rule.<sup>56</sup>

Since the decriminalization debate occurred before the War on Drugs began, Forman posits that the decriminalization opponents' "victory" was a harbinger of the catastrophic consequences of a punitive mandate adopted by the African American community itself.<sup>57</sup> This was one of the small, incremental steps that led to mass incarceration.<sup>58</sup> But what connects these incremental steps to structural inequality? In other words, what do these decisions mean in the context of a system that perpetuates lockups and chokeholds?

Adopting a structural conception of Forman's discussion of over- and under-policing, Professor Deborah Tuerkheimer offers an equal protection argument based on the anti-subordination principle, which addresses the marginalization of oppressed communities.<sup>59</sup> This is another binary disruption because Tuerkheimer grounds her approach in the broader structural dimensions of race. Specifically, she discusses how the lives of those in marginalized communities are valued.<sup>60</sup> In resolving the over- and under-policing dichotomy identified by Forman, Tuerkheimer advances a theory of substantive equality<sup>61</sup>—an antisubordination theory<sup>62</sup>—designed to dismantle structural inequality by valuing lives in equal protection terms.<sup>63</sup>

<sup>54</sup> *Id.* at 20–23, 33–46.

<sup>55</sup> *Id.* at 35.

<sup>56</sup> *Id.* at 43, 46.

<sup>57</sup> *Id.* at 45, 113–14, 155–70.

<sup>58</sup> *Id.* at 45, 229.

<sup>59</sup> Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1146 (2018) (“As Forman demonstrates, these marginalized citizens were undervalued, they endured *too little* by way of a state response to their crime victimization, along with *too much* of a state response when it came to their punishment for crime perpetration.”).

<sup>60</sup> *Id.*

<sup>61</sup> Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1644–46 (2017).

<sup>62</sup> Tuerkheimer, *supra* note 59, at 1161–66.

<sup>63</sup> *Id.* at 1150 (“[I]nsistence on a responsive criminal justice system can best be understood as a demand by those who live in neglected communities for the law’s equal protection. . . . [E]fforts to catalyze criminal justice should be seen as representing legitimate declarations of worth.”).

Documenting the criminal justice system's perpetual indifference to violent crimes disproportionately impacting vulnerable communities like gun violence,<sup>64</sup> sexual violence,<sup>65</sup> and hate crimes,<sup>66</sup> Tuerkheimer argues that substantive claims from these communities can be theorized as demands for the law's equal protection.<sup>67</sup> Tuerkheimer's analytical approach focuses the inquiry on the systemic response to and impact on oppressed communities.<sup>68</sup> While Forman's innovative historical account notes this systemic outcome by pinpointing over- and under-policing as the "central paradox of the African American experience," there is no structural explanation for this outcome other than the individual decisions and motivations of the African American officials and policymakers.<sup>69</sup> This is the structural inequality paradox: Forman identifies an under-theorized aspect of structural inequality, but his comprehensive historical theory does not highlight the connection between these individualized policy decisions (or political proclamations) in the aggregate.<sup>70</sup>

Advancing an antisubordination theory of criminal justice,<sup>71</sup> Tuerkheimer builds upon Forman's historical insights about how these incremental decisions led to mass incarceration. The key enterprise then, under Tuerkheimer's structural approach,<sup>72</sup> is to eradicate the systemic outcomes of over- and under-policing:

[A]n *antisubordination* theory of criminal justice takes aim at both the devastation of mass incarceration [through over-policing] and the neglect of injuries to subordinated communities [through under-policing]. This approach demands that the state attend to harms of citizens whose injuries have traditionally been overlooked—*whether* those citizens are crime perpetrators or crime victims.<sup>73</sup>

Tuerkheimer's antisubordination theory of criminal justice also underscores the complexity of Forman's central premise of *Locking Up Our Own*;

<sup>64</sup> *Id.* at 1150–54.

<sup>65</sup> *Id.* at 1154–57.

<sup>66</sup> *Id.* at 1158–61.

<sup>67</sup> *Id.* at 1150.

<sup>68</sup> *See id.* at 1150–61.

<sup>69</sup> *Id.* at 1146.

<sup>70</sup> *Id.* at 1147.

<sup>71</sup> *Id.* at 1161–66.

<sup>72</sup> *Id.* at 1161 ("Our criminal justice system operates as a new racial caste system—a 'set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position, effectively creating a second-class citizenship.'"). This is precisely why the Thirteenth Amendment is an appropriate doctrinal starting point in dismantling structural inequality. *See infra* Section III.

<sup>73</sup> Tuerkheimer, *supra* note 59, at 1161.

specifically, not only did African American policymakers contribute to mass incarceration,<sup>74</sup> but they also contributed to under-policing because of class distinctions within the Black community.<sup>75</sup>

While Forman does not explicitly embrace the antisubordination theory in *Locking Up Our Own*, he does nevertheless identify the racialized structural components of the criminal justice system.<sup>76</sup> For example, Forman observes:

[N]o individual officer chooses to ignore criminal behavior by whites, structurally a pretext regime does precisely that. When [Eric] Holder [then the first African American U.S. Attorney for the District of Columbia] and the D.C. police department decided to target black communities for pretext stops, they gave a free pass to white drivers across town with marijuana (and other drugs) safely stashed in their glove compartments.<sup>77</sup>

So, apart from the disproportionate impact of pretext stops,<sup>78</sup> what explains why African American officials would adopt such a policy position fully aware of its effect on the African American community? Of course, crime prevention, law enforcement, and the protection of the community are readily available answers, but these neutral systemic goals do not complicate the structural dimensions of race.

Another aspect of structural decision-making is the neutral enforcement rhetoric espoused by African American officials that, while resonating as general calls for a powerful enforcement response to the societal scourge of drugs, ultimately culminated in the militarization of law enforcement against the very communities that these officials thought that they were protecting.

### *B. Neutral Enforcement Rhetoric*

Perhaps one of the most compelling historical accounts in *Locking Up Our Own* is when Forman catalogues the litany of Black punitive rhetoric adopted by African American officials and politicians:

Although the federal government played a critical role in the drug war, its actions are only part of the story. The nation's urban centers exercised their own power—especially when it came to policing. And African

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<sup>74</sup> See FORMAN, *supra* note 9, at 9, 45, 148, 229.

<sup>75</sup> See *id.* at 13, 209.

<sup>76</sup> See *id.* at 120–34, 180–84, 214–15.

<sup>77</sup> *Id.* at 214.

<sup>78</sup> *Id.* at 213.

Americans, often underrepresented in federal and state government, featured prominently in many municipal governments. . . . There were also more than three hundred African American mayors, including those in D.C., New York, Los Angeles, Philadelphia, Detroit, Baltimore, Atlanta, and Oakland. The words and deeds of these black law enforcement officials and politicians, so often overlooked in histories of the War on Drugs, are crucial to explaining why and how the war developed as it did in American cities.<sup>79</sup>

Of course, Forman's point here is well taken; there is a causal connection between words and deeds in which the words of these African American leaders further propelled the War on Drugs. Forman persuasively argues this point from a historical perspective, but the structural context and dimensions of race are not readily apparent.<sup>80</sup> Employing militaristic language in the wake of the explosion of the crack cocaine drug trade, African American mayors reveled in the rhetorical flourishes that would give voice to the fear and outrage of vulnerable communities—these self-appointed “generals” in the War on Drugs used forceful language which, at the very least, implicitly embraced the legitimacy of state-sanctioned violence in this “war.”<sup>81</sup> As Forman observes, “some African Americans went beyond metaphor and requested that actual troops be sent to ghetto streets.”<sup>82</sup> Political expediency, the immediate needs of a dispirited and depressed African American community during the massive siege of crack, and a “tough on crime” stance eagerly embraced by all constituencies helps to explain the allure of this neutral “war” rhetoric—the “enemy” has no articulated racial identity, but this is so only because the disproportionate impact on the African American community is readily apparent.<sup>83</sup>

This purportedly neutral language intended to “protect” the African American community had the consequence of escalating the declared war on vulnerable communities.<sup>84</sup> Some of this could be characterized as “unintended consequences,” but Forman powerfully illustrates that African American policymakers made choices fully aware of their disproportionate impact.<sup>85</sup> This is where Forman could have more fully elaborated on the structural dimension of race in these decisions. That is, apart from the neutral

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<sup>79</sup> *Id.* at 164–65.

<sup>80</sup> *See id.* at 20–46.

<sup>81</sup> *Id.* at 166.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 164 (quoting legal scholar David Sklansky about the congressional debate over criminal penalties for crack: “the most prominent motivation in the congressional debate over crack was the fear that ‘a black drug, sold by black men’ was making its way out of the ghetto and into white communities”).

<sup>84</sup> *See* Tuerkheimer, *supra* note 59, at 1146–47, 1150–61.

<sup>85</sup> *See* FORMAN, *supra* note 9, at 202–03.

purpose of protecting the Black community, what do these decisions say about the structural dimensions of race? African American leaders made these decisions by employing neutral rhetoric that actually galvanized the war against their own communities. Indeed, the power of neutral rhetoric in perpetuating oppression, like that inherent in the criminal justice system, is well established.<sup>86</sup> This says something important about race and context.

### C. *The Paradox of Race*

Forman's historical analysis of crime and punishment in America acknowledges structural inequality, but his discussion of Black political power and decision-making does not explicitly reference this context (the structural dimensions of race).<sup>87</sup> Scholars who de-emphasize the salience of race by advancing formalistic conceptions of neutrality and equality will attempt to appropriate Forman's work as an affirmation of the insignificance of race in American society. Advocating post-racialism and an exaggerated notion of Black agency, these scholars will conclude that *Locking Up Our Own* is proof that African Americans actively participated in their own societal demise in advancing policies that led directly to mass incarceration.<sup>88</sup> This facile conclusion should be discarded; it is in the same vein as the distortion of Dr. King's legacy,<sup>89</sup> Justice Thomas' post-racial constitutional revisionism,<sup>90</sup> and the rhetorical appeal of Black-on-Black crime.<sup>91</sup>

<sup>86</sup> William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1112–26 (2014) (“Belief in the neutrality of social structures enables those structures to perpetuate racially disparate outcomes.”); Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglas, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 837 (2008) (“Today, subordination is maintained through neutrality.”); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 81 (1993) (“Far from being a guarantor of social justice . . . colorblindness [a tenet of neutrality] has the potential for concrete use against oppressed communities. . . . By obscuring the reality of Black subjugation, colorblindness denies the legitimacy of efforts to secure racial justice.”).

<sup>87</sup> See FORMAN, *supra* note 9, at 45, 238 (the emphasis is on how incremental decision-making led to mass incarceration).

<sup>88</sup> See generally Ali Khan, *Lessons From Malcolm X: Freedom By Any Means Necessary*, 38 HOW. L. J. 79, 91 (1994) (explaining how pervasive racism makes the oppressed turn on themselves).

<sup>89</sup> Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 107–08, 124–30 (1996) (unpacking the distortion of Dr. King's message and legacy and critiquing the rhetorical manipulation inherent in the colorblind thesis).

<sup>90</sup> Powell, *supra* note 86, at 888–92.

<sup>91</sup> Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L. J. 594, 616 (1996) (stating that there is an erroneous status quo belief that the majority of crime is Black-on-Black; “in fact, whites comprise the majority of those arrested in any given year . . . with most crimes, the offender and victim are of the same race”); BUTLER, *supra* note 9, at 24 (“In fact, white men commit the majority of violent crime in the United States.”).

It is imperative that Forman's incisive critique of the cumulative effects of diffuse policy choices is not obscured by post-racialist reinterpretations of *Locking Up Our Own*. While acknowledging the power and significance of Forman's work, some scholars have opined that there should be a more in-depth grounding of the structural dimensions of race.<sup>92</sup> That is, how does race function within particular sites of power and discretionary influence when the official exercising power is African American? As *Locking Up Our Own* suggests, it would be essentialist to conclude that being a member of a racial group ensures a cohesive political identity that will be beneficial to the community.<sup>93</sup> Moreover, what is the scope and extent of the power identified in *Locking Up Our Own*? Both of these structural queries seek to build upon Forman's work by fully integrating an analysis of structural inequality in the criminal justice system.<sup>94</sup>

Professor Devon W. Carbado and Dean L. Song Richardson offer a comprehensive theoretical and empirical critique of *Locking Up Our Own*.<sup>95</sup> Their structural critique is an insightful integration of the power and structure of decision-making, individual choice, and race.<sup>96</sup> Acknowledging that Forman is clear in describing the decisions of African American leaders to

<sup>92</sup> See Hutchinson, *supra* note 25, at 2396; Carbado & Richardson, *supra* note 25, at 1982–83.

<sup>93</sup> FORMAN, *supra* note 9, at 107 (stating that black solidarity between black citizens and black officers could not be simply assumed because “blacks who joined police departments had a far more complicated set of attitudes, motivations, and incentives than those pushing for black police had assumed”); Carbado & Richardson, *supra* note 25, at 1980 (“The point is rather that the phenomenon of African Americans exercising governance does not eliminate the racial barriers to combatting racial inequality.”).

<sup>94</sup> Indeed, Forman has made some of these observations in previous works. He critiques the “New Jim Crow” analogy as obscuring the structural dimensions of race by ignoring the significance of Black punitive responses to violent crime, class distinctions inherent in the disparate impact of mass incarceration on low-income African Americans, and clear historical distinctions between the Old Jim Crow and the New Jim Crow. FORMAN, *supra* note 9, at 37 (“The Jim Crow analogy encourages us to understand mass incarceration as another policy enacted by whites and helplessly suffered by blacks. But today, blacks are much more than subjects; they are actors in determining the policies that sustain mass incarceration in ways simply unimaginable in past generations.”).

<sup>95</sup> Carbado & Richardson, *supra* note 25, at 1980–81 (“[O]ne of the most important lessons to be drawn from Forman’s book [is that] racial diversity without meaningful reallocations or redistributions of power might not only limit the possibilities for social transformation but also potentially reproduce and legitimize the very forms of inequality the pursuit of racial diversity was intended to address. At least implicitly, Forman advances that insight with respect to the mass incarceration of African Americans.”). It is the fact that this insight is implicit in Forman’s book rather than explicit that leaves interpretive room for post-racialists to over-emphasize Black agency without conceptualizing structural inequality. So, while Forman examines the history of these decisions by African American policymakers, there is only an implicit connection between the decisions and the present-day effects of past discrimination.

<sup>96</sup> *Id.* at 1981 (“Structural factors are at play as well, in much the same way that structural factors shaped, though certainly did not fully determine, how the black leaders Forman describes mobilized various dimensions of the criminal justice apparatus to address the proliferation of crime and drug usage in African American communities.”). It is this structural analysis that is largely absent in Forman’s account.

participate aggressively in the War on Drugs,<sup>97</sup> how these leaders attempted to balance a punitive approach with a societal approach,<sup>98</sup> and the historical context in which these decisions occurred,<sup>99</sup> Carbado and Richardson express concern about how Forman's book can be interpreted to neutralize the core significance of race in mass incarceration:

Some might deploy Forman's book to advance the proposition that race has played less of a role in the mass incarceration of African Americans than liberals and progressives like to admit. After all, black people have been agents, and not just victims, of mass incarceration. Our own view is that Forman's thesis is more nuanced than the preceding account suggests. His analysis of African American decision-making across various domains of the criminal justice apparatus reminds us that the persistence of racial inequality in the United States derives from problems of power and structure, rather than simply individual choice and identity.<sup>100</sup>

Of course, it is difficult to pinpoint how much these incremental decisions by African American policymakers contributed to the mass incarceration explosion, but Forman's linear description and analysis of these decisions could be interpreted as directly contributing to it. This is true, to a certain extent, but the Black agency proposition could be misinterpreted because the decisions are catalogued and discussed individually, not *structurally*: "Forman's near-exclusive focus on *what* these actors did, with scant attention to the *conditions* under which they acted, leaves readers with the daunting challenge of articulating those structural factors for themselves."<sup>101</sup>

Thus, Carbado and Richardson identify a key structural factor underlying Forman's historical hypothesis: they conceptualize a bright-line distinction between individual agency and structural factors that shape decisions.<sup>102</sup> Certainly, the face of the decision-maker is important; this is what drives *Locking Up Our Own*,<sup>103</sup> but this says very little about the *structure* within which African American leaders operated. "If the two-term presidency of Barack Obama teaches us anything on this issue, it is that the racial identity

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<sup>97</sup> *Id.* at 1980.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1983.

<sup>102</sup> *Id.* at 1981.

<sup>103</sup> The key inquiry is how did African American decisionmakers adopt excessively punitive policies that led to mass incarceration. See FORMAN, *supra* note 9, at 9–11.



of a leader—even a President of the United States—is not enough to dismantle or meaningfully mitigate the racial inequality of a society.”<sup>104</sup>

Advancing a wide ranging and insightful review of *Locking Up Our Own*, Carbado and Richardson illustrate this point by unpacking discretionary police power as a function of dual consciousness<sup>105</sup>—the African American police officer is Black and “blue.” She must maintain her authentic racial identity while remaining true blue to her fellow law enforcement colleagues. Here, individual choice (agency) is constrained by the structural underpinnings of the police force itself.<sup>106</sup> Carbado and Richardson persuasively demonstrate, by referencing implicit bias theory and Fourth Amendment law,<sup>107</sup> that when African American police officers “police our [their] own,” they do so aggressively to authenticate their legitimacy.<sup>108</sup>

An important analogy can be drawn here between the double consciousness decision-making power of African American police officers<sup>109</sup> and the African American legislators in *Locking Up Our Own*.<sup>110</sup> For example, statements like “we’re going to fight drugs and crime until the drug dealer’s teeth rattle”;<sup>111</sup> sellers of drugs or guns that caused a death “deserved to ‘roast’ or fry”;<sup>112</sup> and “[u]nless we arrest [the drug dealers] incarcerate them and spit them back out with only their underwear . . . they’ve beat the system”;<sup>113</sup> all illustrate how African American officials, as much as the African American police officers negotiated between a Black racial identity and a blue law enforcement identity, adopted a similar dual consciousness— one of an African American proponent of the community (the Black identity) and another of an official who was not soft on crime.<sup>114</sup> This is the structural

<sup>104</sup> Carbado & Richardson, *supra* note 25, at 1980.

<sup>105</sup> *Id.* at 1981 (citing W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 45 (Signet Classic 1969) (1903)). (“African American police officers have to negotiate and reconcile two historically distinct strivings—the strivings to be ‘blue’ and the strivings to be ‘black’—in one ‘dark body.’”).

<sup>106</sup> *Id.* at 1981–82, 1989–2014.

<sup>107</sup> *Id.* at 1981.

<sup>108</sup> *Id.* at 1981–82 (noting that there is an incentive for black officers to “work their identities to disconfirm assumptions that they will insufficiently identify with being ‘blue’ and overly identify with being ‘black.’ Overpolicing other African Americans would be one way for black officers to perform that work.”); *id.* at 1989–2010; BUTLER, *supra* note 9, at 33–34 (stating that there are substantially more white officers than black officers, so white officers kill more African Americans than black officers overall; but, “a black cop is more likely to shoot a black person than a white cope is”).

<sup>109</sup> Carbado & Richardson, *supra* note 25, at 1989–2014.

<sup>110</sup> FORMAN, *supra* note 9, at 165.

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 166 (internal quotation marks omitted).

<sup>114</sup> *Id.* at 10–11. In order to not be portrayed as “soft” on crime and ineffective, the African American official had to find common cause with the Thin Blue Line.

factor that connects all of the individual decisions that Forman chronicles in *Locking Up Our Own*.

This could also explain, at least partially, why if Black officials simultaneously advocated for punitive measures as well as what Forman terms an urban “Marshall Plan,” the former option consistently proved to be the policy choice.<sup>115</sup> In order to identify as tough on crime, in an ever-escalating war, Black officials chose their identity as generals or military enforcers (blue or green)<sup>116</sup> over the holistic community (Black). The structural dimensions of race constrained their choices to these two policy extremes.

In an illuminating critique of *Locking Up Our Own*, Professor Darren Lenard Hutchinson offers a structural analysis of Black punitiveness,<sup>117</sup> providing valuable context to Forman’s historical account of Black leadership. Hutchinson posits a comprehensive summary, analysis, and conceptualization of Forman’s theory of Black punitiveness from anti-drug initiatives in the Black Community,<sup>118</sup> gun control,<sup>119</sup> and aggressive policing to neutralize the threat of Black violence and crime.<sup>120</sup> The common theme amongst all of these punitive rationales is that African Americans contributed, in part, to the construction of mass incarceration. As previously discussed, Black punitiveness, as theorized by Forman, implicates a series of decisions by African American leaders without contextualizing the structural salience of race.<sup>121</sup> As Hutchinson observes:

Forman’s research implicates but does not give attention to three important issues that help to alleviate any conflict a reader might find between his observations and antiracist analysis of U.S. criminal law and enforcement: the possible influence of white supremacy on black punitive sentiment, geographical limitations of black political power, and the pervasiveness of antiblack racism as a motivator of punitiveness among whites.<sup>122</sup>

Hutchinson illustrates how white supremacy is an essential component of Black punitive sentiment.<sup>123</sup> There is a disturbing symmetry between

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<sup>115</sup> *Id.* at 12–13.

<sup>116</sup> Here, I mean to suggest a militarized police force embraced by African American officials.

<sup>117</sup> Hutchinson, *supra* note 25, at 2396–97.

<sup>118</sup> *Id.* at 2400–03.

<sup>119</sup> *Id.* at 2403–05.

<sup>120</sup> *Id.* at 2405–07.

<sup>121</sup> *Id.* at 2397–98.

<sup>122</sup> *Id.* at 2412–13.

<sup>123</sup> *Id.* at 2397–98.

right-wing authoritarianism<sup>124</sup> and Black punitive sentiment;<sup>125</sup> the tough-on-crime rhetoric of Black officials, buttressed by implicit bias,<sup>126</sup> and stereotypical depictions of Black criminality;<sup>127</sup> in-group stigmatization (a form of self-hatred which is a product of white supremacy and racism)<sup>128</sup> and the normalization of right-wing authoritarianism.<sup>129</sup> White supremacy is at the heart of Black punitiveness, this means that *Locking Up Our Own* is more than a set of disaggregated individual decisions, but a structural response to a historically oppressed “discrete and insular minority,”<sup>130</sup> calculated to preserve subordination. The systemic impact of these cumulative decisions impacts communities of color disproportionately.<sup>131</sup> This disproportionality is unexplainable on grounds other than race.<sup>132</sup>

In terms of the structural dimensions of race, Hutchinson’s critique offers a key observation about Forman’s compelling history—Black political power was shaped, limited, and constrained by the structure of white supremacy within which such power was deployed. On some level, Forman’s focus on discrete instances of decision-making power exaggerates the scope and vitality of that power. Hutchinson catalogues the limitations of Black political power to “impact criminal policies nationwide:”<sup>133</sup> (i) Blacks were underrepresented in state legislatures and Congress;<sup>134</sup> (ii) prosecutors were overwhelmingly white, thus underscoring the fact that criminal policy and prosecutorial discretion was wielded by whites;<sup>135</sup> and (iii) Blacks were underrepresented on the bench so that the sentencing power was largely out of the hands of African Americans.<sup>136</sup>

Without this essential context, Forman’s discussion of Black decision-making power inadvertently characterizes this power as more potent than it actually is.<sup>137</sup> Forman’s valuable work should not be used to distort the salience of race and Black political power.<sup>138</sup> Nevertheless, his work opens up new and varied discussions on structural inequality and race.

<sup>124</sup> *Id.* at 2423.

<sup>125</sup> *Id.* at 2426.

<sup>126</sup> *Id.* at 2413–17.

<sup>127</sup> *Id.* at 2421–22.

<sup>128</sup> *Id.* at 2418–21.

<sup>129</sup> *Id.* at 2426.

<sup>130</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>131</sup> See *supra* notes 1–5 and accompanying text.

<sup>132</sup> See Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 666 (2003).

<sup>133</sup> Hutchinson, *supra* note 25, at 2427.

<sup>134</sup> *Id.* at 2427–28.

<sup>135</sup> *Id.* at 2428–30.

<sup>136</sup> *Id.* at 2430–31.

<sup>137</sup> *Id.* at 2432–33.

<sup>138</sup> *Id.* at 2446–47.

Where Forman's *Locking Up Our Own* leaves some unanswered questions about the structural dimensions of race, Butler's *Chokehold* offers a compelling account of the impact of structural inequality.<sup>139</sup> But *Chokehold* opens up new questions about the scope and power of radical social change. Butler theorizes structural inequality rather than the content of individualized decision-making within the criminal justice system.<sup>140</sup>

### III. THE SYSTEMIC CHOKEHOLD

"The chokehold is the systemic response to African-American men based on a contrived societal presumption of criminality. This presumption is the driving force that is designed to preserve not only law and order, but the racial order."<sup>141</sup> Conceptualizing the Chokehold "through the lens of policing black men," Butler unpacks the unique intersectionality of the Black male experience within the criminal justice system.<sup>142</sup> Since African American males are presumptively threats to the social order, the Chokehold is a legal and societal response to eliminate that threat through mass incarceration, hyper-aggressive, race-based policing, and state-compelled subservience.

This is the Third Reconstruction,<sup>143</sup> a period of not only retrenchment, but also an active campaign by the state to turn back racial progress and legitimize the permanent subordination of African Americans and all historically oppressed groups. Retrogression is a guiding policy principle of the state, and is graphically displayed in criminal justice policy, buttressed by the disturbing rhetoric of presumptive criminality, and legitimized state violence in the name of social control. As Butler conceptualizes the Chokehold, he notes that the genius of it is its mutability. It adapts,

<sup>139</sup> See BUTLER, *supra* note 9, at 5–6.

<sup>140</sup> Compare FORMAN, *supra* note 9, with BUTLER, *supra* note 9. *Locking Up Our Own* and *Chokehold* can be seen as complementary texts: both deal with the permanence of systemic oppression and both works expand intersectionality. In *Locking Up Our Own*, Forman posits a theory and interpretation of Black political power beyond the traditional binary of white-Black oppression to explore the impact of incremental decision-making by Blacks on their own communities. Butler's *Chokehold* theorizes the Black male body, not to the exclusion of Black women's unique history of oppression, to illustrate that gender functions in specific ways in the oppression of Black males in the criminal justice system. *Locking Up Our Own* analyzes discrete decision-making, while *Chokehold* examines structural decision-making. Both books also propose social change. *Locking Up Our Own* embraces an incremental approach, while *Chokehold* calls for radical structural reorganization or the abolition of the current system. Another germinal text in this canon is Professor Angela J. Davis' edited collection, *Policing the Black Man: Arrest, Prosecution, and Imprisonment* which is a collection of essays offering a full view of the structural racism inherent in the criminal justice system. See ANGELA J. DAVIS ET AL., *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Angela J. Davis ed., 2017).

<sup>141</sup> Cedric Merlin Powell, *Five Recommendations*, 2018 GREEN BAG ALM. & READER 330, 334 (2018).

<sup>142</sup> BUTLER, *supra* note 9, at 7.

<sup>143</sup> See generally Cook, *supra* note 16.

transforms, and morphs so that it is a comprehensive tool of oppression which actually rationalizes subordination: “The dynamic of blaming a victim of subordination for his or her condition, and then imposing a legal and social response that enhances the subordination, is familiar to many out-groups in the United States.”<sup>144</sup> This feature of the perpetual Chokehold is exhibited in use of evocative terminology such as “super predator” in reference to the constructed Black thug, the emphasis on Black-on-Black crime, self-help and personal responsibility narratives, and even “*Blue Lives Matter*.” Notice that in each of these rhetorical tropes, people of color are blameworthy and so the system gives them what they deserve. Butler concludes that: “the system is broke on purpose.”<sup>145</sup>

In *Chokehold*, Butler identifies four crises that lie at the core of the intractability of structural inequality and systemic racism in the criminal justice system—this is why the Chokehold cannot be reformed: (i) Black male performance of masculinity in an anti-social manner: if they would “just pull up their pants” that would solve the problem of the presumption of Black male criminality; (ii) under-enforcement of the law: more police and hyper-aggressive enforcement leads to safer communities, but this is merely a rationalization for the expansion of race-based stop and frisks (as Butler points out in his book, former New York City Mayor Michael Bloomberg stated that “[w]hen it comes to policing, political correctness is deadly”<sup>146</sup>); (iii) police-community relations can be improved by an emphasis on fairness and positive interactions between police and community members; and, when this fails, the traditional intervention is by the Department of Justice, but change here is often temporary and far from substantive and structural; and, finally (iv) the crisis of anti-black racism and white supremacy which “views police brutality against Blacks as a symptom of structural racism and white supremacy.”<sup>147</sup>

What is striking and compelling about Butler’s invocation of the Chokehold metaphor is that it fully encompasses every aspect of the criminal justice system from the vicious and violent first encounter of a stop and frisk gone tragically awry to the death-grip impact of a procedural, doctrinal, and societal system premised on Black criminality.<sup>148</sup> As Butler establishes on a

<sup>144</sup> BUTLER, *supra* note 9, at 7.

<sup>145</sup> *Id.* at 5.

<sup>146</sup> *Id.* at 174.

<sup>147</sup> *Id.* at 171–76.

<sup>148</sup> Discussing *Whren v. United States*, 517 U.S. 806 (1996), Professor Elise C. Boddie opines: “The problem with *Whren* is that it constitutionalizes racialized suspicion of ordinary behavior. It gives police officers license to use minor infractions to justify pretextual stops in ways that target blacks. Under the auspices of supposedly race neutral police practices, *Whren* facilitates presumptions of black criminality for otherwise common conduct. It is an example of the kind of constitutional decision that frustrates the

number of levels, there is no escaping the Chokehold. The Chokehold impacts African American males in specific and unique ways: intersectionality explains the disproportionate impact of the criminal justice system on Black men; the presumption of Black male criminality drives the legitimatization of state mandated violence to preserve social order; neutral rhetoric is deployed to devalue Black lives so they don't matter; and the permanence of racism limits all substantive reform.<sup>149</sup>

### A. Intersectionality

Here, the binary disruption is to conceptualize beyond race and gender to race, gender, and how the structural dimensions of race position maleness as a key ingredient in Black punitiveness.<sup>150</sup> As Professor Frank Rudy Cooper observes, “[i]ntersectionality theory helps explain the Bad Black Man image. [The theory] analyzes ways that race and gender discourses combine to create a particular narrative.”<sup>151</sup> The Bad Black Man is imbued with “uncontrolled libidinal passions”;<sup>152</sup> he is animalistic and hypersexual,<sup>153</sup> and, he is a potential competitor for white women, this gender-based fear leads to the imputation of Black criminality.<sup>154</sup>

Thus, Butler’s conception of the Chokehold is a means of explicating how race, gender, and the structural response to the socially constructed Bad Black Man come together to perpetually oppress him. White supremacy is at the core of how society decides to punish the socially constructed Bad Black Man—the punitive impulse is directly correlated to racist attitudes.<sup>155</sup>

ability of blacks to engage in the kinds of everyday activities and behaviors that whites typically can do as a matter of course.” Elise C. Boddie, *Ordinariness As Equality*, 93 IND. L. J. 57, 69 (2018). Butler references *Whren, Atwater v. Lago Vista*, 532 U.S. 318 (2001) and *Scott v. Harris*, 550 U.S. 372 (2007) as vesting the police with “super powers” to racially profile, arrest for any crime (no matter how minor), and kill even if the police had a choice of stopping the pursuit of a suspect. See BUTLER, *supra* note 9, at 56–61; Paul Butler, *The System Is Working the Way It is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419, 1446–57 (2016).

<sup>149</sup> See BUTLER, *supra* note 9, at 9–15.

<sup>150</sup> Anna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 457 (2018) (noting how the Movement for Black Lives is an example of a radical social movement advancing a vision of intersectional politics for transformative social change: “Movement actors centralize intersectionality in their analysis of identities and structures. Their critique is not limited to race, gender, or identity politics. They move beyond an identity-based theory of inequality, while still recognizing the importance of identity. They think about structure in thinking about individual material grievance.”).

<sup>151</sup> Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 879 (2006).

<sup>152</sup> *Id.* at 879.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; CALVIN C. HERNTON, *SEX AND RACISM IN AMERICA* 19 (Grove Press 1965).

<sup>155</sup> See Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1463 (2018) (“One study reveals that if white people are cued that a particular policy has a disparate impact on black people, it makes white support for the policy go up.”).

“The Chokehold is at the intersection of blackness and maleness, and it is about the social and legal response to that specific identity.”<sup>156</sup> There is a specific and unique societal and legal response to this intersectional identity—this explains the well-documented systemic disparities that impact African American men.<sup>157</sup> The presumption of Black male criminality is a way to justify these disparities as well as to legitimize state-sanctioned violence as a means of social control.

### *B. The Presumption of Black Male Criminality*

The violent and brutal force of the Chokehold is legitimized by the presumption of Black male criminality. Because race, gender, and structure combine to function uniquely in the subjugation of African American males,<sup>158</sup> this presumption is at the very core of the Chokehold, and it helps to explain its depth and breadth.

The presumption of Black male criminality is rooted in race and gender. And it is the structure of the criminal justice system that supplies the devastating impact on African American males when race and gender are tropes for systemic oppression. After the African American male is bestialized, the Chokehold is a neutral and natural response to this socially constructed threat.<sup>159</sup>

Theorizing the scope and oppressive power of the Chokehold, Butler argues that it is a tool of subjugation designed to maintain the racial order, its mandate is anti-blackness, and the structural dimension of race in policing means that African American men are actively targeted for subordination.<sup>160</sup> “American cops are the enforcers of a criminal justice regime that targets black men and sets them up to fail.”<sup>161</sup> But there is something deeper at work here: just as Forman unpacks the nuances of individualized decision-making to underscore how African Americans contributed, on some level, to mass incarceration,<sup>162</sup> Butler locates this analysis structurally by focusing on how the system embraces the presumption of Black criminality; and, how

<sup>156</sup> BUTLER, *supra* note 9, at 68.

<sup>157</sup> See generally Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007).

<sup>158</sup> See generally D. Marvin Jones, *We're All Stuck Here for A While: Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 42 (1998).

<sup>159</sup> See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1340 (2004).

<sup>160</sup> See BUTLER, *supra* note 9, at 3, 5–7.

<sup>161</sup> *Id.* at 6.

<sup>162</sup> See *supra* Section I.

“African American men ourselves perpetuate the Chokehold even as we are its victims.”<sup>163</sup> Of course, Forman and Butler do not air the black community’s dirty laundry in public<sup>164</sup>—it is a historical fact that African American policymakers adopted the harsh rhetoric and policies of the War on Drugs and it is no secret that African American males engage in violent culture.<sup>165</sup> *Locking Up Our Own* and *Chokehold* deconstruct previously under-theorized complexities of the Black experience and structural inequality.<sup>166</sup>

Hyper-masculinity is valued as performance,<sup>167</sup> but it also serves as the distorted rationale for hyper-aggressive policing and its attendant violence.<sup>168</sup> This is but one aspect of the systemic Chokehold. Before violence is unleashed by the state, it must be conceptualized, and Butler offers a two-step progression of how this occurs: first, is what he terms “the construction of the thug,” which is the ubiquitous presumption that “every African American male is a criminal”; and, step two is the rationalization of state-mandated violence and an ever expanding carceral state as mechanisms of societal control.<sup>169</sup> As Butler concludes, “[t]he Chokehold is why, legally speaking, Black lives don’t matter as much as white lives.”<sup>170</sup>

### C. Rhetorical Neutrality<sup>171</sup> and Why Black Lives Don’t Matter

“The second step of the Chokehold is the transformation of anxiety about black men into law and policy intended to contain and control them.”<sup>172</sup> In this post-racial society, the doctrinal and political allure of neutrality is compelling because it explains why inequality is natural; and, that disparate impact is unconnected to intentional state action. So, race has nothing to do

<sup>163</sup> BUTLER, *supra* note 9, at 18.

<sup>164</sup> John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to “The Law School Five,”* 46 HOW. L. J. 175, 179 (2003).

<sup>165</sup> See FORMAN, *supra* note 9, at 17–46.

<sup>166</sup> See generally FORMAN, *supra* note 9; BUTLER, *supra* note 9.

<sup>167</sup> Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 257–59 (2015) (discussing, *inter alia*, Black males embracing gangsta culture as an act of defiance, resistance, and survival).

<sup>168</sup> Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 692, 693–702 (2009) (discussing a “hegemonic pattern of masculinity that is peculiar to police officers,” and noting how force and aggression are defining features of masculine policing intended to maintain control and encourage subordination through intimidation).

<sup>169</sup> BUTLER, *supra* note 9, at 18, 48.

<sup>170</sup> *Id.* at 6.

<sup>171</sup> See Powell, *supra* note 86, at 831–88 (discussing rhetorical neutrality as the “linchpin of the Court’s colorblind jurisprudence,” including underlying myths, Justice O’Connor’s doctrinal approach to the Court’s affirmative action jurisprudence, and post-Grutter colorblindness).

<sup>172</sup> BUTLER, *supra* note 9, at 48.



with the state's response to the threat of crime. This is the disturbing discourse around the criminal justice and enforcement system, and it fits into the neutral rhetoric of post-racialism:

In post-racial discourse, several rhetorical features are readily apparent: (i) neutral rationales are employed to rationalize inequality as inevitable if it is disconnected from state action; (ii) there is a virtually exclusive focus on the most extreme instances of racism; (iii) discrimination is conceptualized as the product of individual actions, not institutional structures; (iv) any challenge to structural inequality is inverted so that it is misinterpreted as racial politics (or balkanization) rather than a reasonable attempt to advance substantive equality; and (v) post-racialism exaggerates racial progress so that relative, incremental advancements made by oppressed people of color are used to dilute the potency of arguments for transformative social change and undermine laws enacted to ensure that substantive equality exists in every segment of society.<sup>173</sup>

All of the rhetorical propositions inherent in post-racial discourse are directly applicable to the rationales and policies underlying the criminal justice system. For example, perhaps one of the most divisive "neutral" tropes is "All Lives Matter."<sup>174</sup> This is a paradigmatic example of how neutrality perpetuates and reinforces systemic oppression.<sup>175</sup> "All Lives Matter" is acontextual, it embraces formalistic equality and erases race itself, so that it is devalued; the word "all" is deceptively inclusive because it includes all whites lives while offering a counterpoint of exclusion to Black lives; and, "All Lives Matter" seeks to undercut the legitimacy and power of the Black Lives Movement.<sup>176</sup> This is a classic example of inversion.<sup>177</sup>

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<sup>173</sup> Powell, *supra* note 17, at 530.

<sup>174</sup> Jim Hee Lee & Sherrilyn A. Ifill, *Do Black Lives Matter to the Courts?*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 255, 270–71 (Angela J. Davis, ed., 2017). There are varying degrees of this "neutral" slogan from "Blue Lives Matter" to "White Lives Matter," but the intent is to displace and devalue the Movement for Black Lives. "Rather than acknowledging the distinct, historical dehumanization of black people, which has been characterized by their treatment by law enforcement, the focus on "all lives" diminishes the specific injustices faced by "black lives." *Id.* at 271. Although ostensibly neutral because they seek to "include" all lives by shifting the emphasis from an exclusive focus on Black lives, this is simply the most recent incarnation of the reverse discrimination argument favored by opponents of anti-racist movements. See Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 371–72 (2018).

<sup>175</sup> Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS UNIV. PUB. L. REV. 255, 270 (2012).

<sup>176</sup> See Akbar, *supra* note 150.

<sup>177</sup> See Powell, *supra* note 86, at 829–30, 837–38, 847–48.

As Butler conceptualizes the construction of the thug—this “conjuring up a criminal”<sup>178</sup>—is part and parcel of the criminal justice system, and it serves as the foundation upon which to build a set of legal doctrines and policies that give the police unprecedented power.<sup>179</sup> As Butler concludes, “[c]ops are agents of the state. And when police shoot unarmed black people, they almost always get away with it.”<sup>180</sup> The systemic Chokehold is buttressed by a presumption of Black criminality, neutral rhetoric that displaces and devalues the significance of Black lives, doctrinal propositions that reinforce this devaluation,<sup>181</sup> and the permanence and adaptability of racism.

#### D. The Permanence of Racism

In essence, the Chokehold depicts the permanence of racism.<sup>182</sup> It represents the literal brutality of the state against Black bodies and the figurative grip of oppression that strangles Black humanity. In the last pages of *Chokehold*, Butler offers a sobering assessment of the permanence of racism.<sup>183</sup> This is much more than his assertion that the “system is broke on purpose”; it is also where the impact of the Chokehold is most graphic and compelling, as it is the realization that racism is never going away.<sup>184</sup> It will always adapt so that, structurally, there is an oppressive response by the state to keep the subjugated in place. Nowhere is this truer than in the criminal justice system.

The Chokehold symbolizes the permanence of racism: it is not only a death grip around the throat of Black humanity (this is manifested in the unrestrained police violence against Black lives), it is a set of doctrines, rules, policies, and procedures designed and coordinated to maintain structural inequality and white supremacy.<sup>185</sup> “Racial subordination has simply been refashioned from slavery to convict leasing to segregation to mass incarceration.”<sup>186</sup>

In his thought provoking and insightful essay, Professor Nirej Sekhon advances two primary critiques of Butler’s *Chokehold*: (i) he notes that the

<sup>178</sup> BUTLER, *supra* note 9, at 18.

<sup>179</sup> See *supra* note 148 and accompanying text.

<sup>180</sup> BUTLER, *supra* note 9, at 125.

<sup>181</sup> See *supra* note 148 and accompanying text.

<sup>182</sup> See Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2256 (2017).

<sup>183</sup> See BUTLER, *supra* note 9, at 5, 185.

<sup>184</sup> *Id.*

<sup>185</sup> See *id.* at 177.

<sup>186</sup> *Id.* at 228.

Chokehold, as a concept, is too “particularistic”<sup>187</sup> because it focuses exclusively on one specific police practice; and (ii) the Chokehold, as an anti-racist metaphor, is somewhat diffuse because it does not fully link “individual stories of pain and injustice” to “the broader sweep that actuarial style thinking enables.”<sup>188</sup> Here, Sekhon’s claim is that, without a deeper theoretical grounding in Critical Race Theory, the reader may lose the significance of the Chokehold. He asks, “can ‘the Chokehold’ hold?”<sup>189</sup>

Sekhon answers, “No,” to whether Butler “might have done more to further develop the moral implications of his argument.”<sup>190</sup> He also concludes that Michelle Alexander’s New Jim Crow metaphor is a “powerful” metaphor that resonates more effectively in public discourse, even with its imperfections, than does the Chokehold.<sup>191</sup> But here is where the structural dimensions of race are key, and these facets bring the metaphoric connection between the New Jim Crow and the Chokehold closer together than Sekhon’s critique suggests. While Sekhon raises a critical point: what is the scope, power, and resonance of the Chokehold as an anti-racist metaphor? He does not fully factor in the structural dimensions of race. The Chokehold denotes the full force of oppressive violence (this is the particularized aspect), but it also connotes a full-blown apparatus of oppression.

Citing the Movement for Black Lives, Butler makes the point that this broad, intersectional movement for radical transformation focuses on the eradication of structural inequality broadly defined.<sup>192</sup> So, police violence is one of many forms of state-sanctioned violence: inadequate health care, dirty water, food deserts, and failing schools are all forms of violence against the oppressed.<sup>193</sup> If Butler can persuasively make this connection, then it is easier to conclude that the Chokehold metaphor will resonate and be accessible to the reader. Indeed, it should be noted that the Movement for Black Lives fully incorporates the complexity and comprehensiveness of structural inequality in its platform to eradicate it.

While it is beyond the scope of Butler’s book, he does specifically identify a number of distinct Chokeholds, which target communities of color, the poor, and transgendered.<sup>194</sup> He makes the point that the Chokehold as “a

<sup>187</sup> Nirej Sekhon, *The Chokehold*, 57 U. LOUISVILLE L. REV. 43, 43 (2018).

<sup>188</sup> *Id.* at 57.

<sup>189</sup> *Id.* at 56.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 57 (citing Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L. Q. 845, 847 (2014)); see FORMAN, *supra* note 9, at 22.

<sup>192</sup> BUTLER, *supra* note 9, at 177.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 7.

tool of oppression” is not solely applicable to African American men.<sup>195</sup> Again, the impact of the Chokehold on these communities should underscore the fact that the metaphor will resonate with them. The Chokehold will hold, if this is the case.

But Sekhon raises a more compelling critique when he notes that Butler fails to fully engage the question of violence as self-defense when he espouses *Chokehold*'s radical theory of transformation of the criminal justice system.<sup>196</sup> Of course, there are legitimate arguments over the boundaries of revolutionary social change. While noting the “greater complexity” of the moral question of armed resistance as a form of legitimate struggle and self-defense,<sup>197</sup> Sekhon nevertheless observes “[t]he absence of full engagement with the question of violence leaves *Chokehold*'s conclusion more muted than one would expect.”<sup>198</sup> Perhaps there is no answer to this question because there is no way to articulate how much violence is enough to meet the oppressive power of the state, what will be considered a “victory” in the face of insurmountable state police and military power, and how committed is the oppressed community to this avenue of revolutionary action? Sekhon correctly points out that the Chokehold metaphor cannot answer these questions, but no anti-racist metaphor truly can.<sup>199</sup>

This underscores the fact that *Locking Up Our Own* and *Chokehold* follow their analytical and narrative paths to the conclusions inherent in the questions that they frame: *Locking Up Our Own*'s incremental approach to systemic change is rooted in Forman's analysis and historical account of individual decision-making power;<sup>200</sup> by contrast, *Chokehold*'s structural critique is rooted in a clarion call that “this be the last time Blacks reinvent this country without crushing white supremacy.”<sup>201</sup> However we choose to crush white supremacy, an appropriate starting point could be the Thirteenth

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<sup>195</sup> *Id.*

<sup>196</sup> Sekhon, *supra* note 187, at 58–59.

<sup>197</sup> *Id.* at 58.

<sup>198</sup> *Id.* at 59.

<sup>199</sup> Black self-defense and self-determination have always been core components of Black liberation. Perhaps Butler could have referenced this conception of self-defense articulated more than fifty years ago in Black Power: “If a nation fails to protect its citizens, then that nation cannot condemn those who take up the task themselves. . . . Those of us who advocate Black Power are quite clear in our own minds that a “non-violent” approach to civil rights is an approach black people cannot afford and a luxury white people do not deserve. It is crystal clear to us—and it must become so with the white society—that there can be no social order without social justice. White people must be made to understand that they must stop messing with black people, or the blacks will fight back!” TURE & HAMILTON, *supra* note 20, at 52–53.

<sup>200</sup> See *supra* Section I.

<sup>201</sup> BUTLER, *supra* note 9, at 228.

Amendment as an analytical, doctrinal, and political tool to disrupt the current chattel system of mass incarceration.

#### IV. THE THIRTEENTH AMENDMENT: A NEW THEORY OF CRIMINAL JUSTICE

The modern carceral state has all of the badges and incidents of slavery: dehumanized Black bodies are controlled, policed, and detained through state-sanctioned violence; control and surveillance are maintained by the exercise of pervasive state power; imprisonment is commodified<sup>202</sup> so that mass incarceration or perpetual virtual surveillance serves an economic interest (cheap labor is akin to slave labor); and, after the initial contact with this sprawling system of oppression, there is very little hope for a complete and participatory life as a citizen because of the enduring stigma of the badge of convicted felon. The chains are simply invisible now.

It is ironic that the very amendment that eradicated caste-based oppression in America has been transformed into a license to privatize the prison system and commodify mass incarceration.<sup>203</sup> If neither slavery nor involuntary servitude shall exist within the United States,<sup>204</sup> then punishment for crime should not be a new form of slavery. The Thirteenth Amendment should be employed to eradicate all badges and incidents of slavery with present-day effects.<sup>205</sup> This highlights the comprehensive scope of dismantling structural inequality in segregated housing, re-segregated schools, segregated neighborhoods produced by racist redlining, race-based mortgage lending, environmental racism, and, of course, state-sanctioned violence against Black bodies.<sup>206</sup> One way to dismantle structural inequality is to target *all* state action that perpetuates caste.

While the Thirteenth Amendment is not often the subject of doctrinal emphasis in anti-discrimination law, it nevertheless is a potent constitutional

<sup>202</sup> See Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U. LOUISVILLE L. REV. 61, 78–83 (2018).

<sup>203</sup> Ifeoma Anjuwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385, 1407 (2018) (“While the Thirteenth Amendment of the U.S. Constitution has been lauded by history books and legal scholars for abolishing slavery, the Amendment has also been read to uphold labor practices that in reality amount to slavery for a certain segment of the American population—that is, those convicted of a crime.”).

<sup>204</sup> See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any other place subject to their jurisdiction.”).

<sup>205</sup> *Jones v. Alfred Mayer*, 392 U.S. 409, 445–48 (1968) (Douglas, J., concurring) (cataloguing the persistence of racism and the badges of slavery that remain in modern society and stating that “[t]his recital is enough to show how prejudices, once part and parcel of slavery still persist”).

<sup>206</sup> See BUTLER, *supra* note 9, at 4–7.

amendment standing alone, or along with the Fourteenth and Fifteenth Amendments.<sup>207</sup> The Reconstruction Amendments made full citizenship a constitutional guarantee for the newly emancipated slaves, and it has been American's one-hundred-and-fifty-year struggle to translate this promise into reality. A stark vestige of slavery's indelible impact is the criminal justice system and mass incarceration.<sup>208</sup>

*Locking Up Our Own* and *Chokehold* begin some of the work of dismantling structural inequality—both books share the primary objective of eradicating the disparities that continue to enslave the Black community. We can unlock the systemic oppression and break the Chokehold by applying the Thirteenth Amendment to the defining features of oppression in the criminal justice system identified by Forman and Butler. There are at least three badges and incidents of slavery<sup>209</sup> that are highlighted in *Locking Up Our Own* and *Chokehold*: (i) the unbridled power and legitimized state violence which targets Black bodies for social control based upon a socially constructed presumption of criminality;<sup>210</sup> (ii) a devastating punitive system that ensures an ever-growing population of Black and Brown bodies in the criminal justice system due to disproportionate punishment;<sup>211</sup> and (iii) the perpetual cycle of enhanced collateral punishment derived from stigmatization of individuals who have served their time—this is the brutal transition from convicted felon to carceral citizen.<sup>212</sup> Even after serving time

<sup>207</sup> See Patricia Okonta, Note, *Race-based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 260–69 (2017).

<sup>208</sup> As one scholar observes: “Numerous scholars have pointed to the parallels between Jim Crow and our present system of criminal justice, with its far-reaching and disproportionate impact on young African American men and its resulting disenfranchisement and disempowerment of large segments of the black population. State-sanctioned racism has been outlawed by the Constitution. But our punitive modern criminal justice system remains strikingly unequal. At the extreme, on penal plantations in many southern states, criminal punishment manifests as a latter-day reenactment of slavery.” Aliza Cover, *Cruel and Invisible Punishment Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1161 (2014).

<sup>209</sup> It is beyond the scope of this essay to explore each badge and incident of slavery underlying the criminal justice system and mass incarceration, but these three defining features of the carceral state are essential components of what can be viewed as modern-day slavery.

<sup>210</sup> See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 89 (2004) (“The use of race as an *ex ante* proxy for criminal suspicion by law enforcement officials or those with *de jure* or *de facto* enforcement power is a badge or incident of slavery outlawed by the Thirteenth Amendment.”).

<sup>211</sup> See Cover, *supra* note 208 and accompanying text.

<sup>212</sup> See Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 296 (2016) (“Carceral citizenship is instead a novel *social arrangement* produced by crime control practices born in the era of mass incarceration and its community analogue, mass supervision. Unlike citizenship under the Fourteenth Amendment, which is based on ancestry (via birthright), it is a new form of citizenship based on the presumed actions of its class. Differential treatment of the carceral citizen is therefore based solely on his or her status as a legal offender, or someone who has been presumed to have broken a law, and is arguably constitutionally justified.”).

and purportedly being rehabilitated, an individual impacted by the criminal justice system is never truly free.

Unpacking the super powers of the police,<sup>213</sup> Butler demonstrates how these lethal powers advance hyper-aggressive policing so that every encounter between the police and presumed suspects becomes an escalating masculinity contest.<sup>214</sup> This is a contest that a Black man can never win. The Ferguson Report identifies this systemic targeting of Blacks as presumptive criminals as a constitutional violation.<sup>215</sup> What is striking is how dehumanization is an operative tool in maintaining the subordination of African Americans. Just as violence was used to keep slaves in their place and subjugated,<sup>216</sup> so too does the use of police violence in targeted communities accomplish the same vile purpose. Now that African Americans are “free,” the presumption of criminality serves as a badge of oppression with legalized state violence as an incident of that oppression.<sup>217</sup> Butler notes that “[s]top and frisk can be seen as a ‘badge and incident’ of lynching, the gendered and racialized violence directed against African American men (among others) around the turn of the twentieth century.”<sup>218</sup> Apart from the brute violence of the stop and frisk encounter, this contact can be seen as the first of many perpetual encounters in which African Americans are enslaved by the criminal justice system. The point is surveillance and control: “African American men are arrested mainly so that they can be officially placed under government surveillance.”<sup>219</sup> There is a punitive mandate that runs throughout the criminal justice system.<sup>220</sup>

The system’s punitive mandate should be re-envisioned so that punishment is actually based upon the severity of the crime. Criminal defendants should not be punished for exercising their Sixth Amendment right to trial. The Sixth Amendment should be given its substantive

<sup>213</sup> See *supra* note 148 and accompanying text.

<sup>214</sup> BUTLER, *supra* note 9, at 205; see Cooper, *supra* note 151.

<sup>215</sup> U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15–24 (2008), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>216</sup> See William M. Carter, Jr., *The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment*, 85 TEMPLE L. REV. 867, 875 (noting that infliction of violence on historically oppressed groups is a badge and incident of slavery intended to be abolished by the Thirteenth Amendment).

<sup>217</sup> See Norwood, *supra* note 6.

<sup>218</sup> BUTLER, *supra* note 9, at 105.

<sup>219</sup> *Id.* at 61.

<sup>220</sup> See Carter, *supra* note 210, at 64 (“The point is not that racial profiling is the equivalent of flogging slaves found off the plantation. Instead, the point is that during slavery, blacks were denied freedom of movement based on their race and that widespread racial profiling has the same effect today. Thus, racial profiling, when it leads to an arrest or detention, can be characterized as a Thirteenth Amendment seizure, in violation of the Amendment’s promise to eliminate this vestige of the slave system.”).

meaning—“[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”<sup>221</sup>—a fair trial must include the substantive right to decide whether to go to trial without being punished for making that decision and exercising that constitutional right. Butler advances the practical structural proposition that “[d]ecriminalization is a way of ratcheting down the police super power to arrest.”<sup>222</sup> If there were fewer crimes to be used as leverage in plea bargains, perhaps this would limit prosecutorial discretion and also make going to trial less of a rare occurrence and more of a constitutional right. There is something wrong with a system of justice where 95% of defendants end up pleading guilty.<sup>223</sup> This is a skewed system focused on pre-determined outcomes, rather than just results. Many lives have been crushed by this system.

Kalief Browder’s life is a tragic example of the failure of the system and the Sixth Amendment. As Butler concludes, “Kalief Browder was an innocent man. An innocent man who should have pled guilty. Then he might still be alive.”<sup>224</sup> Browder had no rights in the criminal justice system that arrested him for an alleged robbery of a backpack on an unreliable identification, set bail at an amount that his family could not afford, delayed his trial for almost three years while he was held in solitary confinement,<sup>225</sup> and brutalized him from all sides.<sup>226</sup> Browder never accepted the offer to plead guilty to two misdemeanors, so “he could go home that day” because he insisted on his innocence.<sup>227</sup> After languishing in the vicious confines of Riker’s Island for more than one-thousand days, his case was summarily dismissed by the prosecution.<sup>228</sup> This casualness belied the wholesale devastation impacting Browder’s life. After being released, he never recovered from his years in solitary confinement and he committed suicide.<sup>229</sup> Browder was systematically dehumanized, which is the very essence of the barbarism that is slavery.

A clear indication that these vestiges of chattel oppression are still enduring and vibrant in the criminal justice system is the recurring

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<sup>221</sup> U.S. CONST. amend. VI.

<sup>222</sup> BUTLER, *supra* note 9, at 233.

<sup>223</sup> *Id.* at 221.

<sup>224</sup> *Id.* at 220.

<sup>225</sup> Here, the state effectively erased all of Browder’s constitutional protections under the Sixth Amendment. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”). Browder never received this opportunity because the State presumed his guilt and punished him for it.

<sup>226</sup> BUTLER, *supra* note 9, at 220.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 220–21.



stigmatization that awaits the formerly incarcerated upon re-entry into society. Perpetual punishment is a defining feature of slavery and the modern oppression inherent in the criminal justice system and society at large. Professors Rueben Jonathan Miller and Amanda Alexander conceptualize the “carceral citizen,”<sup>230</sup> not a second-class citizen with limited rights derived from full citizenship, but a unique citizenship rooted in perpetual surveillance and exclusion. As Miller and Alexander observe, “[i]n the age of mass supervision, regimes of post-incarceration surveillance and ostensible social welfare provision serve to cement the legal exclusions of carceral citizenship.”<sup>231</sup>

Further complicating carceral citizenship are the massive disruptions imposed on everyday life in society—the collateral consequences range from discrimination in private employment,<sup>232</sup> crushing debt from legal financial obligations,<sup>233</sup> and disenfranchisement.<sup>234</sup> What is particularly devastating is that mere contact with the criminal justice system itself can undermine a person’s life chances and opportunities.<sup>235</sup> This perpetual stigmatization is an essential component of a system of subjugation. In *Locking Up Our Own*,

<sup>230</sup> See Miller & Alexander, *supra* note 212.

<sup>231</sup> *Id.* at 309.

<sup>232</sup> Anjuwa & Onwuachi-Willig, *supra* note 203, at 1411 (“If prison labor is deemed an appropriate vehicle to enable prisoners to gain job skills, why then should companies, who ostensibly have benefitted from those same job skills while a formerly incarcerated individual was behind bars, also have the power to reject the same individual when she presents herself in the private labor market?”).

<sup>233</sup> Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1655 (2015) (“Both the “old” and “new” forms of peonage share structural similarities. Under the old form, law enforcement arrested emancipated blacks on trumped-up criminal charges, such as vagrancy, and permitted an employer to pay the convicted defendant’s fine in exchange for his labor. . . . Under the new form, low-income people, many of whom are already living at the margins of society, frequently incur criminal-justice debt as a result of minor, nonviolent offenses that in many instances stem from the criminalization of poverty.”). “Under both the old and new forms of peonage, the criminal justice system itself is complicit in their continued operation.” *Id.* at 1657. Coercive labor is maintained, under the old and new forms of peonage, through a system of fees and fines assessed to maintain “the essence of involuntary servitude.” *Id.* at 1658.

<sup>234</sup> Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 275 (2015) (arguing that disenfranchisement is a badge of slavery); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 371 (2012) (concluding that “virtually every felony conviction carries with it a life sentence,” and discussing the collateral effects of disenfranchisement and other forms of “invisible punishment” which permanently disable individuals from functioning as fully engaged and participatory citizens because of “significant limitations on employment, restrictions on occupational licenses, barriers to public and private housing, thwarted access to legal immigration, ineligibility for public benefits, limited access to educational loans, the inability to maintain parental rights or act as a foster parent, qualifications for jury service, and child support enforcement for debt accrued during a period of incarceration”).

<sup>235</sup> Anjuwa & Onwuachi-Willig, *supra* note 203, at 1398 (“Additionally, it is important to note that the detrimental impact of a criminal record attaches *even when* a defendant has been acquitted of charges.”) (emphasis added).

there is a disturbing example of how the system continues to punish those who come into contact with it even for minor infractions.<sup>236</sup>

After a pretextual investigatory stop uncovered about twenty dollars of marijuana in the glove compartment of her car, Sandra Dozier received a citation to appear in court which initially seemed to be a great outcome because she avoided jail and missing work.<sup>237</sup> The prosecution ultimately decided not to bring charges against her—the charges had been “no papered,” and she was again a full and free citizen.<sup>238</sup> Yet this ostensibly minor encounter with the criminal justice system had a disparate impact on Ms. Dozier’s life, given the fact that her minor infraction was not even formally documented. During a record check at the end of her probationary work period as a new employee at FedEx, “the paperwork came back showing [Ms. Dozier’s] recent arrest for marijuana possession. And FedEx promptly fired her.”<sup>239</sup> This is an example of private job discrimination based upon the presumption of criminality and the stigmatization of carceral citizenship.<sup>240</sup>

It is even more disheartening because Ms. Dozier simply brushed against the system; she was not fully in it.<sup>241</sup> But it engulfed her nevertheless: “Ms. Dozier had become the victim of the latest pretext-stop strategy. Designed to get guns off the street, it required casting a wide net—wide enough to capture lots of minor offenders like Sandra Dozier with her two baggies of marijuana.”<sup>242</sup> This systemic net ensnares the historically oppressed and burdens them with the badges and incidents of slavery underpinning the modern-day carceral state.

The Thirteenth Amendment mandates the eradication of *all* of the vestiges of caste-based oppression. Thus, police practices should not indiscriminately target African Americans for capture by the criminal justice system based upon the presumption of Black criminality. The criminal justice system should be restructured so that the punitive impulse is limited to the severity of the crime (proportionality), and sentencing is exercised with well-defined discretion. There should be no punishment for exercising the right to a trial and to confront witnesses.

Collateral punishment and carceral citizenship should be abolished so that the formerly incarcerated are not punished again by being excluded from the job market, housing, financial aid, and the fundamental aspects of

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<sup>236</sup> FORMAN, *supra* note 9, at 189.

<sup>237</sup> *Id.* at 189–90.

<sup>238</sup> *Id.* at 190.

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

<sup>240</sup> Anjuwa & Onwauachi-Willig, *supra* note 203, at 1389–90, 1411–12.

<sup>241</sup> FORMAN, *supra* note 9, at 191.

<sup>242</sup> *Id.* at 194.

citizenship, specifically voting rights. Upon release from prison, all rights of full citizenship should be restored.

All non-violent drug offenders should be released and remanded to treatment. All other non-violent offenders who committed crimes due to the criminalization of poverty should be released as well.

Other serious offenders should be considered for re-entry into society, and programs should be created to prevent recidivism so that full citizenship has substantive meaning.

The privatization of the prison system should be stopped by halting construction of new prisons, returning control of prisons to the state, not private corporations,<sup>243</sup> and by abolishing all private prisons.<sup>244</sup>

#### V. CONCLUSION

This Essay critiqued *Locking Up Our Own* and *Chokehold*, two powerfully influential books, in a canon inspired by *The New Jim Crow*, but expanded into new doctrinal and conceptual directions by positing a structural analysis of race beyond binary Black-white power relationships. Both books unpack the structural dimensions of race, and how decision-making reinforces and advances systemic disparities in mass incarceration and the systemic Chokehold of the criminal justice system. Dismantling structural inequality will be a long and sustained battle against the endemic oppression inherent in America. These provocative calls to action challenge us to begin the work of dismantling the edifice of mass incarceration. We must abolish oppression.

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<sup>243</sup> See generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

<sup>244</sup> andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 412 (2016).

