

THE GREAT RURAL BOON: RACIAL POLITICS AND THE CRIMINALIZATION OF THE URBAN POOR

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America loves a good story. And in today's era, where stories of "injustice" are a thing of podcasts and "ripped from the headlines" television, it's quite easy to lose ourselves in anecdotes, and to overlook the *policies* that subjected 2.8 million blacks to our nation's criminal legal system.¹ Alice Johnson's clemency and the First Step Act notwithstanding, there has been *no* seismic shift in America's response to crime. By "crime" I don't mean acts of supposed moral turpitude. Rather, I'm talking about the criminalization of the black urban underclass—by all means, an "industry" vital to the American economy.

Indeed, blacks make up just 12 percent of the population but a third of all prisoners.² We're hardly living in the era of President Lyndon B. Johnson's "War on Poverty." In 2014 state expenditures on prisons—as opposed to anti-poverty programs—approached \$60 billion.³ Yet roughly two-thirds of incarcerated adults between the ages of 27 and 42 earned less than \$23,000 a year when arrested.⁴ Many on the Right disagree that race has played a role in incarceration rates, claiming instead that the spike in crime during the so-called "crack years" is to blame. Yet this situates the "tough-on-crime" politics of the 1970s and 80s in a vacuum, removed from controversy over affirmative action and housing discrimination, from the mythic "welfare-queen," and from full-page ads calling for the death penalty for the "Central Park Five."

Although concentrated in inner cities, crime was a *boon* for rural America. Between 1982 and 2007, as incarceration rates grew to an all-time high and as manufacturing employment rapidly

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1. Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.
2. John Gramlich, *The gap between the number of blacks and whites in prison is shrinking*, PEW RES. CTR. (Jan. 12, 2018), <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.
3. *Trends in U.S. Corrections*, SENTENCING PROJECT (2016) <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.
4. Bernadette Rabuy & Danile Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015) <https://www.prisonpolicy.org/reports/income.html>.

declined, the criminal legal system created 2.5 million jobs.⁵ Nationwide, nearly 70 percent of prison employees are white,⁶ and 70 percent of the 1,152 prisons built between 1970 and 2000 are in rural areas.⁷ It is quite the coincidence that just as the economy slowed in the nation's "Rust Belt" and small towns, a massive transfer of black bodies helped shore up America's most precious resource—white jobs.

What is more, the twentieth century's forced migration of urban blacks to rural American prisons had serious political implications. The nation's "prison boom" began in the 1970s, following passage of the Voting Rights Act, and soon after the Warren Court ended malapportionment in rural congressional districts.⁸ Prison expansion tripled the number of prisons nationwide, leading to wide-scale "prisoner gerrymandering" that *re-disenfranchised* the black urban voter, and helped restore the overrepresentation of rural areas that existed prior to the Warren Court's malapportionment decisions.⁹

Naturally, with *de jure* segregation replaced by an exploitative criminal legal system, the focus would eventually turn to the Supreme Court, the most significant institutional ally of the Civil Rights Movement. Long removed from its *Dred Scott*¹⁰ days, the twentieth century Federal judiciary became, for a time, a bulwark protecting black citizens' rights. From the Scottsboro case¹¹ to *Brown v. Board*,¹² the Court stepped up to protect black citizens left vulnerable to the vagaries of "States' Rights." Yet, due largely to the legislative compromises of Clinton era "New Democrats," the federal judiciary's steps towards ensuring procedural fairness and equal protection in criminal cases abruptly ended in the mid-1990s, as incarceration rates swelled.

Soon after pledging to "end welfare as we . . . know it,"¹³ which included limiting aid to mothers with incarcerated spouses, President Bill Clinton became a *de facto* signatory to Newt Gingrich's "Contract with America."¹⁴ As part of that "contract," Congress passed the Antiterror-

5. See JOSEPH MARGULIES, *WHAT CHANGED WHEN EVERYTHING CHANGED, 9/11 AND THE MAKING OF NATIONAL IDENTITY* 109 (2013).

6. See Rachel Gandy, *In prisons, Blacks and Latinos do the time while Whites get the jobs*, Prison Pol'y Initiative (July 10, 2015) https://www.prisonpolicy.org/blog/2015/07/10/staff_disparities/ (census numbers are from 2005).

7. See John M. Eason, *Why prison building will continue booming in rural America*, CONVERSATION (Mar. 12, 2017) <https://theconversation.com/why-prison-building-will-continue-booming-in-rural-america-71920>.

8. See *Baker v. Carr*, 369 U.S. 186 (1962); see also, Robert M. Crea, Note, *Racial Discrimination and Baker v. Carr*, 30 J. LEGIS 289 (2004).

9. See generally, Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323 (2018).

10. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

11. *Powell v. Alabama*, 287 U.S. 45 (1932).

12. *Brown v. Board of Education*, 347 U.S. 483 (1954).

13. Alana Semuels, *The End of Welfare as We Know it*, ATLANTIC (Apr. 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/>.

14. REPUBLICAN CONTRACT WITH AMERICA, REPUBLICAN PARTY (1994), <https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html>.

ism and Effective Death Penalty Act (“AEDPA”), placing what scholars have described as the “most significant” constraints on the federal courts’ power “that had. . . ever been enacted,”¹⁵ and leaving federal judges hamstrung to oversee a growing number of state criminal convictions. As no statute had ever done, AEDPA required federal courts defer to state judges *on matters of federal law*.¹⁶ Although Congress rejected similar bills 13 times in the 40 years prior to AEDPA’s passage,¹⁷ it remains the law despite recent estimates placing the rate of wrongful convictions at anywhere between 2 and 10 percent—that is, between 46,000 and 230,000.¹⁸

But not only was the disproportionately poor and black prison population stripped of plenary federal review of state criminal proceedings, they were further stripped of federal oversight of prison *conditions*. A year after AEDPA, the Gingrich-Clinton coalition passed the Prison Litigation Reform Act (“PLRA”), erecting “exhaustion” barriers and imposing hefty filing fees for prisoner lawsuits alleging abuses by guards or inhumane living conditions.¹⁹ Prisoners often could not afford the fees and were unaware of the state and remedies they were now required to exhaust. As civil rights law professor Margo Schlanger recently commented, “[t]he preservation of prisoners’ civil rights now depends on their ability to dot i’s and cross t’s,” something the PLRA has proven “they’re not so good at.”²⁰

Given the twentieth century’s changing economic and political climate, poor black citizens went like lambs to the slaughter. Racial criminalization became both a jobs program to combat economic decline in rural America and preferred policy response to urban poverty. Mass incarceration perpetuates many of the exploitative laws of our nation’s past, none different than the Black Codes or Jim Crow. Crime, while certainly an issue in black neighborhoods, was largely an *excuse* for much of white America. Jobs for black Americans, not *bars*, would have been a much better solution to crime.

15. Stephan I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 941 n.2 (2011) (emphasis added).

16. 28 U.S.C. § 2254(d)(1).

17. The stricter proposals were put forward in the wake of *Brown v. Allen*, 344 U.S. 443 (1953), which adopted a plenary review standard for habeas petitions.

18. See John Grisham, *Why the innocent end up in prison*, CHICAGO TRIBUNE (Mar. 14, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-innocent-prisoners-innocence-project-death-row-dna-testing-prosecutors-0315-story.html>.

19. 42 U.S.C. § 1997e.

20. Rachel Poser, *Why it’s nearly impossible for prisoners to sue prisons*, NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons>.