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ABSTRACT

In 1954, the Supreme Court's *Brown v. Board of Education* opinion relied on social science research to overturn *Plessy v. Ferguson*'s separate but equal doctrine. Since *Brown*, social science research has been considered by the Court in cases involving equal protection challenges to grand jury selection, death penalty sentences, and affirmative action. In 2016, Justice Sotomayor cited an influential piece of social science research, Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, in her powerful *Utah v. Strieff* dissent. Sotomayor contended that the Court's holding overlooked the unequal racial impact of suspicionless stops. Though the defendant in *Strieff* was white, Sotomayor emphasized that "it is no secret that people of color are disproportionate victims of this type of scrutiny," and mentioned *The New Jim Crow* in support of her conclusions about the role race plays in suspicionless stops. *The New Jim Crow*, published in 2010, has sold over 750,000 copies. It describes how the criminal justice system disproportionately targets and incarcerates black men. The book has inspired a popular movement to end mass incarceration and the racial caste system mass incarceration has created. In addition to its appearance in *Strieff*, *The New Jim Crow* was cited in *United States v. Nesbeth*, a well-publicized 2016 sentencing order in which the court imposed probation instead of the incarceration recommended by the federal sentencing guidelines. *The New Jim Crow* has also been cited to explain the unfair collateral consequences faced by those convicted of drug crimes, as well as convictions' disproportionate racial impact.

This Article is the first to study *The New Jim Crow*'s equal protection potential. *The New Jim Crow*'s presence in federal decisions is reminiscent of the Supreme Court's citation to social science research in *Brown v. Board of Education*. This Article considers whether *The New Jim Crow* sits alongside canonical works of social science research considered by the Supreme Court in cases like *Brown*. It examines how *The New Jim Crow* is sometimes cited by the federal courts in passing, as a nod to a work that has infiltrated popular culture, but not always as evidence that influences case outcomes. Noting its appearance in Judge Scheindlin's orders finding

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that the New York Police Department's (NYPD) use of stop-and-frisk encouraged unconstitutional racial profiling, it questions whether *The New Jim Crow* could successfully support equal protection claims. It concludes that citations to *The New Jim Crow* represent soft law, albeit soft law with hard law potential.

INTRODUCTION

> Michelle Alexander's *The New Jim Crow* is the secular bible for a new social movement in early twenty-first century America.
>
> —Cornel West[1]

The New Jim Crow: Mass Incarceration in the Age of Colorblindness was published in 2010,[2] and became an unexpected publishing sensation. The New Press, its publisher, originally printed only 3,000 copies, assuming that it would sell about as well as other academic tomes.[3] As of 2014, the book was in its thirteenth paperback printing,[4] and, as of 2016, has sold over 750,000 copies.[5] It has won awards and was a "catalyst" in the NAACP's 2011 decision to call for an end to the war on drugs.[6] Michelle Alexander "became a social justice celebrity, an icon of a cause célèbre."[7]

Though *The New Jim Crow* reached mainstream audiences, providing sound-bite-ready arguments for prison reform, its thesis is rooted in Alexander's legal career. Before entering legal academia, Alexander directed the ACLU of Northern California's Racial Justice Project, where she "began to awaken to the reality that our nation's criminal justice system functions more like a caste system than a system of crime prevention or control."[8] *The New Jim Crow* was written with the support of a Soros Justice Fellowship, which Alexander received while teaching at Stanford

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[1] Cornel West, *Foreword* to MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, at ix (2010).

[2] ALEXANDER, *supra* note 1, at ii.

[3] *See* Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), https://nyti.ms/2kp2HtB.

[4] *See* THE NEW PRESS, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS: A CASE STUDY ON THE ROLE OF BOOKS IN LEVERAGING SOCIAL CHANGE 1 (2014).

[5] *See Michelle Alexander Receives 2016 Heinz Award*, THE NEW PRESS (Sept. 14, 2016), https://thenewpress.com/news/michelle-alexander-receives-2016-heinz-award [https://perma.cc/R4FL-ZWGZ].

[6] *See* Leonard Pitts, Jr., *The New Jim Crow Alive and Thriving*, MIAMI HERALD (Jan. 15, 2012, 12:00 AM), http://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article1939330.html [https://perma.cc/K4P2-7GNH].

[7] Alfredo Garcia, *The New Jim Crow: Churches Respond to Mass Incarceration*, RELIGION & POL. (Aug. 13, 2013), http://religionandpolitics.org/2013/08/13/the-new-jim-crow-churches-respond-to-mass-incarceration/ [https://perma.cc/YR9B-43XW].

[8] *About the Author*, THE NEW JIM CROW, http://newjimcrow.com/about-the-author [https://perma.cc/S299-SRA7] (last visited Oct. 15, 2018).

Law School.[9] Alexander was, until recently, an Ohio State University law professor.[10] She resigned in 2016 to join the faculty at Union Theology Seminary in New York.[11] Alexander explained that "America's journey from slavery to Jim Crow to mass incarceration raises profound moral and spiritual questions," which "are generally not asked or answered in law schools or policy roundtables."[12]

But law schools and law reviews continue to engage with *The New Jim Crow*. Though its impact reaches beyond academia, Alexander's book is a work of legal scholarship.[13] Over 1,000 law reviews and journals have cited *The New Jim Crow*.[14] Generally, legal academics laud its thesis, describing as "powerful" Alexander's conclusion that the racial caste system of the post-Reconstruction era has reemerged in a new form today.[15]

Perhaps because it has achieved popularity and influence in the culture at large, *The New Jim Crow*'s influence on the courts has been overlooked. Yet *The New Jim Crow* is an important work of social science research, and has been treated as an important work by the courts,[16] and by the federal courts in particular.[17] This Article considers its influence on federal litigation, analyzing its appearance in fifteen

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[9] *See id.*

[10] *See* Paul L. Caron, *Michelle Alexander Resigns From Ohio State Law Faculty For Seminary, Valuing 'Publicly Accessible Writing Over Academic Careerism'; Law Without 'A Moral Or Spiritual Awakening' Cannot Bring About Justice*, TAXPROF BLOG (Sept. 25, 2016), http://taxprof.typepad.com/taxprof_blog/2016/09/michelle-alexander-resigns-from-ohio-state-law-faculty-for-seminary-valuing-publicly-accessible-writ.html [https://perma.cc/E27M-DL9U].

[11] *See id.*

[12] *Id.*

[13] *See* Deborah Tuerkheimer, *Criminal Justice for All*, 66 J. LEGAL EDUC. 24, 25 (2016).

[14] I conducted a search which identified the number of law review articles that used the terms "Michelle Alexander" and the "The New Jim Crow" in the same sentence.

[15] *See, e.g.*, Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 335–36 n.39 (2014); Zanita E. Fenton, *Bastards! . . . . And the Welfare Plantation*, 17 J. GENDER RACE & JUST. 9, 14 n.31 (2014); Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 330 n.66 (2014); *see also* Aneel L. Chablani, *Legal Aid's Once and Future Role for Impacting the Criminalization of Poverty and the War on the Poor*, 21 MICH. J. RACE & L. 349, 351 (2016) (describing *The New Jim Crow* as "groundbreaking"); Zack G. Goldberg, *Potholes: DUI Law in the Budding Marijuana Industry*, 82 BROOK. L. REV. 241, 276 n.215 (2016) (describing *The New Jim Crow* as "perhaps one of the best pieces of writing describing mass incarceration, the War on Drugs, and the role of systemic racism in perpetuating the two"); Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61, 87 (2016) (describing *The New Jim Crow* as "groundbreaking"); Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 250 (2015) (describing *The New Jim Crow* as "seminal" and "poignant").

[16] *See infra* text accompanying notes 19–20.

[17] *See* discussion *infra* Part II.

federal court opinions, most notably in Justice Sotomayor's social justice-infused dissent in *Utah v. Strieff*.[18] The federal appellate courts have cited *The New Jim Crow* in two opinions.[19] The federal district courts have cited it in twelve orders.[20]

Social science research has, at times, transformed constitutional law, and equal protection precedent in particular. In *Brown v. Board of Education*,[21] for example, the Supreme Court relied on social science research to declare segregated schools unconstitutional.[22] Following this Introduction, Part I highlights the social science research canon that played a role in groundbreaking equal protection litigation. Part II describes what role *The New Jim Crow* plays in the federal opinions and orders that cite it. Part III considers whether *The New Jim Crow* is the kind of social science research that might support an equal protection challenge to race-based differential treatment. The Conclusion states that *The New Jim Crow* has equal protection promise, but has yet to achieve the kind of litigation success the NAACP's research obtained in its twentieth century equal protection victories.

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[18] 136 S. Ct. 2056 (2016). *Id.* at 2070 (Sotomayor, J., dissenting) (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95–136 (2010) in support of the proposition that "it is no secret that people of color are disproportionate victims of this type of scrutiny").

[19] *See* United States v. Black, 750 F.3d 1053, 1055, 1058 n.5 (9th Cir. 2014) (Reinhardt, J., dissenting from the denial of rehearing en banc); United States v. Blewett, 746 F.3d 647, 667 (6th Cir. 2013) (Moore, J., concurring). The book was also mentioned but not cited by United States v. Anglin, 846 F.3d 954, 961 (7th Cir. 2017), *vacated*, 138 S. Ct. 126 (2017) (quoting remarks made by the district judge at defendant's sentencing hearing, at which the judge noted that "defense counsel's arguments 'reminded [him] of a recent book written by Professor Michelle Alexander which is called *The New Jim Crow*'").

[20] Johns v. City of Eugene, No. 6:16-CV-00907-AA, 2017 WL 663092, at *8 (D. Or. Feb. 15, 2017); United States v. Walker, 315 F.R.D. 154, 156 (E.D.N.Y. 2016) *as amended* (Aug. 2, 2016) (quoting Justice Sotomayor's *Utah v. Strieff* dissent and its reference to *The New Jim Crow*); United States v. Nesbeth, 188 F. Supp. 3d 179, 180 n.2 (E.D.N.Y. 2016); United States v. Tarango, No. CR 07-2443, 2015 WL 10401775, at *24 n.15 (D.N.M. Oct. 29, 2015); Floyd v. City of New York, 959 F. Supp. 2d 668, 672–73 n.6 (S.D.N.Y. 2013); Floyd v. City of New York, 959 F. Supp. 2d 540, 587 n.190 (S.D.N.Y. 2013); Ligon v. City of New York, 925 F. Supp. 2d 478, 517 n.270 (S.D.N.Y. 2013); Davis v. City of New York, 902 F. Supp. 2d 405, 420 n.85 (S.D.N.Y. 2012); Floyd v. City of New York, 861 F. Supp. 2d 274, 295 n.115 (S.D.N.Y. 2012); United States v. Shull, 793 F. Supp. 2d 1048, 1052 (S.D. Ohio 2011); Betts v. City of Chicago, 784 F. Supp. 2d 1020, 1025 n.1 (N.D. Ill. 2011); United States v. Bannister, 786 F. Supp. 2d 617, 631 (E.D.N.Y. 2011). This Article does not assess the state courts' reliance upon *The New Jim Crow*—to date, only six state court opinions cite it. Though also beyond the scope of this Paper, parties have cited to *The New Jim Crow.* It has been relied upon by parties and amici in at least ten briefs presented to the Supreme Court, including those filed in the recently decided *Los Angeles v. Mendez* Section 1983 case. It has been cited in fifteen briefs filed in Court of Appeals cases, and has appeared over twenty-five times in defendants' district court sentencing memoranda.

[21] 347 U.S. 483 (1954).

[22] *See id.* at 494–95 n.11.

I. EQUAL PROTECTION'S SOCIAL SCIENCE CANON

To discuss the role of social science research in equal protection precedent, a definition of "social science research" is necessary. I follow Lauren De Lilly's suggestion that social science research is "data 'dealing with social, social-psychological, and psychological issues.'"[23] Notable examples from federal litigation are "studies and data on the impact of secondary trauma in the capital punishment system" and "studies to demonstrate the traumatic psychological impact of segregation on African-American children."[24] With that definition in mind, what follows is a brief history of the leading cases in which federal courts engaged with social science research to reach decisions regarding equal protection challenges.

The Supreme Court's reliance on social science data originated with the rise of "legal realism," which, as Rebecca Haw explains, "reject[s] the idea that judges discover law as a scientist discovers physical properties of the universe."[25] As the Court began to imagine its role to be policy making, access to information about the effects of that policy became necessary to make rules responsive to social needs. In *Muller v. Oregon*,[26] Louis D. Brandeis filed an amicus brief citing social scientific data about women in the workforce that proved influential on the Court.[27] The case challenged the constitutionality of limitations on work hours for women,[28] and the Court found support in studies cited in Brandeis's brief indicating physiological differences in women that the law could take notice in determining whether equal protection had been violated.[29]

Social science research was used to argue against de jure segregation in *Westminster School Dist. of Orange County v. Mendez*.[30] In *Mendez*, decided seven years

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[23] Lauren M. De Lilly, Note, *"Antithetical to Human Dignity": Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions*, 23 S. CAL. INTERDISC. L.J. 107, 129 (2014) (citing ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS 1–3 (1998)). *See also* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 106 (2003) (describing "the legal realist movement and its attempt to focus awareness on social context").

[24] De Lilly, *supra* note 23, at 129. Of course, "not all social science is created equal," and its probative value must always be assessed. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1079 (1989).

[25] Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1252 (2011).

[26] 208 U.S. 412 (1908).

[27] Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).

[28] *Muller*, 208 U.S. at 417.

[29] *Id.* at 419–21. "Today, of course, *Muller* reads as blatantly misogynistic, its 'data' dated and disproved." Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 631 (2006).

[30] 161 F.2d 774 (9th Cir. 1947).

before *Brown v. Board of Education*, the U.S. Court of Appeals for the Ninth Circuit departed from *Plessy v. Ferguson*[31] in finding that Latino students were unconstitutionally segregated in California public schools.[32] The NAACP Legal Defense Fund submitted an amicus brief in *Mendez* at the appellate level.[33] The brief relied on data "collected by Ambrose Caliver, an African-American researcher employed by the U.S. Department of Education," and "argued that racial segregation would inevitably lead to inferior schools for minorities because few school districts could afford the cost of a dual system and would inevitably cut corners with the schools for Mexicans and blacks."[34] The social science was not relied upon in the appellate court's decision,[35] but, as Richard Delgado has noted, the power of social science research in school desegregation cases was identified in *Mendez* and used again in *Brown v. Board of Education*.[36]

Haw describes *Brown v. Board of Education* as "[p]erhaps the most famous use of social scientific data in Supreme Court policy making."[37] In *Brown*, social science literature was used to demonstrate that "segregation was inherently unequal because of the damaging effects of discrimination on black children."[38] The NAACP Legal

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[31] 163 U.S. 537 (1896); *see* Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 301 (2000).

[32] *See* Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1773–74 (2001).

[33] *See id.* at 1774.

[34] Delgado, *supra* note 31, at 304 ("Citing the work of Gunnar Myrdal and others, Carter also argued that racial segregation demoralized and produced poor citizenship among minority individuals and thus contravened public policy.").

[35] *See* Bowman, *supra* note 32, at 1774.

[36] Delgado, *supra* note 31, at 304–05.

[37] Haw, *supra* note 25, at 1253 (explaining that the NAACP's brief in *Brown* "cited a study as empirical support for the idea that school children were injured by segregation in terms of academic advancement and self-esteem"). However, "*Brown* represented the capstone of decades of calculated legal strategy infused and energized by social science research," including Gunnar Mydal's *An American Dilemma*, published in 1944 and recognized as "'the most comprehensive examination of black America ever produced.'" Katherine A. Macfarlane, *Accelerated Civil Rights Settlements In the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 664 (quoting Wendell E. Pritchett, Shelley v. Kraemer: *Racial Liberalism and the U.S. Supreme Court*, *in* CIVIL RIGHTS STORIES 5 (Myriam E. Gilles & Risa L. Goluboff eds., 2008)). In 1945, the NAACP's Chicago branch published the pamphlet "Restrictive Covenants: In a Democracy They Cost Too Much." *Id.* "That same year, economist Robert C. Weaver began to argue that his social science research demonstrated that there was no economic basis to support racially restrictive covenants." *Id.* "In 1948, the Supreme Court held that when enforced by the judiciary, racially restrictive covenants represented state action that violated the Fourteenth Amendment." *Id.* at 665. "The restrictive covenant litigation's innovative use of social science research and policy arguments 'would prove crucial to civil rights cases' that followed—including *Brown*." *Id.* (quoting Pritchett, *Shelley v. Kraemer*, at 18).

[38] Neil Foley, *Over the Rainbow:* Hernandez v. Texas, Brown v. Board of Education, *and* Black v. Brown, 25 CHICANO-LATINO L. REV. 139, 145 (2005).

Defense Fund introduced the results of a study known as the "doll test."[39] The test was developed by social scientists Kenneth and Mamie Clark in the 1940s, "to study the psychological effects of segregation upon black and white children."[40] Paterson, Rapp and Jackson wrote:

> As part of the test, children were shown two dolls, one white and the other black, and asked a series of questions to determine which doll was associated with positive attributes and which was associated with negative attributes. The results overwhelmingly showed that the majority of children—both black and white—attributed positive aspects to the white dolls and negative aspects to the black dolls, thereby exhibiting self-loathing in black children.[41]

At trial, the plaintiff's expert "provided testimony including studies reporting the harmful effects of segregation on black children's self-esteem and ability to learn."[42] On appeal, the NAACP included a "Social Science Statement," which "summariz[ed] the available research on the consequences of segregation and the predicted effects of desegregation in an appendix to their Supreme Court brief."[43] In concluding that separate but equal education violated the Equal Protection Clause, the Supreme Court relied on the doll test and six other studies.[44] It acknowledged the social science data conclusion in holding "that to separate black schoolchildren from others generated a 'feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone.'"[45] The social science research relied upon by the Court in support of its conclusions regarding psychological harm was cited in a footnote, "the much-maligned footnote 11."[46]

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[39] Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount A Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1191 (2008).

[40] *Id.* at 1191 n.82.

[41] *Id.*

[42] Tanya Washington, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans,"* 39 CAP. U. L. REV. 231, 251 (2011) (citing Wallace D. Loh, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 133 n.24 (1982)).

[43] *Id.* (citing Brief for Appellants at Appendix: The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[44] *See* Paterson et al., *supra* note 39, at 1191.

[45] Samantha Barbas, Note, *Dorothy Kenyon and the Making of Modern Legal Feminism*, 5 Stan. J. C.R. & C.L. 423, 437 (2009) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

[46] Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring). Justice Thomas specifically criticized the social science research relied upon in *Brown*, and emphasized that the judiciary is competent to assess the presence of intentional discrimination without "the unnecessary and misleading assistance of the social sciences." *Id.* at 119–21 n.2; Michael

Twenty years after *Brown*, the Supreme Court held in *Castaneda v. Partida*[47] that Texas violated the Equal Protection Clause by discriminating against Mexican Americans in its grand jury selection process.[48] Attorney Thurgood Marshall, brilliant architect of the legal strategy that toppled the Court's separate but equal doctrine,[49] had since become Justice Marshall.[50] Both Justices Marshall and Powell wrote separately regarding the racial discrimination at issue in *Castaneda*.[51] Justice Marshall's concurrence noted the importance of social science research,[52] which he found to be "a compelling resource for helping him understand racial hierarchy."[53] Powell's dissent disagreed, looking instead to "rational inferences from the most basic facts in a democratic society."[54] Haney-López characterized Powell's dissent as "anticipat[ing] a looming epistemological opposition to social science, history, and local context," and "a developing resistance to evidence of racial discrimination that might challenge the predisposition of many Justices."[55]

Enter *McCleskey v. Kemp*,[56] a 1987 case in which the Court ignored social science research in denying a habeas challenge to a death penalty sentence.[57] The defendant in *McCleskey* "introduc[ed] evidence from a comprehensive study indicating that

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Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 293 (2005). Though this Paper does not address whether *Brown* should have relied upon social science research, others have criticized its choice to do so. Michael McConnell has characterized the *Brown* Court's reliance on social science as "arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition—not on considerations of modern social policy." Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949 (1995). Justice Thomas has rejected the theory "that black students suffer an unspecified psychological harm from segregation," as a reasoning that "relies upon questionable social science research rather than constitutional principle." *Jenkins*, 515 U.S. at 114. *But see* Christopher E. Smith & John Burrow, *Race-ing into the Twenty-First Century: The Supreme Court and the (E)Quality of Justice*, 28 U. TOL. L. REV. 279, 298 (1997) (describing Justice Thomas's position in *Jenkins* as "notable both for its confusion of the realities of discrimination with judicial paternalism and for its apparent rejection of social science").

[47] 430 U.S. 482 (1977).

[48] *Id.* at 500–01.

[49] *See Brown*, 347 U.S. at 484.

[50] Thurgood Marshall was sworn in as Associate Justice of the United States Supreme Court on October 2, 1967. Anna Hemingway et al., *Thurgood Marshall: The Writer*, 47 WILLAMETTE L. REV. 211, 221 (2011).

[51] *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1823 (2012).

[52] *Castaneda*, 430 U.S. at 503 (Marshall, J., concurring).

[53] Haney-López, *supra* note 51, at 1823.

[54] *Castaneda*, 430 U.S. at 515 (Powell, J., dissenting).

[55] Haney-López, *supra* note 51, at 1823.

[56] 481 U.S. 279 (1987).

[57] *See generally id.* (noting that the Court's duty is to determine constitutionality, not "the appropriate punishment for particular crimes").

'[d]efendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.'"[58] The research, known as the "Baldus Study,"[59] has itself never been undermined, but rather is considered one of the "'best empirical studies on criminal sentencing ever conducted.'"[60] In an opinion written by Justice Powell, the Court disregarded the Baldus study, and held that statistical proof was "ill-suited" to the question of whether racial discrimination occurred in McCleskey's case.[61] After *McCleskey*, legal strategy that relied upon social science research to support equal protection challenges was dealt a heavy blow.[62] Claims like McCleskey's would fail if supported only by social science research; instead, equal protection challenges to the criminal justice system had to show "'the existence of purposeful discrimination,' which 'had a discriminatory effect.'"[63]

More recently, in *Grutter v. Bollinger*,[64] the Court heard an equal protection challenge to the University of Michigan's law school admissions procedures, which considered an applicant's race as part of its admissions decisions.[65] In holding that the admissions procedures did not violate the Equal Protection Clause, the Court relied on social science research regarding the value of diversity.[66] In concluding that student body diversity was a compelling interest and that the admissions policies were narrowly tailored,[67] the empirical authority "introduced in the lower courts and in amicus curiae briefs were explicitly discussed in the decision and used to support the [Court's] ruling."[68] That is, in *Grutter*, social science research defeated an equal protection claim, albeit one brought by members of historically privileged groups.[69]

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[58] Fradella, *supra* note 23, at 110 (quoting *McClesky*, 481 U.S. at 287).

[59] David C. Baldus, Charles Pulsaki & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

[60] Fradella, *supra* note 23, at 110–11 (quoting Transcript of Trial at 1740, McClesky v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984) (No. 84-6811)).

[61] *Id. See also* Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 770 (2009) (describing how the *McCleskey* Court did not challenge the Baldus Study's data, but rather "set aside the statistical evidence as irrelevant in capital punishment cases unless there was proof of intentional discrimination or proof that racial bias had tainted the defendant's trial").

[62] *See* I. Bennett Capers, *Flags*, 48 HOW. L.J. 121, 164 n.187 (2004) ("[I]n *McCleskey v. Kemp*, the Court seemed to retreat from its willingness to find social science persuasive.").

[63] Fradella, *supra* note 23, at 110 (footnote omitted) (quoting McCleskey v. Kemp, 481 U.S. 279, 292 (1987)).

[64] 539 U.S. 306 (2003).

[65] *Id.* at 311.

[66] Darby, *supra* note 61, at 777.

[67] *Grutter*, 539 U.S. at 325, 334.

[68] Darby, *supra* note 61, at 777.

[69] *See Grutter*, 539 U.S. at 306 (holding that the "narrowly tailored use of race" by the University of Michigan Law School did not violate the Equal Protection Clause).

Since *Grutter*, the Court has twice considered the University of Texas's "race-conscious" admissions policies and their equal protection implications.[70] In its first review of the University of Texas policies—*Fisher v. University of Texas at Austin*[71] (known as *Fisher I*)—the majority did not address social science research regarding diversity,[72] even though the parties and amici did.[73] In his *Fisher I* concurrence, Justice Thomas seemed to reject research touting the value of diversity.[74] He also appeared to agree with mismatch theory, "which postulates that 'large racial preferences . . . systematically put minority students in academic environments where they feel overwhelmed.'"[75] The Court remanded *Fisher I* to the Court of Appeals and ordered it to assess the parties' equal protection arguments under standards that were less deferential to the University.[76]

During the oral argument for the second case—*Fisher v. University of Texas at Austin*[77] (known as *Fisher II*)—Justice Scalia interrogated the University of Texas's attorney with a question that also appeared to adopt mismatch theory.[78] Scalia pondered whether "it does not benefit African Americans to—to get them into UT where they do not do well, as opposed to having them go to a less-advanced school, a less—a slower-track school where they do well."[79] Scalia endorsed the mismatch theory thesis that "learning is hampered when students attend colleges or universities where their academic skills (typically measured by prior grades and test scores) are substantially below the median of most students."[80] Mismatch theory is not widely accepted[81]: one sociologist concluded that there is no evidence "that affirmative

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[70] Fisher v. Univ. of Texas at Austin (*Fisher II*), 136 S. Ct. 2198, 2205 (2016); Fisher v. Univ. of Texas at Austin (*Fisher I*), 133 S. Ct. 2411, 2415 (2013).

[71] 133 S. Ct. 2411 (2013).

[72] *See id.* at 2416. The Court does not identify or acknowledge studies and research from the parties and amici.

[73] Ann Mallatt Killenbeck, *Ferguson, Fisher, and the Future: Diversity and Inclusion as a Remedy for Implicit Racial Bias*, 42 J.C. & U.L. 59, 89 (2016).

[74] *Fisher I*, 133 S. Ct. at 2424 (Thomas, J., concurring) (arguing diversity must be the means, not the end).

[75] Killenbeck, *supra* note 73, at 89 n.246 (quoting H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP AND WHY UNIVERSITIES WON'T ADMIT IT 4 (2012)).

[76] *Fisher I*, 133 S. Ct. at 2422.

[77] 136 S. Ct. 2198 (2016).

[78] Richard Lempert, *Mismatch and Science Desistance: Failed Arguments Against Affirmative Action*, 64 UCLA L. REV. DISCOURSE 136, 137 (2016).

[79] *Id.* at 137.

[80] *Id.* at 137–38 ("The reason, according to mismatch theory, is that because professors pitch their lectures and assignments to the level of the median student, students with academic credentials well below their school's median find it hard to understand lectures and assignments and otherwise keep up.").

[81] *See, e.g.*, *id.* at 141. Numerous researchers have failed to find evidence supporting mismatch theory.

action minorities are harmed due to academic mismatch" and that "[n]o sound science shows adverse effects to academic overmatch."[82] *Fisher II* narrowly upheld the University of Texas's admissions policies, with no express mention of mismatch theory or other social science research appearing in the Court's opinion.[83]

II. FEDERAL COURT RELIANCE ON *THE NEW JIM CROW*

The federal courts have cited *The New Jim Crow* in a criminal case challenging unreasonable searches,[84] civil rights actions targeting stop-and-frisk practices,[85] appeals of indictments obtained through reverse sting operations,[86] and numerous cases implicating disparate drug sentencing and its collateral consequences.[87] When *The New Jim Crow* appeared in Justice Sotomayor's *Utah v. Strieff* dissent, its presence was newsworthy.[88] In the appellate courts, *The New Jim Crow* appears in one dissent from a denial of rehearing en banc, and one concurrence.[89] In the district

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[82] *Id.* at 172.

[83] Martha M. McCarthy, *The Marginalization of School Law Knowledge and Research: Missed Opportunities for Educators*, 331 EDUC. L. REP. 565, 579–80 (2016). Students across the country, however, responded to Justice Scalia's suggestion "that blacks do not belong in elite higher education" with a social media hashtag, #StayMadAbby, through which they shared stories and photos of black students succeeding at competitive colleges and universities. Tomiko Brown-Nagin, *A Reversal of Fortune: The Law, Facts, and Racial Realism Behind the Supreme Court's About-Face on Affirmative Action*, U.S. NEWS & WORLD REP. (June 30, 2016), https://www.usnews.com/opinion/articles/2016-06-30/justice-kennedys-fisher-decision-shows-evolution-on-affirmative-action [https://perma.cc/ENV3-DZKH].

[84] *See* discussion *infra* Section II.A.

[85] *See* discussion *infra* Section II.C.

[86] Doug Nesheim, Case Comment, *Criminal Law—Entrapment: Illegal Police Conduct Gets Stung by the Entrapment Defense in* State v. Kummer. State v. Kummer, 481 N.W.2d 437 (N.D. 1992), 69 N.D. L. REV. 969, 985 (1993) (defining a typical sting as one in which "law enforcement agents pos[e] as drug buyers in order to ferret out the sources and sellers of narcotics" and a reverse sting as one in which "the police actually supply the narcotics, or other criminal means").

[87] *See* discussion *infra* Section II.C.

[88] *See, e.g.*, Irin Carmon, *Sotomayor Issues Scathing Dissent in Fourth Amendment Case*, NBC NEWS (June 20, 2016), https://www.nbcnews.com/news/us-news/sotomayor-issues-scathing-dissent-fourth-amendment-case-n595786 [https://perma.cc/3Q39-ESKP]; Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016), https://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ [https://perma.cc/V7C3-YRYS]; John Nichols, *Sonia Sotomayor's Epic Dissent Explains What's at Stake When the Police Don't Follow the Law*, NATION (June 20, 2016), https://www.thenation.com/article/sonia-sotomayors-epic-dissent-shows-why-we-need-people-of-color-on-the-supreme-court/ [https://perma.cc/N993-B2YS] ("In an opinion that cited Michelle Alexander and Ta-Nehisi Coates, Justice Sotomayor railed against the gutting of the Fourth Amendment.").

[89] *See* discussion *infra* Section II.B.

courts, it has been cited in support of dicta regarding institutional racism,[90] and most often, institutional racism in the criminal justice system.[91] Only once has it served as a dispositive piece of social science evidence.[92]

A. The New Jim Crow *in the Supreme Court*

The New Jim Crow has been cited once by a Supreme Court Justice.[93] In *Strieff*, the Court "declined to apply the exclusionary rule to evidence seized as a result of an arrest that followed an unconstitutional stop."[94] Justice Sotomayor disagreed, writing that "the Fourth Amendment should prohibit admitting evidence seized as a result of an unconstitutional stop."[95] Sotomayor would have excluded the evidence because the arresting officer "'exploited his illegal stop' to discover it."[96] Sotomayor also described the impact of suspicionless stops on their targets, who are most often people of color;[97] the message is that they "are not 'citizen[s] of a democracy but the subject[s] of a carceral state.'"[98]

Sotomayor noted that "many innocent people are subjected to the humiliations of these unconstitutional searches" and cited *The New Jim Crow* in support of her conclusion that "it is no secret that people of color are disproportionate victims of this type of scrutiny."[99] However, Sotomayor cited but did not quote *The New Jim Crow*, and her cite sends the reader to an entire chapter that spans over forty pages.[100] The chapter is entitled "The Color of Justice."[101] Despite the evocative chapter title, without additional insight, it is unclear what aspect of the chapter Sotomayor found relevant to her dissent. Linda Greenhouse argues that Sotomayor's citation to books like *The New Jim Crow* gives her dissent gravitas.[102] Still, no other Justice joined the

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[90] *See* discussion *infra* Section II.C.

[91] *See* discussion *infra* Section II.C.

[92] *See* discussion *infra* Section II.C.

[93] Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

[94] Katherine A. Macfarlane, *Predicting* Utah v. Streiff*'s Civil Rights Impact*, 126 YALE L.J. FORUM 139, 139 (2016).

[95] *See id.* at 142.

[96] *Id.* (quoting *Strieff*, 136 S. Ct. at 2064, 2066, 2070–71 (Sotomayor, J., dissenting)).

[97] *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

[98] Macfarlane, *supra* note 94, at 142 (quoting *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting)).

[99] *Strieff,* 136 S. Ct. at 2070 (Sotomayor, J. dissenting)).

[100] *Id.*

[101] ALEXANDER, *supra* note 1, at 97.

[102] *See* Linda Greenhouse, *The Books of the Justices*, 115 MICH. L. REV. 733, 734 (2017). Two years before her *Strieff* dissent, Tracey Meares and Tom Tyler argued that Sotomayor's jurisprudence implicitly relied on social science research and should explicitly cite it. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. FORUM 525, 526 (2014).

portion of Sotomayor's dissent that cited *The New Jim Crow*, and its appearance in her dissenting opinion did not catch the majority's attention.[103]

B. The New Jim Crow *in the Circuit Courts*

Two circuit courts have cited *The New Jim Crow*.[104] Judge Reinhardt, the Ninth Circuit's liberal lion, cited it in a dissent from a denial of rehearing en banc in *United States v. Black*,[105] in which the defendants challenged their indictment as fundamentally unfair due to "outrageous government conduct."[106] In *Black*, an undercover federal agent working alongside a confidential informant (CI) recruited the defendants to carry out a fictional robbing of a fictional cocaine stash house.[107] The CI was instructed to locate individuals willing to participate in a home invasion.[108] To find them, he went to bars "in 'a bad part of town, a bad bar, you know . . . bars where you've got . . . a lot of criminal activity.'"[109] The CI "was not instructed to look for particular individuals who were already involved in an ongoing criminal operation, but simply to recruit anyone who showed an interest in his conversation."[110] The Ninth Circuit upheld the denial of the defendants' motions to dismiss their indictments.[111]

In dissenting from the denial of rehearing en banc, Judge Reinhardt warned that the majority's opinion "sends a dangerous signal that courts will uphold law enforcement tactics even though their threat to values of equality, fairness, and liberty is unmistakable."[112] For Reinhardt, *Black* was a case about the government's treatment of its own citizens, in particular, its poor, minority citizens.[113] *Black*, Reinhardt feared, endorsed the targeting of "poor, minority neighborhoods," seeking

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[103] Sotomayor's dissent has itself become an oft-cited rallying cry against injustice. *See, e.g.*, Marcos Herrera, *The Exclusionary Rule and the Dueling Legacies of* Utah v. Strieff*: Which Will Be Suppressed?*, 48 ST. MARY'S L.J. 583, 596–97 (2017) (positing that perhaps, "the passionate plea in Justice Sotomayor's dissent will inspire lawyers, judges, future lawyers, and future judges to restore much of what has been lost of the exclusionary rule"); Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 748 (2017) ("Justice Sotomayor challenged many of the assumptions underlying the majority's decision . . . spoke bluntly about what the Court's decision meant for private citizens" and addressed "the severe consequences of unlawful stops and their disproportionate impact on people of color.").

[104] United States v. Black, 750 F.3d 1053, 1055 (9th Cir. 2014) (Reinhardt, J., dissenting); United States v. Blewett, 746 F.3d 647, 667 (6th Cir. 2013).

[105] *Black*, 750 F.3d at 1055–56 (Reinhardt, J., dissenting).

[106] *Id.* at 1054.

[107] United States v. Black, 733 F.3d 294, 297–98 (9th Cir. 2013).

[108] *Id.* at 299.

[109] *Id.*

[110] *Id.* at 313 (Noonan, J., dissenting).

[111] *Id.*

[112] United States v. Black, 750 F.3d 1053, 1054 (9th Cir. 2014) (Reinhardt, J., dissenting).

[113] *See id.* at 1055–56.

them out and intentionally luring them into committing crimes "that might well result in their escape from poverty."[114]

Of particular concern to Reinhardt was how "the law enforcement tactics used in the *Black* cases . . . present a direct threat to the fundamental principle of racial equality."[115] Reinhardt emphasized that the present age is one in which "unequal enforcement of the criminal laws, both at the state and federal levels," is "widely-reported," and noted that the "assignment given to the CI [was] an open invitation to racial discrimination."[116] In support of his assertion that unequal enforcement of the law is well-documented, Reinhardt cited Judge Scheindlin's order criticizing New York City's stop-and-frisk policies,[117] Bruce Western's 2006 book *Punishment and Inequality in America*,[118] and *The New Jim Crow*.[119]

However, *Black* and *The New Jim Crow* are not a perfect fit. *The New Jim Crow* "focuses on the experience of African American men in the new caste system" created by the criminal justice system.[120] Michelle Alexander expressly acknowledged that her book says little about the experiences of "women, Latinos, and immigrants in the criminal justice system," who suffer abuses "that are important and distinct."[121] Reinhardt did not acknowledge how unique criminal justice experiences may be; instead, he treated the experiences of all minority men as equal.[122] In fact, he was unsure of the *Black* defendants' ethnicity, stating that "the record before us reveals that all of the *Black* defendants are in all likelihood black, although it is possible that one or more is Hispanic."[123] Therefore, though Reinhardt cited *The New Jim Crow*, he overlooked its focus on the unique experience of one minority group and Alexander's acknowledgment that not all forms of criminal justice inequality are equal.

The New Jim Crow also appears in a concurring opinion in *United States v. Blewett*,[124] which declined to retroactively apply The Fair Sentencing Act's reduction of crack and powder cocaine sentencing disparities.[125] *The New Jim Crow* is cited in the context of a discussion of the equal protection implications of crack-cocaine convictions.[126] Judge Nelson Moore acknowledged that proof of disparate

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[114] *See id.* at 1054.

[115] *Id.* at 1055.

[116] *Id.*

[117] *See id.*

[118] For a summary of Western's thesis and its critique of criminal laws, *see* Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 186 (2015).

[119] *Black*, 750 F.3d at 1055.

[120] ALEXANDER, *supra* note 1, at 16.

[121] *Id.* at 15–16.

[122] *See Black*, 750 F.3d at 1056.

[123] *Id.* at 1055 n.1.

[124] 746 F.3d 647, 667 (6th Cir. 2013) (Moore, J., concurring).

[125] *Id.* at 649.

[126] *See id.* at 666 (noting that "[i]n 2012, 82.6 percent of convicted federal crack-cocaine defendants were African American, yet African Americans represent only one-third of crack-cocaine users in the United States," and that "[i]n the same time-frame, only 6.7 percent of

impact is not always enough to support an equal protection challenge to, say, drug sentencing, as the Supreme Court requires proof of discriminatory purpose.[127] However, the concurrence suggested that in "rare situations" where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," the evidentiary burden of proving discriminatory intent may lessen.[128]

The concurrence argued that "[t]he federal government's enforcement of the crack-cocaine laws is [so] stark and wildly disproportionate in its effects"[129] that it may be the rare situation where discriminatory intent is not needed to prove an Equal Protection Clause violation.[130] *The New Jim Crow* is cited in support of the concurrence's statement that longer drug sentences to which African Americans are sentenced, "forty-nine percent longer than the average federal drug sentence for Caucasians," have impacts "felt beyond the prison walls."[131] Though *The New Jim Crow* supports the concurrence's position that longer sentences have severe collateral consequences, it does not support its central equal protection position that evidence of disparate sentences may on their own support an equal protection claim.

C. The New Jim Crow *in the District Courts*

The district courts have cited *The New Jim Crow* in cases regarding mandatory sentencing minimums[132] and in civil rights actions brought against cities pursuant to Section 1983.[133]

In *United States v. Bannister*,[134] the Eastern District of New York cited *The New Jim Crow* in a sprawling order regarding the sentences imposed upon 11 defendants charged with, *inter alia*, "conspiracy to sell, and the selling of, crack-cocaine and heroin in the hallways of, and the streets surrounding, [the Louis Armstrong] housing project[s] in Brooklyn between September 2007 and January 2010."[135] The court discussed the history of anti-black discrimination in the United States to support its conclusion that some of the mandatory minimum sentences imposed were "disproportionate to the crimes committed and the backgrounds of the defendants."[136] The

convicted federal crack-cocaine defendants were Caucasian, despite the fact that the majority of users is white").

[127] *Id.*

[128] *Id.* at 666–67 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[129] *Id.* at 667.

[130] *See id.*

[131] *Id.* (citing ALEXANDER, *supra* note 1, at 140–77).

[132] *See, e.g.*, United States v. Bannister, 786 F. Supp. 2d 617, 654 (E.D.N.Y. 2011).

[133] *See, e.g.*, Betts v. Chicago, 784 F. Supp. 2d 1020, 1026 n.1 (N.D. Ill. 2011).

[134] 786 F. Supp. 2d 617 (E.D.N.Y. 2011).

[135] *Id.* at 623, 631.

[136] *Id.* at 688. *See also* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 68 (2013) (describing the *Bannister*

court also noted that the sentences were additionally disconcerting because the defendants were young, and had been subject "to abuse, poverty, drug and alcohol addiction, unemployment, illiteracy, and learning disability, largely attributable to their backgrounds."[137]

The New Jim Crow is not the center of the court's conclusions regarding the impact of historical and systemic discrimination in minority communities. It is cited in support of statements which themselves provide historical context. For example, the court cites *The New Jim Crow* in stating that during Reconstruction, "[u]nder the protection of the federal government, the condition of newly freed African Americans improved."[138] It is also cited to explain the conditions African Americans endured during Jim Crow,[139] and in support of the conclusion that "with the Voting Rights Act and the Civil Rights Act having been passed, the movement for equal legal rights and equal opportunities began to achieve substantial success."[140] *The New Jim Crow*'s research regarding the impact drug offenses have had on the incarceration rate is quoted directly.[141]

Finally, the book is cited to support the court's position that "incarceration imposes numerous collateral consequences," including felons' ineligibility for public housing assistance "for five years after their release from prison," and landlords' decision to "discriminate against applicants based on criminal history."[142] *The New*

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order's remarkable and detailed consideration of "the defendants' social histories and the role of racism in trapping some of those defendants in a practically inescapable matrix of deprivation"); Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 551–52 ("*Bannister's* opening lines transform a mine-run federal sentencing decision into a *cri de coeur* over lives impaled at the intersection of crime, race, and poverty. . . . *Bannister* comprises more than seventy pages of historical, legal, and socioeconomic analysis on those issues."); Kate Stith, *Weinstein on Sentencing*, 24 FED. SENT'G. REP. 214, 215 (2012) ("And in an opinion spanning more than one hundred pages, [Judge Weinstein] decried—even as he applied—mandatory minimums for minor participants in drug crimes.").

[137] *Bannister,* 786 F. Supp. 2d at 688.

[138] *Id.* at 631 (citing ALEXANDER, *supra* note 1, at 29).

[139] *See id.* (citing ALEXANDER, *supra* note 1, at 30, 31) (stating that "[t]hose who were convicted of crimes were forced to work for little or no pay as prisoners" and "African Americans were further suppressed through a terrorist campaign of lynchings, bombings, and mob violence").

[140] *Id.* at 632 (citing ALEXANDER, *supra* note 1, at 35–38).

[141] *Id.* at 651 (citing ALEXANDER, *supra* note 1, at 59).

[142] *Id.* at 653–54 (citing ALEXANDER, *supra* note 1, at 141–42). In a separate case, Judge Weinstein, author of the *Bannister* order, granted a motion to exclude evidence of a witness's prior convictions because of the impact a contrary ruling would have on "a large population of minorities in New York State who have had contact with the criminal justice system." United States v. Walker, 315 F.R.D. 154, 156–57 (E.D.N.Y. 2016), *as amended* (Aug. 2, 2016), *opinion amended and superseded*, No. 15-CR-388, 2016 WL 4091250 (E.D.N.Y. Aug. 2, 2016). There, Weinstein cited Justice Sotomayor's *Utah v. Strieff* dissent, and noted that

Jim Crow is one of many texts that support the court's findings that federal sentencing laws are unfair.[143] *The New Jim Crow*'s historical account and drug sentencing data are treated as reliable, but did not persuade the court that the defendants' sentences violated the Equal Protection Clause.[144]

In *United States v. Nesbeth*,[145] the Eastern District of New York again cited *The New Jim Crow*.[146] In an order that received significant press coverage,[147] the court imposed a sentence of one year of probation even though the sentencing guidelines recommended thirty-three to forty-one months for Nesbeth's crimes, "[the] importation of cocaine and possession of cocaine with intent to distribute."[148] The court chose "a non-incarceratory sentence . . . in part because of a number of statutory and regulatory collateral consequences [Nesbeth would] face as a convicted felon."[149] The court relied on *The New Jim Crow* to explain these collateral consequences.[150]

The court quoted Alexander in support of its conclusion that "[t]he effects of these collateral consequences can be devastating," amounting to a civil death.[151] *The New Jim Crow* is also cited in support of the court's statement that "[o]ftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless."[152] Moreover, it is cited to explain how certain sentences "disproportionately prohibit blacks from serving on juries."[153]

Nesbeth features a self-designed framework the court used to address "(I) The History of Collateral Consequences; (II) The Depth and Breadth of Post-Conviction Statutory and Regulatory Collateral Consequences; (III) The Governing Caselaw; (IV) Ms. Nesbeth's Collateral Consequences and the Balancing of all § 3553(a) Factors; (V) The Shaping of the Sentence; and (VI) The Responsibilities of Counsel and the Probation."[154] *The New Jim Crow* is cited only in support of the first and

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Justice Sotomayor cited *The New Jim Crow*. *Id.* at 156 (citing Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting)).

[143] *Bannister*, 786 F. Supp. 2d at 647–49.

[144] *Id.* at 666–68. The court did, however, find that four of the eight sentences at issue in *Bannister*, "imposed only because of statutory minima," were "disproportionate to the crimes committed and the backgrounds of the defendants." *Id.* at 688.

[145] 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

[146] *Id.* at 180.

[147] *See infra* notes 157–59 and accompanying text.

[148] *Nesbeth*, 188 F. Supp. 3d at 180. The *Nesbeth* sentence has been described as "groundbreaking." Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 75 (2016).

[149] *Nesbeth*, 188 F. Supp. 3d at 180.

[150] *Id.* at 180.

[151] *Id.* (citing ALEXANDER, *supra* note 1, at 142); *id.* at 182–83 (citing ALEXANDER, *supra* note 1, at 141).

[152] *Id.* at 185 (citing ALEXANDER, *supra* note 1, at 97, 142–58).

[153] *Id.* at 186 (citing ALEXANDER, *supra* note 1, at 1–2).

[154] *Id.* at 180.

second parts of the court's framework.[155] However, its influence is evident throughout the order.[156] The court's reliance on *The New Jim Crow* was newsworthy enough to be referenced in *Nesbeth*-related articles in *The New Yorker*,[157] the *New York Times*,[158] and *Slate*.[159] *Nesbeth* may be the only federal decision in which *The New Jim Crow*'s research was dispositive.

The Southern District of Ohio cited *The New Jim Crow* in *United States v. Shull*,[160] which reluctantly imposed the mandatory minimum sentence for conspiracy to possess with intent to distribute cocaine, despite the court's concern that sentencing disparities for crack-cocaine versus powder cocaine crimes "disproportionately impact[ ] African American defendants like Shull."[161] The court also cited *The New Jim Crow* to explain how "[o]ver the past thirty years, the adult prison population in the United States has skyrocketed from around 300,000 to 2.3 million," and that the increase "is mostly due to the rise of imprisoned drug offenders."[162] *The New Jim Crow* did not affect the outcome in *Shull*.

In an order granting plaintiff's motion to exclude evidence of plaintiff's prior arrests in a Section 1983 false arrest action, the Northern District of Illinois cited *The New Jim Crow* in addressing the impact of repeated false arrests.[163] Defendants

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[155] *See id.* at 180–86 (showing that the last cite to *The New Jim Crow* is right before Section III of the opinion).

[156] *Id.* at 180 (referencing the significance of collateral consequences prior to laying out the court's framework).

[157] Lincoln Caplan, *Why a Brooklyn Judge Refused to Send a Drug Courier to Prison*, NEW YORKER (June 1, 2016), https://www.newyorker.com/news/news-desk/why-a-brooklyn-judge-refused-to-send-a-drug-courier-to-prison [https://perma.cc/EZ49-GSYB] (stating that Nesbeth's counsel submitted briefing about collateral consequences, which "began with a quotation from Michelle Alexander's influential book 'The New Jim Crow: Mass Incarceration in the Age of Colorblindness.'").

[158] Benjamin Weiser, *U.S. Judge's Striking Move in Felony Drug Case: Probation, Not Prison*, N.Y. TIMES (May 25, 2016), https://nyti.ms/1sa2Dlc ("In the opinion, Judge Block quoted from the work of the legal scholar Michelle Alexander, author of 'The New Jim Crow: Mass Incarceration in the Age of Colorblindness.'").

[159] Leon Neyfakh, *In a Remarkable Decision, Federal Judge Lays Out All the Ways Our Justice System Hurts Ex-Cons*, SLATE (May 25, 2016, 3:35 PM), http://www.slate.com/blogs/the_slatest/2016/05/25/frederic_block_federal_judge_speaks_out_against_collateral_consequences.html [https://perma.cc/4VE4-JCSQ] (noting that the court "[q]uot[ed] extensively from the influential book *The New Jim Crow* by Michelle Alexander" and "expresse[d] moral indignation throughout the opinion at all the ways in which the American criminal justice system makes it harder for people with felony convictions to achieve stability in life").

[160] 793 F. Supp. 2d 1048 (S.D. Ohio 2011).

[161] *Id.* at 1064; *id.* at 1052 (citing ALEXANDER, *supra* note 1, at 11, 47–57 (describing the War on Drugs, "which began in 1971 and accelerated in the mid-1980s" and "introduced harsh mandatory minimums")).

[162] *Id.* (citing ALEXANDER, *supra* note 1, at 6).

[163] Betts v. City of Chicago, 784 F. Supp. 2d 1020, 1027 (N.D. Ill. 2011); *id.* at 1025 n.1 (quoting ALEXANDER, *supra* note 1, at 122).

sought to introduce evidence of plaintiff's prior arrest to argue that the arrest in the pending action was not as emotionally disturbing as plaintiff represented it to be.[164] The court disagreed, explaining that each false arrest can be "more demoralizing and distressing" than the last.[165] The court did not focus on *The New Jim Crow*, but rather quoted its assertion that:

> [I]n certain areas, young black people are stopped and searched so frequently by the police that they 'automatically . . . plac[e] [their] hands up against the car and spread[ ] [their] legs to be searched when a patrol car pulls up, knowing full well that they will be detained and frisked no matter what.'[166]

In declining to admit evidence of the plaintiff's arrest history to undermine his emotional distress claim, the court found that the evidence carried with it a "high risk of prejudice," and that it would not admit it "without empirical evidence establishing that the probative value of this evidence outweighs the risk of prejudice."[167]

In an order granting a preliminary injunction against certain New York City stop-and-frisk practices, the Southern District of New York's Judge Scheindlin cited *The New Jim Crow*.[168] The citation appeared in a section of the order in which Scheindlin described the history of the New York Police Department's Trespass Affidavit Program (TAP), through which private building owners gave police officers permission to patrol their buildings and drive out drug use by arresting those who could not provide proof of residence.[169] However, the court explained, the TAP program expanded, and caused officers to engage in unlawful trespass stops outside of the buildings they had permission to be in.[170] *The New Jim Crow* pages cited by the court do not relate to TAP, the NYPD, or New York City.[171]

In an order finding that New York City's stop-and-frisk practices were unconstitutional, initiated as a result of racial profiling as opposed to reasonable suspicion,

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[164] *Id.* at 1024–25.

[165] *Id.* at 1025.

[166] *Id.* at 1025 n.1 (quoting ALEXANDER, *supra* note 1, at 122).

[167] *Id.* at 1027.

[168] Ligon v. City of New York, 925 F. Supp. 2d 478, 486, 517 n.270 (S.D.N.Y. 2013) (citing ALEXANDER, *supra* note 1, at 40–58).

[169] *Id.* at 517.

[170] *Id.* at 520; *id.* at 517 n.270 (citing ALEXANDER, *supra* note 1, at 40–58). The cited pages describe "The Birth of Mass Incarceration," beginning with a description of conservative resistance in the 1950s and 1960s to the gains of the Civil Rights Movement, and ending with an indictment of Bill Clinton's "conservative racial agenda on welfare" and his role in "a drug war aimed at racial and ethnic minorities." ALEXANDER, *supra* note 1, at 40–58. These are important and insightful points, but they do not speak to New York City trespass arrest policies.

[171] *See id.* (showing that these pages are unrelated to TAP, the NYPD, or New York City).

Judge Scheindlin again cited *The New Jim Crow*.[172] This time, the court discussed the impact of racial bias and the stereotype that black men are more likely to engage in criminal conduct than others.[173] *The New Jim Crow* is cited as evidence of the "prevalence of this stereotype."[174] The citation is to the book as a whole rather than to specific sections or pages.[175]

On April 16, 2012, in *Floyd v. City of New York*,[176] another case implicating the constitutionality of New York City police practices, Judge Scheindlin cited *The New Jim Crow* in an order granting in part and denying in part defendants' motion to exclude plaintiff's expert.[177] In concluding that the expert's reasonable suspicion analysis would be admitted, the court reviewed the history of New York's unconstitutional loitering statutes.[178] *The New Jim Crow*'s discussion of post-Reconstruction vagrancy laws in the South is included as a "see also" cite,[179] but its relevance to New York loitering laws is unclear. On October 9, 2012, in an order denying in part and granting in part defendants' motion for summary judgment in a related case, Judge Scheindlin cited the same five pages of *The New Jim Crow* it cited in *Floyd*.[180] Again, *The New Jim Crow* was cited in support of the relatively uncontroversial position that "[p]rohibitions on loitering have a long and ugly history . . . across the United States."[181]

In denying a motion to dismiss plaintiff's municipal liability claim, the District of Oregon cited *The New Jim Crow* in support of its conclusion that it would not, as a matter of law, hold that the city defendant "had no constructive notice that institutional racism could taint investigations with bias and lead to unconstitutional seizures."[182] That is, *The New Jim Crow* helped provide the defendants with notice of pervasive racial bias.

The District of New Mexico has cited *The New Jim Crow* as an example of the commentary made by lawyers, academics, legislatures, and laypeople regarding "the high costs of imprisonment, overcrowded prisons, and the need to have fewer people

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[172] Floyd v. City of New York, 959 F. Supp. 2d 540, 556, 562, 587 n.190 (S.D.N.Y. 2013) (citing ALEXANDER, *supra* note 1).

[173] *Id.* at 587 n.190 (citing ALEXANDER, *supra* note 1).

[174] *Id.* ("For an analysis touching on the prevalence of this stereotype, and the consequences related to it, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).").

[175] *Id.*

[176] 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

[177] *Id.* at 278–79, 295 n.115 (citing ALEXANDER, *supra* note 1, at 28–32).

[178] *Id.* at 295.

[179] *Id.* at 295 n.115 (quoting ALEXANDER, *supra* note 1, at 28–32).

[180] Davis v. City of New York, 902 F. Supp. 2d 405, 410, 420 n.85 (S.D.N.Y. 2012) (citing ALEXANDER, *supra* note 1, at 28–32).

[181] *Id.* at 420 n.85 (ALEXANDER, *supra* note 1, at 28–32).

[182] Johns v. City of Eugene, No. 6:16-CV-00907-AA, 2017 WL 663092, at *8 (D. Or. Feb. 15, 2017) (citing Utah v. Strieff, 136 S. Ct., 2056, 2069–71 (2016) (Sotomayor, J., dissenting)).

in prisons and jails."[183] The court disagreed with the chorus into which it lumped *The New Jim Crow*.[184]

III. *THE NEW JIM CROW*'S PLACE IN THE CANON

Legal scholarship has referred to *The New Jim Crow* as a work of social science.[185] David Faigman has posited that "[t]he legal relevance of social science findings should depend on their scientific strength, that is, on the ability of social scientists to answer validly the questions posed to them."[186] Social science research, he argues, is like any other evidence, and should be admitted and considered so long as it meets relevant evidentiary standards.[187] However, scrutinizing *The New Jim Crow* through the lens of *Daubert* motion practice does not answer this Article's main question: what could *The New Jim Crow* accomplish? After all, unlike the studies presented in *Brown*,[188] *The New Jim Crow* was written by an author unattached to parties or any particular case. Indeed, to the extent its appearance in Justice Sotomayor's *Strieff* dissent is its most impactful, its relevance was not suggested by the parties—*The New Jim Crow* does not appear in the *Strieff* briefs.[189]

An additional point distinguishing *The New Jim Crow* from the research I describe above as the social science canon: the book is not always fully engaged with by the

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[183] United States v. Tarango, No. CR 07-2443, 2015 WL 10401775, at *24 (D.N.M. Oct. 29, 2015); *id.* at *24 n.15 (citing ALEXANDER, *supra* note 1); Gerard E. Lynch, *Ending Mass Incarceration: Some Observations and Responses to Professor Tonry*, 13 CRIMINOLOGY & PUB. POL'Y 561 (Nov. 2014); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & J. 1, 28–29 (2006); Sari Horwitz, *Unlikely Allies: A Bipartisan Push for Sentencing Reform Unites President Obama and the Koch Brothers, but Many Are Still Waiting Behind Bars*, WASH. POST (Aug. 15, 2015), http://www.washingtonpost.com/sf/national/2015/08/15/clemency-the-issue-that-obama-and-the-koch-brothers-actually-agree-on/?utm_term=.34cf92cc943a [https://perma.cc/HE2R-Z7TL]; Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. OF BOOKS (May 21, 2015), http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/ [https://perma.cc/BHS5-69BP]; Bryan Tau, *Obama Decries "Mass Incarceration" in Call for Prisons Overhaul,* WALL ST. J. (July 14, 2015), https://www.wsj.com/articles/obama-decries-mass-incarceration-in-call-for-prisons-overhaul-1436917797.

[184] *See Tarango*, 2015 WL 10401775, at *24.

[185] *See, e.g.*, Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1699–700 (2015); Richael Faithful, *Response to Brett Degroff's Book Review of the New Jim Crow: Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, New York: The New Press, 2010. 290 Pp.*, 70 NAT'L LAW. GUILD REV. 122, 127 (2013).

[186] Faigman, *supra* note 24, at 1009–10.

[187] *Id.* at 1095.

[188] *See supra* notes 39–43 and accompanying text.

[189] *See generally* Brief for Petitioner, Utah v. Strieff, 136 S. Ct. 2056 (2016) No. 14-1373; Brief for Respondent, Utah v. Strieff, 136 S. Ct. 2056 (2016) No. 14-1373.

courts that cite it. For example, in *Black*, though Judge Reinhardt cited *The New Jim Crow*, he did so in a way that misapplies it.[190] He sought to use it to make a broad statement about the treatment of all minority defendants,[191] but overlooked *The New Jim Crow*'s specific focus on defendants of one gender (male) and one race (black).[192] Other references to *The New Jim Crow* cite to the book as a whole,[193] or fail to explain why a citation to an entire chapter of *The New Jim Crow* is relevant to their conclusions.[194] At times, *The New Jim Crow* appears as an afterthought. Overlooking a key aspect of the book's focus or citing it without explaining its relevance leaves it untethered to any claim.

Because Alexander's work is about the racial disparities inherent in the criminal justice system,[195] it is most relevant to claims that seek to challenge those disparities through the Equal Protection Clause. However, after *McCleskey*, the Supreme Court has foreclosed any sentencing-related equal protection challenges that do not include proof of discriminatory purpose.[196] Indeed, *McCleskey* anticipated equal protection claims "based on differentials in arrests and sentencing in drug cases."'[197] Because "broad-based claims would call 'into serious question the principles that underlie our entire criminal justice system,'" *McCleskey* insisted that any equal protection claim related to such issues had to be supported by proof of discriminatory intent.[198] Alexander's book is a work that describes disparate impact.[199] Until the Court's equal protection framework changes, *The New Jim Crow* will not persuade the Court the way the studies in *Brown*'s footnote 11 did.[200]

The New Jim Crow is not without its critics. Professor James Forman challenges aspects of Alexander's thesis, arguing that some of her attempts to create continuity between the post–Reconstruction Jim Crow era and modern-day America fail, and

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[190] *See* United States v. Black, 750 F.3d 1053, 1058 n.5 (citing ALEXANDER, *supra* note 1, at 9).

[191] *Id.* at 1055 (citing ALEXANDER, *supra* note 1, at 9).

[192] *See generally* ALEXANDER, *supra* note 1.

[193] *See, e.g.*, *Black*, 750 F.3d at 1058 n.5; Floyd v. City of New York, 959 F. Supp.2d 540, 587 n.190 (S.D.N.Y. 2013).

[194] *See, e.g.*, Ligon v. City of New York, 925 F. Supp. 2d 478, 517 n.270 (S.D.N.Y. 2013).

[195] *See generally* ALEXANDER, *supra* note 1.

[196] Stephen McAllister, *Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capital Cases*, J. KAN. B. ASS'N, 20, 27 (Oct. 1995); J. Scott Perkins, Case Comment, *United States v. Robinson*, *1992 U.S. App. Lexis 16861 (4th Cir. 1992), United States Court of Appeals, Fourth Circuit*, 1 RACE & ETHNIC ANC. L. DIG. 72, 74 (1995) ("McCleskey had to prove that the decisionmakers in his case acted with discriminatory purpose.").

[197] David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 271 (quoting McCleskey v. Kemp, 481 U.S. 279, 315 1986).

[198] *Id.* (quoting *McCleskey*, 418 U.S. at 315).

[199] *See generally* ALEXANDER, *supra* note 1.

[200] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 n.11 (1954).

even ignore the complexities of the modern black experience.[201] Forman also criticizes Alexander's failure to consider "[r]ising levels of violent crime and demands by black activists for harsher sentences," omissions that "promote[ ] a reductive account of mass incarceration's complex history."[202]

Where does that leave this important book? It still sits outside the canon of social science research that transformed equal protection precedent and provided key evidence that it was necessary to desegregate schools. *The New Jim Crow* is mostly a famous book—one that has inspired social justice movements, and one that merits a place on a college or law school syllabus—but it is not a book that has moved legal mountains. It has yet to find the right cause through which to affect outcomes in federal litigation.

CONCLUSION

Citing a book in a legal opinion could be a way of communicating that the opinion's author believes the book should be read. It could also signal that the opinion's author wants its readers to know that she too has read the book. In that sense, *The New Jim Crow* may be acting as a form of soft law. Though it lacks the formal force of precedent, it can still establish or strengthen norms.[203] To the extent the norm being established is awareness of the racial consequences of mass incarceration, this alone is a noteworthy step in federal jurisprudence.

Still, my study of the ways federal courts have cited *The New Jim Crow* suggests that there is a self-consciousness to the way federal courts cite the book. They are aware of its existence and its impact, but do not always engage with it in a meaningful way. Aside from an outlier district court opinion, *The New Jim Crow* has yet to impact a federal case's outcome. As a result, *The New Jim Crow* has yet to achieve the status of the social science research cited in *Brown v. Board of Education*'s infamous footnote 11.[204]

But perhaps focusing on citations to *The New Jim Crow* tells only part of its legal impact story. A recently announced project supported by Loyola Law School,

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[201] James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond The New Jim Crow*, 87 N.Y.U. L. REV. 21, 55–58 (2012).

[202] *Id.* at 36. *But see* Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 846 (2014) (assessing Forman's critiques of *The New Jim Crow*).

[203] *See* Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity*, 7 HARV. L. & POL'Y REV. 139, 166 (2013) (describing how judges use soft law); *see also* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 573 (2008) (explaining how "[s]oft law consists of rules issued by lawmaking bodies that do not comply with procedural formalities necessary to give the rules legal status yet nonetheless influence the behavior of other lawmaking bodies and of the public").

[204] *See Brown*, 347 U.S. at 494–95 n.11.

Los Angeles, is devoted to providing "free legal representation to individuals with past criminal justice involvement to assist them in navigating and overcoming many of the collateral consequences of conviction with the goal of facilitating successful reintegration into society."[205] For those familiar with *The New Jim Crow*, this collateral consequences project appears to respond directly to Alexander's most pressing concerns. In one of *The New Jim Crow*'s most compelling passages, Alexander explains that:

> Once labeled a felon, the badge of inferiority remains with you for the rest of your life, relegating you to a permanent second-class status. Consider, for example, the harsh reality facing a first-time offender who pleads guilty to felony possession of marijuana. Even if the defendant manages to avoid prison time by accepting a "generous" plea deal, he may discover that the punishment that awaits him outside the courthouse doors is far more severe and debilitating than what he might have encountered in prison.[206]

Once labeled a felon, "you are no longer wanted . . . unable to drive, get a job, find housing, or even qualify for public benefits, many ex-offenders lose their children, their dignity, and eventually their freedom—landing back in jail after failing to play by rules that seem hopelessly stacked against them."[207]

If law students are trained to help those that have been incarcerated escape incarceration's collateral consequences, Alexander's work has had real legal impact. *The New Jim Crow* may result in the provision of legal services to mass incarceration's victims before it breaks down the systems that create the victimization.[208]

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[205] LOYOLA LAW SCH., L.A., Collateral Consequences of Conviction Justice Project, http://www.lls.edu/academics/centers/centerforjuvenilelawpolicy/theclinics/collateralconsequencesofconvictionjusticeproject/ [https://perma.cc/LHE3-AWX8].

[206] ALEXANDER, *supra* note 1, at 142.

[207] *Id.* at 143.

[208] *See also* Arthur F. McEvoy, *The Martyrdom and Avenging of Enrique Camarena-Salazar: A Review of Caselaw and Scholarship After Thirty Years*, 23 SW. J. INT'L L. 39, 67–68 (2017) (describing how *The New Jim Crow* has "made a powerful impact not only on the scholarship but also the law of criminal justice" and explaining that even "[i]f Alexander did not invent the term 'mass incarceration,'. . . [t]he idea took on new substance in people's comprehension of events in a political culture disrupted by international terrorism and the Great Recession of 2007–09").