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Frank W. Munger

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Race, Law, and Inequality,
50 Years After the Civil
Rights Era

Frank W. Munger¹ and Carroll Seron²

¹New York Law School, New York, New York 10013; email: fmunger@nyls.edu

²Department of Criminology, Law and Society, University of California, Irvine, California 92637; email: seron@uci.edu

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Abstract

Over the last several decades, law and social science scholars have documented persistent racial inequality in the United States. This review focuses on mechanisms to explain this persistent pattern. We begin with policy making, a mechanism fundamental to all the others. We then examine one particularly important policy, the carceral state, which can be described as the most important policy response to the civil rights era. A significant body of scholarship on employment discrimination presents a site for explaining the transformation of law on the books into the law in action. Finally, we review scholarship on the persistence of segregation and concentrated neighborhood disadvantage and their attendant impact on racial inequality. We conclude with two themes that deserve special emphasis: the need for theory drawing these fields together and our need, above all at this moment in our history, for public scholarship changing the discourse, politics, and law perpetuating racial inequality.



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INTRODUCTION

Deep racial inequality persists in the United States more than 50 years after the end of de jure segregation and passage of sweeping national civil rights legislation. Although these changes have bettered lives and opportunities for a fragile black middle class, on average African Americans continue to experience the deep historical legacies of racial division and structural inequality. Scholars have devoted considerable effort to explaining the enduring entanglement between law, inequality, and race, choosing different points of entry often related to discipline, but contributing complementary perspectives on the impact of civil rights laws, mechanisms that carry forward the legacy of racial division predating civil rights, and new sources of racial inequality. A field of research shows that racial inequality persists, perpetuated by more than flawed civil rights laws, institutional resistance or backlash against civil rights, and inequality growing from adaptation to concentrated disadvantage. Racial inequality continues to arise in the shadow of law from contemporary policy making as well as acts of private discrimination and resistance to greater equality. This review describes recent law and social science scholarship about mechanisms that maintain racial inequality. We observe that different social science disciplines typically focus on particular mechanisms. Although our descriptions of them are based on relatively distinct bodies of empirical inquiry, our conclusion emphasizes the value of an integrated field of theory building and research that brings these fields of study together.¹

At least two achievements of what we term the civil rights era—the culmination of movements in the 1950s and 1960s leading to civil rights legislation—have improved the landscape of racial equality: the expansion of the African American middle class through greater access to education, jobs, and housing and increasing access to the ballot gained, in no small part, through the Voting Rights Act of 1965 (VRA). But both gains remain insecure. Although the African American middle class has grown since the 1960s, its position is far more fragile than that of whites (Kochhar et al. 2015). And although effective enforcement of the VRA, in part, led to the changed demographic profile of elected officials at the local, state, and federal level, the Supreme Court recently held a key part of the VRA unconstitutional, allowing conservative state majorities to tailor voter access and redistricting laws to weaken the power of African American voters.²

Across most dimensions of American society, the landscape remains bleak. Initial gains have been slowed by failure to enforce civil rights laws and resistance to integration. With the ending of the postwar economy and election in 1980 of a conservative administration, gains for the working class, and African Americans in particular, came to an abrupt halt (Mandel & Semyonov 2016, Stainback & Tomaskovic-Devey 2012). Harsh changes in criminal justice have increased racial inequality. Mass incarceration has become the most important determinant of racial hierarchy, and since the 1960s, the chance that a black man will be incarcerated is one in four, significantly greater than his chance of completing college (Wakefield & Wildeman 2014). Not only have stark differences in income and wealth between whites and blacks remained almost unchanged since the 1970s (Sharkey 2013), but large numbers of African Americans continue to live in conditions of concentrated disadvantage. In the current generation, only a few percent of all white children grew up in neighborhoods with 30% or more poor, a condition experienced by more than one-third of all African Americans, the same proportion as the generation born in the 1970s (Sharkey

¹We find that our review of the breadth of research on the intersection of law, inequality, and race traverses what might be described as a division of labor between law and social science and criminology. To fully appreciate the breadth of the legacy of race and law requires, however, that we read across the divide. In this regard, it is quite unfortunate that Annual Reviews is contributing to the divide by developing a separate venue for work in criminology. We would, in our view, be better served by being under one, large, less-specialized tent.

²*Shelby v. Holder* (2013).

2013). Unlike white families, African American families have been unable to translate economic resources into movement to better neighborhoods (Sharkey 2013); consequently, *“the same families have experienced the consequences of life in the most disadvantaged environments over multiple generations”* (Sharkey 2013, p. 26, italics in original; also see Massey & Denton 1993).

Racial inequality has new sources and has taken new forms in part because of economic globalization and massive immigration. Among industrialized democracies, the United States alone has responded to globalization by dismantling its economic safety net, allowing the minimum wage to stagnate, failing to address economic dislocation caused by deindustrialization or the increasing need for technical skills, and downsizing government employment. The absence of government intervention has undermined the lives of both white and black working poor and unemployed, fueling racial resentment, backlash against civil rights, and new perceptions of racial difference and perpetuating a “legacy of race, which continues to divide poor, working class, and middle class Americans from one another and deliver their political support to politicians who serve the powerful, wealthy, and affluent” (Massey 2009, p. 22). Further, perceptions of racial inequality have been altered by massive immigration, which has added millions to a deeply divided low-wage labor force. This complex stream of immigrants, some arriving with economic and educational advantages over African Americans, has placed racial inequality in a new light for both white and black Americans.

Our review is in five parts. The next four parts review recent research describing mechanisms maintaining racial inequality. The first examines policy making, a mechanism fundamental to all the others, describing three points of entry to examination of the impact of policy making on racial inequality: interest group influence, racial formations, and exogenous social and economic change. Sociologist Douglas Massey (2007, p. 110) concludes that “two structural configurations are central to perpetuation of black disadvantage in the post–civil rights era: the housing market and the criminal justice system.” The next section reviews recent scholarship on the second of these, the impact of the criminal justice system and mass incarceration on racial stratification. The following section takes up a classic law and society issue, transformation of law on the books into law in action, using recent research on enforcement of civil rights in employment as a case study. The last reviews research on the other institutional configuration identified by Massey (2007), the persistence of segregation and concentrated neighborhood disadvantage. Our conclusion returns to two themes that deserve special emphasis: the need for theory drawing these fields of study together and our need, above all at this moment in our history, for public scholarship changing the discourse, politics, and law perpetuating racial inequality.

RACE AND POLICY MAKING

Research by New Policy Studies scholars, which we review here, examines mechanisms by which race became, and remains, an important factor in legislative action (and inaction).³ American Political Development scholars conclude that persistent entanglement between race and policy making grows from a “deep structure” of “race-framed conflict” in politics (Epp 2016). We review three overlapping points of entry by scholars who find evidence that racial biases infuse American political institutions. The first of these grows from a long tradition of studying the relationship between interest groups in American politics and the legislative strategies that control agendas, distribution of power, and the structure of government itself. The second point of entry uses a

³For many of the ideas we elaborate here, we acknowledge our debt to Charles Epp’s (2016) insightful comments on the importance of New Policy Studies in the field of law and social science research on racial inequality.

broader lens to find evidence of racial formations in American politics that drive party agendas, political conflict, and the emergence of new discourses about race and racial inequality. The third point of entry emphasizes changes in the context of policy making and implementation, especially sea changes accompanying global and domestic upheaval, including the Great Depression; social movements and global leadership in the 1950s and 1960s; and later, deindustrialization, economic globalization, and massive immigration.

Race, Interest Group Politics, and Policy Making

Recent studies of the New Deal's foundations of the American welfare state, the pinnacle policy achievements of the civil rights era, and policy decisions in the era of civil rights backlash and globalization examine the critical role of interest groups aligned with maintaining or reducing racial inequality. Katznelson (2005) asks, in the years after World War II when key New Deal welfare victories remained in place and Americans enjoyed unprecedented prosperity, why African Americans were left out. He finds that three mechanisms employed by partisan interest groups shaped the racial effects of New Deal and Fair Deal legislation: (a) omission of benefits and protections for work performed predominantly by African Americans and Latinos (e.g., farm labor and domestic service), (b) delegation of administrative control to local stakeholders with a known bias, and (c) absence of a mechanism for reviewing claims of discrimination. Compromises engineered by the powerful southern block in Congress employed well-understood forms of federalism, allowing racially biased local governmental authorities or union leaders to control actual benefits or union protections of overtly race-neutral legislation. This limited access not only to safety net benefits but also to unions, higher education, and home mortgages, creating barriers to accumulation of economic and social capital that left African Americans far behind whites in wealth, education, and job security, affecting multiple generations (see also Katznelson 2013).

Frymer's (2008) study of African Americans in the labor movement examines the lasting political impact of the New Deal's racially biased labor protections. The New Deal's failure to assure African Americans a place in the labor movement guaranteed that equal employment legislation would become an important goal of the civil rights movement. Frymer argues that the political consequences of belated equalization of employment rights have been enormous. Instead of granting whites and blacks equal rights, the separate protections of the National Labor Relations Act and employment protections of Title VII of the Civil Rights Act seemed to pit taken-for-granted labor rights of a white working class against the civil rights of African Americans. As deindustrialization and global competition ended American economic expansion, conservatives recruited disillusioned white workers, turning them against civil rights laws that were characterized as unfairly benefiting African Americans and their Democratic Party sponsors.

Just as the Southern Democratic block left its mark on New Deal and Fair Deal legislation, entrenched political interests weakened major civil rights laws enacted in the 1960s. Pedriana & Stryker's (2014) comparison of the enforcement powers granted to federal agencies by Title VII (employment) of the Civil Rights Act of 1964, the VRA of 1965, and the Fair Housing Act (FHA) of 1968 reveals the power of key members of Congress and the executive branch who paid lip service to civil rights while channeling the reservations of white majorities. Their preferences carried extra weight during negotiations that crippled Title VII and the FHA but not the VRA. The agencies charged with enforcing the first two acts, the Equal Employment Opportunity Commission and the Department of Housing and Urban Development, emerged from committee negotiations with conservative white congressmen with power to conciliate and process complaints but lacking power to enforce, reducing their work, in the words of one scholar, to a "fiasco" (Skrentny 1996, p. 122; see Edelman 1992, 2016; Farhang 2009).

Pedriana & Stryker (2004) show that Title VII became a robust source of protection for employment rights in the 1970s through interpretation by a sympathetic federal judiciary (see also Frymer 2003). Persuaded to adopt a broad “group-centered effects” construction of ambiguous statutory language, the courts stretched Title VII to permit plaintiffs to show evidence of “systemic *group disadvantage* rather than individual harm, discriminatory *consequences* rather than discriminatory intent, and substantive *group results* rather than formal procedural justice” (Pedriana & Stryker 2014, p. 5, italics in original).⁴ Following Reagan’s election in 1980, the will to pursue group-centered class actions disappeared, and the Equal Employment Opportunity Commission de-emphasized systematic enforcement in favor of the statute’s original, compromised legislative mandate to resolve individual complaints. FHA enforcement was similarly weakened by statutory language, and even after amendments strengthened the Department of Housing and Urban Development’s enforcement power, it never became a force for structural change (Sharkey 2013, p. 53; Bell 2013, Turner et al. 2002).

The VRA, enacted in 1965 as a brutal struggle for voting rights in Selma and other southern cities played out on nightly television, expressly incorporated group-centered language mandating preclearance of voting practices that could potentially impede African American voting (Valelly 2004). A strong public consensus behind voting rights prevailed over southern and conservative reservations in part because the Act required preclearance by southern, but few northern, states. Until the Supreme Court’s decision in *Shelby v. Holder* (2013) rendering preclearance inoperable, the VRA was uniquely effective civil rights legislation.

These recent studies of the legislative process demonstrate the pervasive influence of key interest groups that expect to gain or lose from changes in racial hierarchy. Although few studies provide similarly detailed documentation of interest group influence on enactment and enforcement of thousands of state and local laws that complement federal legislation on the basic structure of the welfare state and civil rights, there is little doubt that interest group dynamics prevail at every level. Subsequent parts of this review consider studies that describe the role of important types of local policy making on racial inequality, including criminal justice enforcement, regulation of employment, and local zoning and housing policies. The pervasive influence of interest groups with a stake in racial hierarchy contributes to the conclusion reached by scholars that racial inequality remains the persistent challenge for American democracy and its legal institutions.

Racial Formation

Theories of racial formation provide an explanation for the pervasive presence of racial hierarchy in ideologies maintaining major political coalitions. Two decades ago, influential scholars Omi & Winant (1994, p. 55) defined racial formation as the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed,” attributing the embedding of race in American politics to the “racial projects” of American elites who led social movements in the 1960s and 1970s. Refining and extending Omi & Winant’s concept, King & Smith (2005, p. 75) argue that the formation of racial orders—political coalitions bound together by racial commitments—provides a “framework to organize empirical evidence of the extent and manner in which structures of racial inequalities have been interwoven with economic as well as gender and religious hierarchies and social institutions.” Political entrepreneurship in every generation, they conclude, has required recruitment of, among others, actors invested in preserving or reducing white advantage and accommodation of a preexisting institutional order (bureaucracies, Congress,

⁴*Griggs v. Duke Power Company* (1971).

established nonstate actors) that perpetuates the racial politics of prior eras (King & Smith 2005). Two racial orders have always been present, if not always in balance: one promoting or maintaining white advantage and another allied with those who oppose it.

Although political coalition members may have varied motives, they must sign on to a common agenda to keep the coalition together, an agenda that necessarily accommodates maintaining or reducing a legacy of white advantage.⁵ Racial orders explain the influence of race not only on legislation with an explicit racial impact but also on the vast array of nonracial government policies and practices that “have never developed apart from pressures to alter or maintain the nation’s racial ordering,” including powers over commerce, taxation and the environment, voting rights and representation, immigration, free expression, and criminal justice. Similarly, battles over racial hierarchies pervasively influence government agency practices—program administration, hiring, promotion, and unionization (King & Smith 2005, p. 84).

Social movements arising in the 1970s and 1980s, led by conservative political entrepreneurs, placed political representatives at every level (Heinz et al. 2003, Southworth 2008, Telles 2010), supporting legislation that contributed to sharply rising levels of economic inequality and minimization of welfare state benefits for the working class and sharp reductions in protection for civil rights.⁶ The new discourse of resistance to affirmative action created by “active and conscious rhetorical construction of conservatives” (Novkov 2008, p. 655) avoided “‘hot’ rhetoric” that invoked racial status directly (HoSang 2008, quoted in Novkov 2008, p. 655). Opposition to affirmative action was framed as colorblind resistance to racial discrimination by the government, thus embracing racial equality while denying government authority to intervene to redress benefits of past racial subordination (Lowndes 2008, Obasogie 2013, Siegel 2004). Colorblind policy advocacy draws support from, and in turn legitimates, symbolic racism, a stereotype shared by a significant proportion of whites that African Americans themselves are to blame for inequality because they do not value education, work, or marriage (Bobo & Charles 2009, Kinder & Kam 2011, Schuman et al. 1998, Sears & Henry 2005).

Although racial stereotypes have been mobilized to oppose equality-enhancing legislation and enact more punitive welfare and crime-control policies (Gilens 2000, Greenhouse 2008), strong antigovernment sentiment mobilized in favor of colorblind policy also supports inaction. Policy drift through legislative inaction must also be understood as a choice reflecting costs and benefits to key political interests. Failure to maintain the minimum wage or welfare benefits notwithstanding rising need or inflation (Hacker & Pierson 2010) has disadvantaged disproportionate numbers of African Americans.⁷

Perhaps the most important bellwether of the new racial order is the Supreme Court, an institution regarded as the bulwark of constitutionalism and American political values (Han 2015). Far from defending the vision of *Brown v. Board of Education* (1954), recent conservative majorities of the Court have channeled skepticism characteristic of the new racial order by embracing colorblindness while severely limiting possibilities for affirmative action, expressing concern that otherwise undeserving groups might gain unfair advantage.⁸ In 1989, the Court’s apparent indifference to the effects of a long history of pervasive discrimination caused dissenting Justice Thurgood

⁵ Conflict over race, Frymer (2008, p. viii) argues, has been “embedded in institutions . . . that promote rules and sources which in turn make appeals to racism a politically inviting strategy” (see also Tesler 2016).

⁶ Mass incarceration is such a policy (Alexander 2010, Gottschalk 2006), to which we return in the section titled The Carceral State, below.

⁷ Failure on the part of Congress to restore Section 5 of the VRA in the aftermath of *Shelby v. Holder* is also an important example of policy drift.

⁸ See *Richmond v. Croson* (1989); *Parents Involved in Community Schools v. Seattle School District #1* (2007).

Marshall to remark that “a majority of the Court signals that it regards racial discrimination as largely a phenomenon of the past.”⁹

Policy Context

Studies of the relationship between race, political structure, and policy show the powerful influence of changes in the domestic or international social and economic order, which we call the policy context (see King & Smith 2005, Massey 2009). New Deal origins of a racially divided welfare state cannot be separated from the economic upheaval accompanying the Great Depression. Likewise, the post–World War II civil rights era depended on support from a working class benefiting from an expanding economy and elite concern about the legitimacy of America’s claim to global leadership. Post–World War II global and domestic priorities created conditions favorable to *Brown’s* epistemic break with Jim Crow, de jure segregation, and an opening for civil rights legislation. A decade later, economic globalization and massive immigration contributed to a very different context for interest group strategies, racial formation, and realization of *Brown’s* mandate. Deindustrialization, job losses, and growing competition from minorities—initially African Americans migrating from the South to urban centers in the North in the 1950s and 1960s, but more recently massive numbers of immigrants—created an opportunity for the conservative realignment that absorbed a large part of a white working class and other moderates opposed to further government intervention to reverse benefits of an existing racial hierarchy in school quality, employment seniority, or the advantages of economic and cultural capital possessed by whites seeking higher education.¹⁰ This new alignment favors colorblind policies that oppose affirmative action and welfare but, ironically, also policies favoring the wealthy who control the new legislative coalition.

Policies that affect inequality are no longer organized expressly along lines of race but along lines of class, creating competition between racial minorities and poorer white men. African American interests are represented in legislative battles by what is now a losing political coalition. The winners are the wealthy, supported by those they have recruited with the help of globalization and deindustrialization to oppose regulatory intervention and government spending. But the coalition also supports tax breaks and subsidies for the wealthiest (Hacker & Pierson 2010, Massey 2009, Mettler 2011, Piketty 2014), leaving poor whites and especially African Americans, already disadvantaged by a vast wealth divide, further behind (Jacobs & Dirlam 2016, Massey & Sampson 2009).

Race-neutral deregulation in the era of free market globalization not only has increased the economic disadvantages of the poor, a group that is disproportionately African American, but also disproportionately destabilizes the African American middle class (Kochhar et al. 2015, Sharkey 2013, Wilson & Sekura-Lemessy 2000) by reducing government employment (Massey 2009), deregulating the mortgage market (Rugh & Massey 2010), ending enforcement of school desegregation (Clotfelter 2004), and enacting policies encouraging segregated housing markets (Massey 2007; see section titled Law, Segregation, and Concentrated Disadvantage, below).

Immigration policy illustrates the pervasive influence of policy context on interest group strategies and racial formation. Influential organizations in the dominant political coalition of the 1960s

⁹*Richmond v. Croson* (1989) at 552. Since 1976, the Court has typically required evidence of intent to discriminate. See *Washington v. Davis* (1976). Provine (2011) comments that the Court, thus, ignores complexities of racialized fears and misperceptions, implicit bias, and institutional rules that encourage people to act in racially discriminatory ways (see Lane et al. 2007, Richardson & Pittinsky 2005). For a contrasting statutory ruling taking into consideration the possibility of implicit bias, see *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (2015).

¹⁰These themes come together around the policy domain of the carceral state, which we turn to in the following section.

that opposed racial stereotyping, including the National Association for the Advancement of Colored People and its allies, together with elites influenced by the Cold War, supported the Immigration and Nationality Act of 1965. The Act, for the first time in a century, opened the door to immigration from Asia, Latin America, and later Africa (Yu 2001). Subsequently, massive immigration linked to globalization, especially from Asia and Latin America, shifted the racial and ethnic profile of the United States, fostering “a new discourse about the ‘new immigrants’ . . . that perpetuates stereotyped notions of racial identities” (King & Smith 2005, p. 89; Massey 2007), often to the disadvantage of African Americans (e.g., Kasinitz & Rosenberg 1996, Newman 1999). In turn, new immigrants’ support for policy choices requires “racial triangulation” (Kim 1999), which compels them to secure their position in relation to black and white identities (Tesler 2016).

All policy regimes have consequences for racial inequality. Policy that perpetuates inequality is an outcome of interest group agendas and legislative strategies, racial formations created by political coalition building, and significant change in policy context—currently globalization, deindustrialization, and massive immigration. Each explanation illuminates the formation of policy goals, distributive outcomes, and racial stereotypes that allow them to go unchallenged. Going forward, law and social science scholars have an opportunity to draw on these strands of theory and research to suggest better explanations of outcomes and more promising ways to reduce inequality.

THE CARCERAL STATE

The consolidation of the carceral state, including the growth of incarceration in state prisons and county jails since the 1970s, disproportionately affects communities of color and has become the most important policy sustaining racial inequality in the post–civil rights era. Here we highlight three bodies of scholarship. First we review research that builds on New Policy Studies to unpack the politics behind the expansion of the carceral state. Next we review an emerging body of research that focuses on the often unrecognized connections between the census and incarceration. Finally, we review the literature on mass incarceration as a mechanism of stratification and its collateral consequences.

The Politics of the Carceral State

Gottschalk (2006) has persuasively demonstrated that a contemporary policy of incarceration has deep roots in American political development that long predate the massive build-out of prisons beginning in the 1970s (also see Useem & Piehl 2008, Barker 2009, Lynch 2010; but see Garland 2001). Crime policy is, moreover, deeply entwined with a strong federalist tradition, with notable historical variations among states and regions of the country (Miller 2008). Despite these differences, by the 1970s every state in the country was building more prisons. An important body of current research explores reasons for this policy convergence around incarceration and whether fundamental reform is feasible.

Research has shown that the policies of the civil rights movement and its progeny met with significant, strident, and sophisticated backlash that is deeply embedded in a historical legacy of “racial hierarchy that deems African Americans mostly responsible for their situation” (Provine 2011, p. 50; also see Alexander 2010, Hacker & Pierson 2014). A politics of law and order coupled with antiblack sentiment is rarely far beneath the surface in American politics—and often bipartisan (Gottschalk 2006). Across the South and among white working class citizens in the North, civil rights reforms were often linked to a fear of crime and lawlessness (Campbell & Schoenfeld 2013, p. 1390; also see Weaver 2007). Such rhetoric was a critical factor in laying the foundation for reforms in crime-related policies, including sentencing, victims’ rights, prison litigation, and

policing. For example, Campbell & Schoenfeld (2013) map state-level policies that resulted in prison expansion and, with it, “mass incarceration” (Garland 2001) of African Americans and Hispanics, particularly men; they demonstrate the ways in which historical legacies and political mechanisms coalesce around a policy regime that, as Simon (2007) argues, resulted in a politics of “governing through crime.” Drawn from comparative case studies of eight states in different regions, Campbell & Schoenfeld (2013, p. 1377) “find that over time national political competition, federal crime control policy, and federal court decisions helped to create state-level political innovation and special interest groups that pushed lawmakers to increasingly define the crime problem as a lack of punishment and to choose policy solutions that put more people in prison for longer periods of time.”¹¹

Research also documents recent attempts to challenge the politics of the carceral state. Though Schlanger (2003, 2016) reveals the ways in which the Prison Litigation Reform Act of 1996 undermined potentially impactful case law, prisoner rights advocates in California leveraged a unique set of resources to challenge the conditions of confinement in the state’s prisons. After nearly 20 years of litigation, the Supreme Court held that the conditions of confinement in California’s prisons violated the Eighth Amendment and ordered the state to reduce the prison population by approximately 30,000 inmates, to 137.5% of design capacity.¹² Recognizing that the state had no alternative, the governor signed the Public Safety Realignment Act, which is designed to downsize the state’s prison population through county-supported programs that return nonviolent, nonsexual, nonserious prisoners to local supervision. Implementation of supervision is left to the county and may range from building more jail beds to instituting various rehabilitative models (Bird & Grattet 2016, Verma 2015). California’s reform has been described as “the great penal experiment in American incarceration policy” (Petersilia 2014, p. 328).

The California experiment in prison downsizing, along with other reforms, such as reentry programs, and emergent left–right coalitions that argue that the cost of incarceration is unsustainable, particularly in the aftermath of the Great Recession of 2008, have engendered the most recent turn in the debate around the carceral state. In *Caught*, Gottschalk (2015) lays bare why we should remain skeptical about the impact of the Court’s decision in *Plata*. Innovative reentry strategies to tackle recidivism and stronger political support may help, but progress will be impeded by contemporary “pathologies that run through the carceral state [and] also run through American politics” (2015, p. 20), including neoliberalism, globalization, immigration, deindustrialization, and policies creating significant structural inequality (see section titled Race and Policy Making). Yet, a recent symposium (Kubrin & Seron 2016) suggests that California’s experiment may offer hope of meaningful decarceration (also see Clear & Frost 2014). Documenting how these efforts unfold will remain a ripe vein for future scholarship.

The Politics of the Census

New Policy Studies, particularly the work of Desmond and King, as we noted above, argue that policy analysis must be examined in the context of a history organized around racialized orders. Debates among demographers have long turned on how to count nonwhite populations, and these designs have changed significantly over time (Prewitt 2013). An emerging body of scholarship tackles a different question, the unit of analysis used by the census to count employment and

¹¹For example, see Gottschalk (2006, 2015) on prison growth and sentencing, Jacobs & Jackson (2010) on the politics of imprisonment, and Phelps (2011) on the possibility of prison downsizing.

¹²*Brown v. Plata* (2011).

housing among other demographic patterns. As this body of scholarship suggests, the seemingly benign task of selecting a unit of analysis in counting the American population presents a ripe site for unpacking the political mechanisms and historical contingencies that explain decisions by the US census and their attendant impact for explaining racial inequality.

In two recent studies, Pettit & Sykes (2015) demonstrate the impact of omitting inmates in the analysis of employment and housing. Mass incarceration eroded many of the gains that had been made toward racial workplace integration, particularly for black men (see also Western & Pettit 2010). Building on this work, Pettit & Sykes (2015, p. 600, emphasis added) demonstrate that, by omitting inmates, “conventional labor force statistics significantly *overestimate* the labor force involvement of African American men, and young black men in particular.” In a similar vein, researchers rely on census data that collect demographic information for households that does not, therefore, take into account the expansion of the criminal justice system since the 1970s and its impact on where large proportions of blacks, particularly young black men, reside for long periods of time. They argue that taking incarceration into account significantly expands the degree of hypersegregation in American society. Not only does time spent in prison have consequences for securing a job postrelease (Pager 2008, Pager et al. 2009), voting (Manza & Uggen 2006), health (Massoglia 2008), and jury service (Binnall 2009), but it also excludes one from being counted by federally sponsored surveys of the American population.

Although Pettit & Sykes demonstrate that the census decision on units of analysis and omission of the incarcerated population has critical consequences for explaining housing and employment patterns, the policy behind this decision offers a ripe site for further study that can benefit from insights developed by New Policy Studies scholarship.

Incarceration: A Mechanism of Stratification with Collateral Consequences

Social scientists have traditionally conceptualized mechanisms of social mobility around education and labor force participation. As Wakefield & Uggen (2010) argue, today mass incarceration and its disproportionate impact on African Americans and Hispanics should also be treated as a mechanism that opens and closes opportunities for mobility.

Here we review a growing body of research that demonstrates the wide-ranging collateral consequences of mass incarceration for the mobility prospects and well-being of family members and children. For example, Comfort (2008) demonstrates the process of “secondary prisonization” of women and children of the incarcerated. These “legal bystanders” go through a Kafkaesque process to simply see their partners: Rules and regulations and checks and rechecks through a bureaucratic maze are required before an often very short visit can even take place (also see Goffman 2014, Rios 2011). In addition to these demeaning practices, partners experience collateral burdens in time lost at work and the cost of travel; in an earlier era, Malcom Feeley (1979) concluded that the “process is the punishment” (and for an update on that process, see Van Cleve 2016). Comfort’s work suggests that the process of visiting the incarcerated is also a form of punishment.

Desmond (2012) unpacks another collateral consequence of mass incarceration among African American men to argue that for their female counterparts, housing eviction is a mechanism with equally insidious consequences. Residents of poor, urban neighborhoods experience higher rates of residential mobility than their wealthier counterparts. Using court data and a household survey of Milwaukee, Desmond’s findings show that in predominantly black neighborhoods women are more likely to hold a lease because of their male partners’ past criminal record (Beckett & Herbert 2009), current incarceration, or complete absence. In these neighborhoods, women are more likely to be evicted than men, and the overall eviction is higher than it is for men or women in predominantly white neighborhoods. Desmond (2016) movingly shows the complex ways in which

racial hierarchies are systematically reproduced in interactions between often-white landlords and their black female renters when something happens and the rent cannot be paid or the landlord fails to make a repair.

The institutionalization of mass incarceration has consequences for child well-being, including mental health and behavioral problems, infant mortality, and homelessness. Initially, one might assume that removing a parent who has committed a crime has a beneficial effect on child well-being. Wakefield & Wildeman (2014, p. 150; see also Foster & Hagan 2007, Sykes & Pettit 2015) show that before the prison boom of the 1970s, the incarceration of a father was relatively rare. Today, however, more criminal laws, more frequent incarceration of the mentally ill, and three-strikes sentencing guidelines, among other factors, have transformed that probability into a “common [reality] for recent generations of black children—especially those whose fathers dropped out of high school.” Using the best data sets available coupled with rigorous statistical modeling, the authors demonstrate that net of a host of factors, the incarceration of African American fathers significantly increases the odds that his offspring will experience serious mental health and behavioral problems, is at significantly higher risk of infant mortality, and is significantly more likely to experience homelessness. A large body of scholarship on child well-being shows that each of these factors has long-term consequences for success as an adult. On a sobering note, the authors conclude that “parental imprisonment is a distinctively American force for promoting intergenerational social inequality in the same league with decaying urban public school systems and highly concentrated disadvantage in urban centers that distinctively touch—and disadvantage—poor black children” (Wakefield & Wildeman 2014, p. 157).

A politics of law and order is built into the DNA of American political development, as Gottschalk (2006) makes clear. The sweep of a politics of law and order in the late twentieth and early twenty-first century is, however, of a qualitatively different magnitude, as these scholars have documented. That this research is central to an analysis of the legacy of the civil rights movement underscores the enduring challenge of overcoming a politics of policy making steeped in a history of racial hierarchy.

TRANSLATING THE LAW ON THE BOOKS TO THE LAW IN ACTION: THE CASE OF TITLE VII

Judicial and legislative achievements of the civil rights movement present ripe sites for explaining the steps taken to institutionalize the goals embodied in these rulings and statutes, from the institutionalization of K–12 school desegregation to affirmative action in higher education to housing and employment. Here, we review one particularly rich site, employment, where law and social science scholars have made particularly important contributions to our understanding. Although this literature is intrinsically important for what it demonstrates about scholarly debate around whether and to what extent the Civil Rights Act of 1964, and specifically Title VII, has achieved its goal, it also reminds us that the law in action is often more telling than the law on the books.

As scholars repeatedly note, Title VII was remarkably ambiguous in its wording and provided little guidance on implementation or metrics for evaluating compliance (Dobbin 2009, Edelman 2016, Pedriana & Stryker 2014). Epp (2009), Dobbin (2009), and Skrentny (1996) demonstrate that Title VII has had an impact on the organization and management of the contemporary workplace. For example, Dobbin’s (2009) longitudinal study of corporate responses to Title VII reveals the pivotal site of human resources (HR) management and its role in filling the void left by the enabling legislation. Building on a post–New Deal model that managerialized labor–management relations, the newly feminized field of HR became the corporate site for devising policies and

practices designed to address what were in their earliest iteration referred to as affirmative action policies and then, over time, morphed into diversity programs of various kinds (e.g., mentoring, networking) (also see Kelly & Dobbin 1998). Two points are worth noting. First, HR experts “peddled” their programs in prominent business journals; “these changes [in HR ‘best practices’] happened piecemeal, [but] by the beginning of the new century, they had revolutionized the employment relationship” (Dobbin 2009, p. 224). Second, Dobbin’s empirical findings show that the threat of lawsuits by individuals and the government casts a shadow that keeps everyone on the HR innovation bandwagon, though often with little attention to assessing its overall effectiveness (p. 232; also see Hacker & Pierson 2014).

Edelman’s (2016) application of her theory of legal endogeneity seeks to explain why the arc of equal employment opportunity legal mandates and its institutionalization in the workplace has failed to mitigate racial and gender discrimination. She brings together decades of research that builds from neo-institutional theories of organizations and sociology of law, arguing that the social fields of law and management have blurred to the point where the law is, in essence, little more than symbolic (Edelman 2016, p. 41). Law’s commitment to rights and a rule of law has in actuality been co-opted by the social field and logic of management’s focus on efficiency and effectiveness. The law has been reframed by new HR professionals who put lawlike guidelines and courtlike practices in place to manage claims of racial (or gender) discrimination. What sets Edelman’s work apart, however, is examination of the judges’ responses to claimants who sue after exhausting internal grievance procedures. Her findings show that judges, rather than interrogating whether these “symbolic structures” of the workplace are effective, “defer” to the mere presence of workplace policies and structures as indicative of or synonymous with effectiveness, a finding that holds over time, regardless of political ideology. Judicial deference to managerial interpretation means that “[t]o the extent that the meaning of law within legal fields is influenced by organizational constructions of law and compliance, law becomes *endogenous*, or constructed within the social fields it seeks to regulate” (p. 26, italics added). Pessimistically, she concludes that “we live not in a post-civil rights society but rather in a symbolic civil rights society” (p. 216).

In a novel reframing of this project, Skrentny (2014) examines the impact of the civil rights revolution on the workplace logic of organizational effectiveness. Skrentny finds that organizations and professions are guided by a market logic that recognizes the pragmatics and usefulness of “racial realism” that has little to do with traditional notions of civil rights law whether in the guise of protecting equality of opportunity or affirmative action. Racial realism refers to the “strategy of using membership in a racial group as a qualification” (Skrentny 2014, p. 3) for a position. How racial realism plays out, Skrentny argues, depends on the employment sector and often on racial or ethnic stereotypes. Employers prefer stereotypically hardworking immigrants in low-paying sectors to native-born whites or African Americans. And employers who hire doctors according to race and ethnicity often rely on research in medicine that suggests that racially concordant doctor-patient matching has significant, positive effects on quality of health. These institutionalized practices take place, Skrentny argues, under the radar of formal law, and often without legal challenge, though not necessarily without problematic consequences, particularly in less formal, more poorly compensated sectors of the economy. In addition to discovering the ways in which racial realism permeates the modern workplace yet operates beside the law, Skrentny (2014, p. 267) argues, “America’s civil rights laws have become, in some very real and perhaps morally troubling sense, anachronisms.”

These studies and similar research (see, e.g., Berrey 2015) demonstrate that organizations have co-opted civil rights mandates, whether through symbolic or realistic mechanisms. Edelman’s finding that courts accepted employers’ symbolic efforts to ameliorate the effects of discrimination (also see Best et al. 2011, Krieger et al. 2015) is particularly telling and speaks to the limits of the judiciary’s capacity to address a deeply engrained legacy of institutionalized racial

discrimination (Edelman 2016). Research on specific professions, including medicine (Skrentny 2014), law (Payne-Pikus et al. 2010), and engineering (Byars-Winston et al. 2015, Landivar 2013), for example, consistently corroborate the stalled pace of workplace integration along racial lines, particularly in the upper echelons of these respective fields.

Before concluding this part of our review, we note that recent research (Kalev & Dobbin 2006, Kalev et al. 2006) looks closely at the specific design of civil rights and diversity policies that do, and do not, prove effective for ameliorating racial discrimination. How and to what extent such findings inform future policy making that is transformative remains, however, an open question.

LAW, SEGREGATION, AND CONCENTRATED DISADVANTAGE

In the late 1970s, Wilson's (1978, 1987) seminal analyses of isolated, impoverished African American communities answered racial stereotyping and moral judgments by conservatives who claimed that African Americans themselves were responsible for the failure of civil rights-era antipoverty programs. Wilson argued that although expressly discriminatory policies no longer accounted for the lack of progress, profound restructuring of urban economies over the latter half of the twentieth century gutted opportunity structures providing routes out of poverty for earlier minority groups, and new policies contributed to continuing isolation and exposure to concentrated disadvantage. In turn, concentrated disadvantage had become an independent cause of deep poverty. Middle and employed working class families tended to move, leaving behind neighborhoods devoid of role models and community-based institutions and facing severely limited opportunities for education and employment (also see Anderson 1999). Massey & Denton's (1993) study of multiple urban centers extended Wilson's analysis by showing that continuing segregation after the 1960s explained the persistence of deep poverty and concentrated disadvantage over recent generations. Segregation, they concluded, is responsible for "enabling all other forms of racial oppression," the process that "binds them together into a coherent and uniquely effective system of racial subordination" (Massey & Denton 1993, p. 8), making racial segregation and its institutional form, the black ghetto, "the key structural factors responsible for the perpetuation of black poverty in the United States" (pp. 8–10).

Massey & Denton (1993, p. 10) conclude that the "evolution of segregated, all-black neighborhoods was not the result of impersonal market forces" but an entity "constructed through a series of well-defined institutional practices, private behaviors, and public policies by which whites sought to contain growing urban black populations." Segregated neighborhoods have deep roots in employment, education, and housing subsidies offered by the New Deal to whites but largely denied to African Americans. Studies reviewed earlier show that the legislative coalition anchored by Southern Democrats and moderates acting on behalf of ambivalent white constituents weakened the enforcement provisions of the 1968 FHA. More effective enforcement made possible by 1988 revisions was undermined initially by presidential opposition, local resistance, and, more recently, Supreme Court hostility to civil rights litigation (Pedriana & Stryker 2014). Local zoning and development policies reflect strong pressure to separate rather than integrate African Americans (Sharkey 2013). National and local civil rights policies forbidding racial steering by brokers and redlining by mortgage lenders are poorly enforced (Bond & Williams 2007, Schwemm & Taren 2010). Policy failures are consistent with the views of large constituencies. Survey data continue to show that while African Americans remain the group most open to living in an interracial community, they are considered the least desirable neighbors by Hispanics and whites, as well as better-off African Americans (Bobo & Charles 2009, Woldoff 2011).

Ironically, effective interventions exist. A test of Wilson's neighborhood effects hypothesis was already under way when Wilson wrote, in the form of a court-ordered remedy for racial

discrimination by the Chicago Housing Authority,¹³ which required allocation of housing vouchers to one group sent to white suburbs and another group sent to urban neighborhoods. Initial results suggested a strong positive neighborhood effect on income, employment, and leaving welfare (Rubinowitz & Rosenbaum 2000), but serious methodological problems weakened these promising conclusions. A subsequent study funded by the US Department of Urban Development, Moving to Opportunity (MTO), designed by a team of economists to replicate the experiment, randomly assigned participants to a mix of housing choices and counseling (Briggs et al. 2010). Interim analysis failed to reveal improvement in employment or income, but reanalysis of MTO data (Sampson 2008) discovered positive neighborhood effects overlooked in the initial report (Clampet-Lundquist & Massey 2008, Sampson 2008), including massive improvements in health and neighborhood safety (Ludwig 2012). A subsequent replication of *Gautreaux* with improved design found strong positive effects on employment, earnings, and household income (Casciano & Massey 2012).

Wilson's initially controversial hypothesis about the causes of isolation, namely, that the residents of isolated neighborhoods contribute to the reproduction of concentrated disadvantage and inequality, has proven to be a fruitful source of insight about the racially unequal impact of important policies, among them crime control and housing. Theories suggested by his hypothesis link individual behavior and neighborhood social capital to urban structure and policy (Sampson 2012; see also Jencks & Mayer 1990) through mediating processes such as neighborhood social interaction, perceptions of neighborhood disorder and collective capacity for informal social control, neighborhood institutional resources, and the spatial organization of land use (Sampson 2012, p. 458). Concentrated disadvantage has been shown to have an effect on income, employment, education, and exposure to concentrated disadvantage in the next generation independent of parents' status with respect to each of these measures (Sharkey 2013).

Further, neighborhood effects influence both the formulation of policy and outcomes. Broken windows policing concentrates on punishing perpetrators of minor infractions based on the theory that if unchecked they will commit crimes of increasing seriousness. Questioning the theory's premises that disorder leads to escalating crime and warrants more comprehensive enforcement of quality-of-life infractions, Sampson & Raudenbush showed that any direct link between actual neighborhood disorder (e.g., broken windows) and crime is quite weak (Morenoff et al. 2001). By contrast, collectively shared perceptions of disorder can have important consequences, including neighborhood disinvestment or out-migration (Sampson & Raudenbush 2004). Further, perceptions of disorder are correlated with concentration of minorities and poverty, rather than actual disorder, and ironically, perceptions of disorder, rather than actual disorder, predict future levels of crime, a self-perpetuating cause of further isolation and crime, which is, Sampson (2012, p. 147) suggests, "one of the underappreciated causes of continued racial and economic segregation in the United States and perhaps elsewhere."

Further, reanalysis of data from the MTO housing voucher experiment showed that ghetto residents given a choice of neighborhoods had overwhelmingly chosen to return to neighborhoods similar to those they left—in effect "moving to inequality" (Sampson 2008). In other research, Sampson (2012, p. 366) found "high levels of intersubjectively shared cynicism and perceived irrelevance of legal rules" correlated with higher levels of violence and lower readiness for civic participation. From these and similar results, he concludes that shared orientations are part of the process in neighborhoods with concentrated disadvantage that shapes "social norms and coordinated beliefs . . . rooted in cognitive processes, many of which are implicit or that operate

¹³ *Hills v. Gautreaux* (1976).

below conscious awareness . . . in a structurally patterned and relational manner” (Sampson 2012, p. 367). Mediating structures, including social policies, law enforcement, and institutions outside the ghetto, play an indirect role in creating such “persistent cultural mechanisms” constituting a “deep structure” reproducing inequality. These and similar findings over many years of research showing that racial inequality arises from multigenerational exposure to concentrated disadvantage recently led Massey (2013, p. 693) to conclude that “[t]he social structure of urban America is such that absent forceful intervention powerful, institutionalized, socially-embedded processes will operate to replicate the existing ecological landscape.”

CONCLUSION

We wrote this review against the backdrop of the 2016 election. The themes discussed here resonate with the hotly contested and divisive debates over domestic policy during the election cycle. Continuing a pattern we have described in this essay, offshoring of manufacturing jobs and declining security among the white working class were pitted against the challenges that continue to face urban, minority communities, including the disproportionate incarceration of minority men and the collateral consequences for child and family well-being, education, health, and housing. It is worth quoting the Supreme Court’s decision in *Shelby v. Holder* striking down a key part of the VRA that subjected proposed voting reforms in states with long histories of discrimination to federal approval: “There is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.” In many respects, the Court had already reached the same decision about the need for policies addressing inequality in other areas (see the section titled Translating the Law on the Books to the Law in Action above), tracking beliefs held by the American public (see the section titled Race and Policy Making, above subsection Racial Formation). Notwithstanding the Court’s opinion, we observe that in the aftermath of *Shelby*, several states, especially in the South, with strong white working class constituencies imposed state-level requirements restricting access to the voting booth that disproportionately affected minority constituencies (Brennan Cent. Justice 2016, Kousser 2015).

The scholarship reviewed here paints a dramatically different portrait of inequality in the United States along lines of race/ethnicity and class. Indeed, the scholarship reviewed here shows significant setbacks beginning in the 1980s in our aspiration to achieve a more egalitarian, integrated, fair, and equitable society. The generation inspired by the aspirations of the civil rights movement has asked the tough questions and brought rigor, depth, sophistication, and insight to an analysis of its legacy. Emerging scholars in law and social science continue to build on a remarkably solid foundation. Thus, in the aftermath of the most divisive election in our memory, it is a challenge to remain optimistic about the role we, as scholars of law and social science, can take to overcome a legacy of structural inequality along lines of race and class. We take solace in the words of Martin Luther King, Jr.: “The arc of the moral universe is long, but it bends towards justice” (Selma, AL, March 25, 1965). At this dark moment in our nation’s history, we do not have the luxury to sit back because, simply put, it is too important to keep pushing that bend toward justice.

In closing, we encourage our colleagues to take concrete and pragmatic steps to expand the audience for our scholarship to a wider community of policy makers, legislators, and the public. There is much debate about the forms this may take, from writing op-eds to blogs.¹⁴ Space does

¹⁴One example of this effort is the modules developed by the Stanford Center for Poverty and Inequality, https://www.youtube.com/channel/UC_p1Lq0HG0Ezoo7TPQ9gAaA.

not permit a review of the pros and cons of these various venues. But, if our mission is to set the record straight, then what we have to say is far too important to be limited to our usual venues of peer-reviewed journals and academic presses. In a word, we can no longer be content to speak solely to our law and social science peers.

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