
POLICING, MASS IMPRISONMENT, AND THE FAILURE OF AMERICAN LAWYERS

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It did not surprise me that almost every child in the D.C. public high school class raised a hand when I asked if any of them had been stopped and searched by the police. When I told them that being stopped without reasonable suspicion that they were committing a crime is a violation of the United States Constitution, one of the students corrected me: “No, you don’t understand, these are the Jumpouts,¹ not the police. They’re allowed to do that.” I’m used to people laughing in disbelief when I do constitutional rights trainings in heavily policed communities. But when I heard those words, my heart sank. In front of me was a child in whose world being stopped and frisked was so regular, such a fact of everyday life, that he had reasonably concluded that it must be lawful. This child was growing up believing that his suspicious body could be probed at will by government employees. One by one, the students described to me the routine that they had developed to turn and face the nearest wall while officers searched through their backpacks and pockets on the way home from school. Like many of the problems in the criminal legal system, there is no genuine dispute that these and more serious illegalities are happening on a massive scale. In the seven years that I have spent working in American courts and jails, one thing sticks out above all else: the divergence between the law as it is written and the law as it is lived.

The contemporary system of American policing and incarceration puts human beings in cages at rates unprecedented in American history and unparalleled in the modern world.² It is a considerable bureau-

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¹ The term “jumpout” is slang in the D.C. area for infamous squads of armed police officers who conduct surprise “stop-and-frisk” maneuvers. See Nicole Flatow, *If You Thought Stop-And-Frisk Was Bad, You Should Know About Jump-Outs*, THINKPROGRESS (Dec. 11, 2014, 11:00 AM), <http://thinkprogress.org/justice/2014/12/10/3468340/jump-outs> [<http://perma.cc/F374-VL8L>].

² The United States has 5% of the world’s population but 25% of the world’s prisoners. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/us/23prison.html>. Its current rate of incarceration is about five to ten times that of other comparably wealthy countries and five times its own steady historical average prior to 1980. See generally Bruce Western & Becky Pettit, *Mass Imprisonment, in BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA* 11, 14–15 (2006); *Highest to Lowest — Prison Population Rate*, INT’L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 8, 2015) [<http://perma.cc/L79X-MRQB>].

cratic achievement to accomplish the transfer of thirteen million bodies each year³ from their homes and families and schools and communities into government boxes of concrete and metal. It is also a failure of the legal profession.

There is a lot to say about American policing; it is, of course, tied up in big things that people don't like to talk about in polite company, such as structural racism — which determined virtually every aspect of modern American society, like who owns things, what neighborhoods look like, who we care about, and who seems scary — and capitalism — whose logic proudly depends on the perpetual reproduction of domination and control. But in these few pages, I would like instead to explore carceral America as a failure of legal reasoning and legal practice.

The failure of lawyers is a tragedy in two parts. First, there has been an intellectual failure of the profession to scrutinize the evidentiary and logical foundations of modern policing and mass incarceration. Second, the profession has failed in everyday practice to ensure that the contemporary criminal legal system functions consistently with our rights and values.

I. OUR INTELLECTUAL FAILURE

Lawyers bear some responsibility for the gulf between how we talk about our society and how it is. We have failed to do what lawyers are taught to do: take fundamental shared values and help society translate those principles into results through rigorous argument based on evidence and logic.

I'd like to divide this intellectual failure into two components. First, lawyers have failed properly to catalog, appreciate, and interrogate the negative costs of how we police and how we jail. Second, we have failed to scrutinize the purported benefits, both because of a bizarre undertheorization of the amount of harm actually caused by what we popularly call "crime" and because of a scandalously underdeveloped account of whether caging humans leads to less "crime."

In order for the legal system to unleash police on poor communities such that the United States came to imprison black people at a rate six times that of South Africa during the height of Apartheid,⁴ it was necessary for popular culture and legal culture to develop and nurture serious intellectual pathologies. So deeply have these pathologies cap-

³ Of the more than thirteen million arrests in 2010, only 4% were arrests for "violent crimes." See FED. BUREAU OF INVESTIGATION, *Arrests*, in UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2010 (2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested/arrestmain.pdf> [<http://perma.cc/KD68-6ATE>].

⁴ LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 263 (2002).

ured the legal elite that the wholesale normalization of this brutality has become arguably the chief daily bureaucratic function of most of us who work in the system.

A. We Haven't Confronted the Suffering that We Inflict

Imagine one of the thousands of sentencing hearings every week in which a person is charged with possessing marijuana plants or selling rocks of cocaine. The prosecutor stands to address the court and produces a wheel. The prosecutor proposes as a punishment that the judge spin the wheel to determine the defendant's fate. The prosecutor declares that, based on the way that her office has constructed the wheel, there is a one-in-ten chance that the defendant's punishment is that he will be taken into the next room and raped.⁵ Or, to take a slightly different example, consider a judge ordering that a defendant be whipped in public or poked thirty-seven times with a sharp knife in non-life-threatening ways. It is likely that lawyers and judges would come up with persuasive arguments against such punishments. But this is essentially what we do when, in doctrinal silence, we allow people to be sentenced to American jails and prisons.⁶

There are a couple of points to make about this. First, notice the arbitrariness and intellectual vacuousness of the narrow range of standard legal argument. We are stuck inside the box. It should not require a slightly odd sentencing proposal to trigger rigorous examination of the magnitude of the harms that we are causing and to scrutinize whether they are worth it. Second, at some point lawyers allowed the legal system to view caging a person as more acceptable than other physical and psychological punishments and, then, we allowed those cages to degenerate into places in which a person will contract life-threatening illness, endure torturous solitary confinement, rape, physical assault, and a variety of other horrors. We then found it unimportant to incorporate those harms into our doctrinal thinking.

The legal profession and the doctrines that it produces exhibit a willful blindness to the extent of the physical and psychological punishments that we perpetrate. Putting a human being in a cage is brutal business — one that every lawyer should study in meticulous detail for herself. Lawyers must understand and communicate what it does

⁵ See ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ NO. 237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 5 (2012), <http://www.bjs.gov/content/pub/pdf/svrfspo8.pdf> [<http://perma.cc/JW94-4GQF>] (finding that 9.6% of former state prisoners reported at least one instance of sexual victimization during their most recent period of incarceration).

⁶ It is worth all lawyers contemplating George Bernard Shaw's brilliant "smallpox" analogy to explain the "thoughtless wickedness with which we scatter sentences of imprisonment." GEORGE BERNARD SHAW, *Preface* to MAJOR BARBARA (1907).

to a person to strip from him almost every form of humanity that we take for granted every day: to prevent him for years from eating at a restaurant, going on a date, making love, visiting a museum, traveling to a new place, hugging his mother, seeing his grandfather. But the consequences of the policing-to-incarceration pipeline go well beyond physical banishment; they include what we do to people in our cages: scandalous medical and mental health care, brutal beatings, rampant sexual trauma, extended periods of solitary confinement, and coerced labor; obliteration of parental and other family relationships; severing of friendships; loss of jobs; revocation of the right to vote; rendering families homeless; deportation; and crushing cycles of debt, despair, and alienation.

We have barely cared about these consequences largely because they aren't happening to wealthy white people. To the contrary, we have smothered, silenced, and erased them. One cannot even engage in a thought experiment about what would happen if other demographic groups were the ones being stopped, probed, strip searched, violently raided, disenfranchised, tased, shot, and caged for years because it is not possible to square such thoughts with how our society works. If nonviolent criminal laws were enforced on college campuses or investment banks for just a single day in the same rates as in poor communities, there would be twenty-four-hour news vans outside of every local jail and immediate public hearings about the harshness and efficacy of our legal system. Does anyone doubt that our lawyer-made doctrines of policing interactions, criminal procedure, sentencing, punishment, jail conditions, and every other area of related law would look thoroughly different? Instead, tens of millions of arrests later, we're starting to have symposia in which people talk about whether everything will be better if we give police more money to buy cameras for their lapels.

It is the responsibility of lawyers to ensure our fidelity to neutral principles — to ensure that our legal system does not allow practices to develop or to persist because of *who* they are happening to, and to ensure that the magnitude of grievous harm is witnessed and weighed regardless of the bodies and minds on whom that harm is visited. We have not done that.

B. We Haven't Bothered to Ask About the Benefits

At the same time that lawyers have failed to ensure a proper accounting of the costs of massive human arresting and caging, we have failed to demand a logical and rigorous discussion of its benefits. Under longstanding constitutional precedent, the deprivation of a fundamental right requires the application of strict scrutiny. That is a sensible rule: taking away the most basic human liberty should require

compelling reasons and should be done only to the limited extent that it actually achieves those objectives.⁷

Instead of taking this analysis seriously, we have allowed the discourse to be driven by irrational priorities and myths about what kinds of things are likely to cause us harm. The things that we are told to fear in order to justify brutal and repressive policies are hardly ever among the biggest preventable threats to our safety. “Terrorists” — a term whose propagandistic use has rendered it almost entirely devoid of meaning⁸ — cause miniscule amounts of harm compared to things like cigarettes,⁹ contaminated water,¹⁰ salty

⁷ See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” (quoting *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969))); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing the “fundamental nature of th[e] right” of freedom from confinement); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (“[A] statutory classification based upon suspect criteria or affecting ‘fundamental rights’ will encounter equal protection difficulties unless justified by a ‘compelling governmental interest.’”). Federal statutory law similarly provides that each sentence issued by a federal court must be “not greater than necessary” to accomplish legitimate enumerated goals. 18 U.S.C. § 3553(a) (2012). The federal courts have abandoned any serious intellectual inquiry of demonstrating that the particular prison terms that they impose, let alone the rampant imposition of mandatory minimum sentences for nonviolent drug offenses, are “necessary.”

⁸ See, e.g., Noam Chomsky, *International Terrorism: Image and Reality*, in WESTERN STATE TERRORISM (Alexander George ed., 1991), <http://www.chomsky.info/articles/199112--02.htm> [<http://perma.cc/ST3R-4LSX>]; Noam Chomsky, *Who Are the Global Terrorists?*, in WORLDS IN COLLISION: TERROR AND THE FUTURE OF THE GLOBAL ORDER (Ken Booth & Tim Dunne eds., 2002), <http://www.chomsky.info/articles/200205--02.htm> [<http://perma.cc/R3HQ-SDWN>]; Glenn Greenwald, *Salon Radio: Manipulative Use of the Term “Terrorism,”* SALON (Mar. 14, 2010, 8:16 AM), http://www.salon.com/2010/03/14/terrorism_20 [<http://perma.cc/3Z62-MVB6>]; Glenn Greenwald, *Terrorism in the Israeli Attack on Gaza*, THE INTERCEPT (July 29, 2014), <https://firstlook.org/theintercept/2014/07/29/terrorism-israelgaza-context> [<https://perma.cc/G6AV-C5LQ>]; Tomis Kapitan, *The Reign of “Terror,”* N.Y. TIMES OPINIONATOR (Oct. 19, 2014, 8:00 PM), <http://opinionator.blogs.nytimes.com/2014/10/19/the-reign-of-terror>. If we define terrorism as acts of violence against civilians to achieve political goals, perhaps the greatest perpetrator of terrorist violence in the modern era has been the American government. See, e.g., WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II* (2004); STEPHEN KINZER, *OVERTHROW: AMERICA’S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* (2006).

⁹ “Cigarette smoking is the leading cause of preventable disease and death in the United States, accounting for more than 480,000 deaths every year, or 1 of every 5 deaths.” *Current Cigarette Smoking Among Adults in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking (last updated Jan. 23, 2015) [<http://perma.cc/FJQ8-FVGW>]. Globally, over five million human beings die every year from tobacco, see *Tobacco*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs339/en> (last updated May 2014) [<http://perma.cc/UP9N-W7MU>], manufacturers of which threaten countries with debilitating litigation should they attempt to enact public health policies to protect their populations, see Sabrina Tavernise, *Tobacco Firms’ Strategy Limits Poorer Nations’ Smoking Laws*, N.Y. TIMES (Dec. 13, 2013), <http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html>.

¹⁰ Unsafe water and sanitation kill over 700,000 children under age five every single year from diarrhea. *Global Water, Sanitation, & Hygiene*, CTRS. FOR DISEASE CONTROL &

food,¹¹ car accidents,¹² poor access to health care,¹³ air pollution,¹⁴ and thousands of other problems that are easily fixable as a policy matter, especially if resources anywhere near the amount of resources expended on “public safety” or “national security” were devoted to them. Secondhand smoke alone kills ten times as many nonsmoking Americans *every year* as the September 11 attacks,¹⁵ and tobacco as a whole kills fifteen times as many Americans as secondhand smoke.

Modern policing has been sold using the same myths. For example, we are bombarded with the irrational myths that the most serious types of crime affecting our society are the kinds of violent crimes that police patrolling the streets supposedly fight and that entire poor communities are “high-crime areas.” The violent crime that forms the ostensible justification for modern policing tactics is a small problem compared to other causes of death and trauma, such as inadequate nutrition¹⁶ or campus sexual assault¹⁷ or any number of other actions that we don’t think of as “crime” to be fought, even when they are illegal. Regardless, the vast majority of modern policing is not even devoted to those violent crimes anyway¹⁸ — nor is it devoted to serious institutional white-collar crime or other leading causes of structural violence, such as wage theft, environmental pollution, and public corrup-

PREVENTION, http://www.cdc.gov/healthywater/global/wash_statistics.html (last updated Nov. 8, 2013) [<http://perma.cc/AGF2-T82N>].

¹¹ Excessive salt consumption, much of it from processed foods and chain restaurants, kills 2.3 million people worldwide and is responsible for one in every ten American deaths. Katie Moisse, *1 in 10 U.S. Deaths Blamed on Salt*, ABC NEWS (Mar. 21, 2013, 4:24 PM), <http://abcnews.go.com/blogs/health/2013/03/21/1-in-10-u-s-deaths-blamed-on-salt> [<http://perma.cc/6UZ4-AXPU>].

¹² Almost 10,000 Americans die every year from speeding alone. *Speed Management Safety*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., <http://safety.fhwa.dot.gov/speedmgt> (last updated Oct. 15, 2014) [<http://perma.cc/H43W-X4CR>].

¹³ As of 2009, lack of adequate health insurance killed 45,000 Americans every year. David Cecere, *New Study Finds 45,000 Deaths Annually Linked to Lack of Health Coverage*, HARVARD GAZETTE (Sept. 17, 2009), <http://news.harvard.edu/gazette/story/2009/09/new-study-finds-45000-deaths-annually-linked-to-lack-of-health-coverage> [<http://perma.cc/E4UQ-ULYX>].

¹⁴ Polluted air causes seven million deaths every year. *7 Million Premature Deaths Annually Linked to Air Pollution*, WORLD HEALTH ORG. (Mar. 25, 2014), <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en> [<http://perma.cc/4F37-2R9C>].

¹⁵ Thirty-four thousand nonsmoking Americans die every year from heart disease caused by secondhand smoke. *Health Effects of Secondhand Smoke*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects (last updated Mar. 5, 2014) [<http://perma.cc/SJ2G-QF93>].

¹⁶ Malnutrition is an underlying cause of forty-five percent of the 6.3 million child deaths that occur globally each year. *Children: Reducing Mortality*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs178/en> (last updated Sept. 2014) [<http://perma.cc/3Q9V-N458>].

¹⁷ “The victimization rate was 27.7 rapes per 1,000 female [college] students.” BONNIE S. FISHER ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ NO. 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<http://perma.cc/9LGW-MGPD>].

¹⁸ See FED. BUREAU OF INVESTIGATION, *supra* note 3.

tion.¹⁹ An intellectually rigorous system would, for example, study in great deal the connection between hundreds of billions of dollars in financial fraud and tax evasion and millions of easily preventable deaths, not dramatically reduce every year the resources devoted to fighting crime committed by the wealthy.²⁰ American police forces deliberately gorge on the excess of 750,000 marijuana-related arrests every year²¹ in order to profit from quotas, grants, and civil forfeiture²² while allowing hundreds of thousands of rape kits to sit untested for years in police warehouses.²³ Only 4% of all American police arrests are for crimes considered “violent” by the FBI, even though those crimes are offered as the justification for enormous public expenditures, wholesale Orwellian surveillance, and every violent aspect of modern policing. Yet another myth — one that is behind much of the militarization of modern policing and the development of correspond-

¹⁹ See Robert Kuttner, *America Should Send More People to Prison*, HUFFINGTON POST (Feb. 1, 2015, 10:59 PM), http://www.huffingtonpost.com/robert-kuttner/america-should-send-more-_b_6591730.html [<http://perma.cc/TLC7-45VT>]. The number of American “law enforcement” agents investigating white-collar crime and public corruption is a tiny fraction of the number patrolling communities and investigating street crime. See *infra* note 20.

²⁰ It is difficult to quantify the suffering and death caused by large-scale financial fraud and tax evasion, but estimates of the costs of poverty are staggering and approach one million deaths annually in America alone. See, e.g., Nicholas Bakalar, *Researchers Link Deaths to Social Ills*, N.Y. TIMES (July 4, 2011), <http://www.nytimes.com/2011/07/05/health/05social.html> (citing a study led by Columbia University researchers and based on data from 2000, when many fewer Americans were living in poverty). In any case, such devastating crimes constitute a minuscule and decreasing percentage of domestic policing resources. See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, FOLLOW-UP AUDIT OF FEDERAL BUREAU OF INVESTIGATION PERSONNEL RESOURCE MANAGEMENT AND CASEWORK ii–iii (2010) (finding that fewer resources were devoted to investigating white-collar crime), <http://www.justice.gov/oig/reports/FBI/a1024.pdf> [<http://perma.cc/S6JM-ZURU>]; William K. Black, *Mueller: I Crippled FBI Effort v. White-Collar Crime, My Successor Will Make It Worse*, NEW ECON. PERSPS. (Aug. 26, 2013), <http://neweconomicperspectives.org/2013/08/mueller-i-crippled-fbi-effort-v-white-collar-crime-my-successor-will-make-it-worse.html> [<http://perma.cc/5U2F-E6MR>]; Mike Masnick, *FBI Admits It’s Not Really About Law Enforcement Any More; Ignores Lots of Crimes to Focus on Creating Fake Terror Plots*, TECHDIRT (Jan. 6, 2014, 11:09 AM), <https://www.techdirt.com/articles/20140106/00442525768/fbi-admits-its-not-really-about-law-enforcement-any-more-ignores-lots-crimes-to-focus-creating-fake-terror-plots.shtml> [<http://perma.cc/R8AN-DLYQ>] (discussing the dwindling resources devoted to investigating and policing white-collar crimes).

²¹ Matt Ferner, *One Marijuana Arrest Occurs Every 42 Seconds in U.S.: FBI Report*, HUFFINGTON POST (Apr. 15, 2014, 7:59 AM), http://www.huffingtonpost.com/2014/10/29/one-marijuana-arrest-occu_n_2041236.html [<http://perma.cc/QF5K-9ZM8>].

²² For a discussion of the profit motive in modern policing, see *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1723–46 (2015). See also Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, <http://www.newyorker.com/magazine/2013/08/12/taken> [<http://perma.cc/2CQE-75P4>]; *Drug Task Force Scandals: A National Look*, PBS INDEP. LENS (Feb. 23, 2009), <http://www.pbs.org/independentlens/tuliatexas/scandals.html> [<http://perma.cc/35Z4-9Q4W>].

²³ See Caitlin Dickson, *How the U.S. Ended Up with 400,000 Untested Rape Kits*, THE DAILY BEAST (Sept. 23, 2014), <http://www.thedailybeast.com/articles/2014/09/23/how-the-u-s-ended-up-with-400-000-untested-rape-kits.html> [<http://perma.cc/HGD4-ZRSP>].

ing legal doctrine to insulate it from accountability — is that policing is a uniquely dangerous job. But contemporary policing is far safer than the work performed by much of the American labor force.²⁴

Perhaps the most striking thing, however, about American policing and mass incarceration is that there is no evidence that they work — even on their own terms. Even if the most serious activities harming the greatest number of human lives were the things that we are currently policing and prosecuting in large numbers, we have never bothered to scrutinize whether jailing people who commit them is the best way to have fewer of those incidents occur.²⁵ If I had to pick one pathology at the core of the modern American legal system, it would be this.²⁶

²⁴ Max Ehrenfreund, *Charted: The 20 Deadliest Jobs in America*, WASH. POST WONKBLOG (Jan. 28, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/28/charted-the-20-deadliest-jobs-in-america> [<http://perma.cc/JG3S-FAC7>]; see also Daniel Bier, *By the Numbers: How Dangerous Is It to Be a Cop?*, FOUND. FOR ECON. EDUC. (Aug. 19, 2014), <http://fee.org/blog/detail/by-the-numbers-how-dangerous-is-it-to-be-a-cop> [<http://perma.cc/87KW-GH5P>].

²⁵ The scientific consensus is that increases in sentence length, such as those seen in American criminal practice over the last several decades, have not had any significant effect on deterrence. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, in 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 28–29 (Michael Tonry ed., 2006) (“Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence.” (citations omitted)). And yet only after decades of brutal imprisonment are we starting to consider “alternatives” to incarceration, such as drug treatment, which has been proven for many years to be far more cost-effective than caging people. See, e.g., JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY (2008), http://www.justicepolicy.org/images/upload/08_01_rep_drugtx_ac-ps.pdf [<http://perma.cc/9EXJ-XSA9>].

To put the point slightly differently, consider the growing body of evidence that violent crime rates may actually be determined in significant part by lead exposure in children. See Kevin Drum, *America's Real Criminal Element: Lead*, MOTHER JONES, Jan.–Feb. 2013, <http://www.motherjones.com/environment/2013/01/lead-crime-link-gasoline> [<http://perma.cc/2EBM-VFPW>]. On a broader level, poverty alleviation, access to healthy food, education that stimulates intellectual and artistic passions, gender equality, and a number of other factors play a role in creating flourishing, safe communities. Our current legal system instead thoughtlessly uses police and prisons as a first resort to control the manifestations of social problems in these other areas rather than reducing the need for policing and prisons by addressing those problems.

²⁶ See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003), http://www.feministes-radicales.org/wp-content/uploads/2010/11/Angela-Davis-Are_Prisons_Obsolete.pdf [<http://perma.cc/D6EQ-6EAA>].

Again, here, the juxtaposition of modern policing tactics with “terrorism” discourse is instructive. We have used the threat of “terrorism” to justify torture, targeted murder, bloody wars, an all-encompassing global surveillance apparatus that alters the nature of free thought, and trillions of dollars in spending that could otherwise have transformed the lives of every single American by ending poverty, saving our environment, and revitalizing our entire domestic infrastructure. We have done all of this without any evidence that those actions actually create fewer “terrorists” and despite very real evidence that they only exacerbate the problem. See, e.g., Mark Mazzetti, *Use of Drones for Killings Risks a War Without End, Panel Concludes in Report*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/26/world/use-of-drones-for-killings-risks-a-war-without-end-panel-concludes-in-report.html> (discussing bipartisan panel’s criticism of government for failing to rigorously weight costs and benefits of drone strikes). See generally *Data Rivers 2.0*, GLOBAL TERRORISM DATABASE, UNIV. OF MD., <http://www.start.umd.edu/gtd>

What kind of legal culture allows the massive deprivation of basic liberty without *any* evidence? If we want to put one person into a cage for a single criminal offense, we are required, at least in theory, to present evidence so compelling that there is no reason to doubt the person's guilt. We have to be very close to certain, for example, that the heroin found in the backpack belonged to the accused. But laws authorizing the imprisonment of tens of thousands of people have gotten no such scrutiny — we have not required *any* factual showing that they lead to *any* benefits. Lawyers have never required evidence that jailing people with heroin in their backpacks furthers a compelling social purpose.

To take another example, it seems clear that, if a state legislature passed a law terminating parental rights (which are also considered fundamental rights²⁷) of anyone allowing their child to drink Coca-Cola, the law would be struck down under a strict scrutiny analysis. And yet, the same legal system is willing to deprive tens of thousands of people of fundamental liberty (and, incidentally, functionally to infringe their parental rights as a consequence collateral to incarceration) for the simple crime of possessing a plant for their own use. To the extent that some types of “crime” are causing a great deal of social harm — and some of them are — we must still require evidence that putting the perpetrators in cages is the best way to create a society in which fewer of those crimes happen. Lawyers must be learned people of evidence and logic ushering society through this difficult terrain, not callous bystanders or, worse, exuberant cheerleaders.

Imagine an ordinary citizen, walking down the street smoking a cigarette. Without more, that person cannot even be patted down by police. Even an order by police to stop walking or the brush of a hand along the outer portion of the person's clothing by police would be unconstitutional. But, if that same person were holding a cigarette containing marijuana in addition to tobacco, the person may be bound in chains, removed from the street, strip searched, placed in a cage, and even held in solitary confinement with no human contact or natural light if his jailors so choose. All of this brutal treatment is now authorized because the person is a “criminal.” And this says nothing of the fact that the person may now lose her job, be kicked out of school,

/features/GTD-Data-Rivers.aspx (last visited Apr. 8, 2015) [<http://perma.cc/K4CK-EHH4>] (charting patterns in rise of terrorism-related incidents by country and region since the United States announced its “War on Terror”).

If courts and lawyers justify assassinations, indefinite detention, and dragnet global surveillance to counter a threat not nearly as significant as the threat of speeding or drunk driving, what will happen when we are asked to apply these principles to perceived domestic problems? The creeping adoption of the language and logic of military battles against “terrorists” into domestic policing reflects a slow march toward fascism that I fear we will not perceive until it is too late.

²⁷ See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion).

lose her home, and be barred from seeing her children, parents, or spouse for months or years. But lawyers never forced us to ask the fundamental question: *Are we sure that putting human beings in cages is absolutely necessary to creating a world with fewer people walking around smoking marijuana?* And, more broadly, that it is necessary to *creating the kind of flourishing society that we want to live in?*

All of this makes the failure of the legal system to apply strict scrutiny to criminal punishment all the more bizarre. We do not act like a society that treats brutal human caging as a narrowly tailored remedy of last resort. The failure to require reasons and evidence has been a sad chapter in American legal history.

II. THE LEGAL PROFESSION IN PRACTICE

A modern de Tocqueville traveling through America's courts and dedicating herself to reverse engineering a list of the basic principles of American law based on what she finds there would produce a document very different from the Bill of Rights. She might envision, as the boy in my class imagined, a society whose values one could identify by looking at the behavior of officials in its "palladiums of liberty."²⁸ But she would be mistaken.

A. *What Do Courts and Jails and People's Experiences Actually Look Like?*

I walked into a local courtroom in Alabama one morning in early 2014 and saw over sixty people of color led into the courtroom from the jail. All of them had been arrested by local police on warrants in cases in which they owed unpaid debt, mostly from old tickets. One by one — single mothers, disabled veterans, the homeless, and other impoverished people — they stood up before the court. The court demanded that they pay their debts and told them that they would be kept in jail unless they could get the money down to the payment window. They begged and pleaded and talked about their poverty. Within seconds, each of their cases was over, and they were returned to the overcrowded city jail to sit out their debts at \$50 per day. Fifty-eight days for one, ninety-nine days for another, twelve days for a third . . . Local police running the jail informed them that they could get out of jail more quickly by earning \$25 toward their debts each day if they agreed to perform janitorial labor for the city. I have seen similar assembly line nightmares in virtually every city and every state that I have visited over the past year. The rise of modern debtors' prisons is a phenomenon affecting hundreds of thousands of people all over the

²⁸ *Illinois v. Allen*, 397 U.S. 337, 346 (1970).

country,²⁹ and it is happening almost entirely outside of the public consciousness. For example, while the police shooting of an unarmed black teenager in Ferguson, Missouri, captured mainstream public attention, especially in the wake of the militarized police assault on journalists and protestors in the weeks that followed, less salient was the fact that the City of Ferguson had, for several years, averaged more than 3.6 arrest warrants *per household*,³⁰ often because of warrants relating to unpaid debt from tickets.

What happens every day in American streets, courts, and jails bears little resemblance to what is written in our law books. To learn about that, I encourage readers to visit their local courts and jails, to ask people in heavily policed communities about their daily experiences, and to read the overwhelming narrative³¹ and empirical literature on the topic.

Consider a few of the many examples:

- Although the law promises indigent defendants a zealous attorney, the system almost entirely ignores that right in practice. Every serious observer recognizes an indigent defense “crisis” in which most of the millions of American criminal defendants each year receive barely any individualized representation at all, let alone a zealous investigation into and presentation of the questions relevant to their fac-

²⁹ See, e.g., Class Action Complaint, *Fant v. City of Ferguson*, No. 4:15-cv-253 (E.D. Mo. Feb. 8, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf> [<http://perma.cc/GF9L-HXAN>] (I represent the plaintiffs in this case); First Amended Class Action Complaint, *Mitchell v. City of Montgomery*, No. 2:14-cv-186 (M.D. Ala. May 23, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Complaint.pdf> [<http://perma.cc/XF2C-E9PS>] (same); Chris Albin-Lackey, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION (2014), <http://www.hrw.org/reports/2014/02/05/profitting-probation>.

³⁰ See MO. SUPREME COURT, 2013 MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2013, at 302, 303, <http://www.courts.mo.gov/file.jsp?id=68905> [<https://perma.cc/Y99G-4YGM>]; U.S. CENSUS BUREAU, *Ferguson (City), Missouri*, U.S. CENSUS BUREAU: ST. & COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/29/2923986.html> (last visited Apr. 8, 2015) [<http://perma.cc/N4E3-TFJN>].

³¹ See, e.g., Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, <http://www.newyorker.com/magazine/2009/03/30/hellhole> [<http://perma.cc/6ZN2-GEPS>]; Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014, <http://www.newyorker.com/magazine/2014/10/06/law-3> [<http://perma.cc/NQU8-VP77>]; Julie K. Brown, *In Miami Gardens, Store Video Catches Cops in the Act*, MIAMI HERALD (Sep. 8, 2014, 6:58 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article1957716.html> [<http://perma.cc/9ESM-69MW>]; Julie K. Brown, *Prisoner: I Cleaned Up Skin of Inmate Scalded in Shower; Human-Rights Groups Call for Federal Intervention*, MIAMI HERALD (June 25, 2014, 10:28 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article1972693.html> [<http://perma.cc/K6G7-SR4A>]; Shaun King, *One Small Town's Police Have Killed More People than Police in Germany and the UK Combined*, DAILY KOS (Feb. 12, 2015, 7:22 AM), <http://www.dailykos.com/story/2015/02/12/1363996/-Pasco-Washington-police-have-killed-more-people-than-police-in-Germany-the-UK-combined> [<http://perma.cc/462T-YP2D>]; Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: “For Being a F**king Mut”*, THE NATION (Oct. 8, 2012), <http://www.thenation.com/article/170413/stopped-and-frisked-being-fking-mutt-video> [<http://perma.cc/3FVN-ABUD>].

tual guilt and mitigation of punishment.³² On recent trips to Tennessee, Alabama, and Missouri, for example, I saw hundreds of defendants in minor misdemeanor cases plead guilty without a lawyer just so that they could finally get out of jail after weeks in custody because they were too poor to pay for their release pending trial, and I saw judges routinely inform jailed defendants that they would refuse to give them a court-appointed lawyer if their families were able to pay a bond to have them released from jail. Local public defenders reported to me that there was often little that they could do anyway even if they were appointed given that they had between 1000 and 2000 cases per year and barely any investigative resources.

- In a system that guarantees the right to trial unless the right is waived knowingly, intelligently, and voluntarily, over 90% of all defendants plead guilty³³ because they are told that they will be given more serious punishment if they do not plead guilty.

- Although our legal system proclaims that “[i]n our society[,] liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,”³⁴ over 500,000 human beings are kept in an American cage *every single day* solely because they are too poor to make a monetary payment to secure their pretrial release.³⁵ I have seen, within the past several months, a woman held in jail for two weeks after being pulled over for failure to stop completely at a stop sign and for disobeying the order of a police officer because she could not pay \$200, and another woman jailed for over a month because of her inability to pay several hundred dollars in a case charging her with being a passenger in a car that contained a burned marijuana cigarette butt in the ashtray.

- After conducting interviews with community groups, victims, and lawyers in dozens of cities, as well as performing simple Internet searching, I have been unable to find a major metropolitan American police force without a recent history of systemic constitutional abuses.³⁶

³² See, e.g., David Carroll, *Gideon's Despair*, MARSHALL PROJECT (Jan. 2, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis> [https://perma.cc/55KG-JL2M?type=source].

³³ Andrew E. Taslitz, *The Guilty Plea State*, CRIM. JUST., Fall 2008, at 4, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_taslitz.authcheckdam.pdf [http://perma.cc/V8PN-GU3C].

³⁴ United States v. Salerno, 481 U.S. 739, 755 (1987).

³⁵ See, e.g., Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NPR (Jan 21, 2010, 2:00 PM), <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates> [http://perma.cc/YC64-4PMZ].

³⁶ See, e.g., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9 n.7 (2014), <http://big.assets.huffingtonpost.com/NPDFindingsReport.pdf> [http://perma.cc/PE2D-2LBG] (finding up to 93% of police stops in Newark to be unjustified); A.C. Thompson, *Feds Find "Systemic Violations of Civil Rights" by New Orleans Police Department*, PROPUBLICA (Mar. 17, 2011, 3:40 PM), <http://www.propublica.org/nola/story/feds-find-systemic>

- For many decades, American courts have allowed criminal convictions based on policing and forensic techniques that lack a scientific basis. Even after these methods were formally exposed as unscientific by the most prestigious collection of American scientists,³⁷ police, prosecutors, and courts continued to use them every day nonetheless.
- Although every member of our culture understands that armed confrontations with law enforcement are pervaded by coercion and abuse, the legal system presumes such interactions to be consensual.
- In a society that holds out its police forces and courts as guardians of justice, an overwhelming driving force of local policing and

-violations-of-civil-rights-by-new-orleans-police-departm [http://perma.cc/A8CZ-PQWP]; see also, e.g., Spencer Ackerman, *Inside Chicago's Legacy of Police Abuse: Violence "as Routine as Traffic Lights,"* THE GUARDIAN (Mar. 3, 2015, 12:39 PM), <http://www.theguardian.com/us-news/2015/mar/03/chicago-police-violence-homan-square> [http://perma.cc/6MEP-ULCH]; Alice Brennan & Dan Lieberman, *Florida City's "Stop and Frisk" Nabs Thousands of Kids, Finds 5-Year-Olds "Suspicious,"* FUSION (May 9, 2014), <http://fusion.net/justice/story/miami-gardens-stop-frisk-nabs-thousands-kids-finds-667430> [http://perma.cc/QE64-PE75]; John Conroy, *Police Torture in Chicago,* CHI. READER, Oct. 8, 2009, <http://www.chicagoreader.com/chicago/police-torture-in-chicago-jon-burge-scandal-articles-by-john-conroy/Content?oid=1210030> [http://perma.cc/XP5P-2K3V]; Nick Pinto, *When Cops Break Bad: Inside a Police Force Gone Wild,* ROLLING STONE (Jan. 29, 2015), <http://www.rollingstone.com/culture/features/when-cops-break-bad-albuquerque-police-force-gone-wild-20150129> [http://perma.cc/7CHH-EWHC]; Catherine E. Shoichet, Elliott C. McLaughlin & Kyung Lah, *Justice Dept.: Cleveland Police Has Pattern of Excessive Force,* CNN (Dec. 4, 2014, 8:59 PM), <http://www.cnn.com/2014/12/04/us/cleveland-justice-department-police-excessive-force> [http://perma.cc/TV5J-ATV3].

Unlawful policing tactics have also spawned a pandemic of perjury, popularly called "testilying" by police officers and others. See, e.g., Radley Balko, *How Do We Fix the Police "Testilying" Problem?*, WASH. POST (Apr. 16, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/04/16/how-do-we-fix-the-police-testilying-problem> [http://perma.cc/7V3Y-CFPM]; Nick Malinowski, *Testilying: Cops Are Liars Who Get Away with Perjury*, VICE (Feb. 3, 2013), <http://www.vice.com/read/testilying-cops-are-liars-who-get-away-with-perjury> [http://perma.cc/TR2U-WFEL]. Although quantification of this problem is difficult, my interviews of public defenders, criminal defendants, and police officers around the country support the conclusion that the vast majority of criminal cases concerning guns and drugs include some kind of false or misleading statements in order to conceal a constitutional violation.

Just as we are irrationally drawn to focus on "bad criminals," many people look at these stories and seek to blame "bad cops." This is a serious mistake. Part of the system's success is its ability to get people to focus on criticizing "bad apples" rather than on challenging deeper structural problems.

³⁷ NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 7 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [https://perma.cc/NY2W-3H67] (concluding that, except for DNA evidence, every other area of forensic testimony offered for decades in American courts lacked a reliable scientific basis that supported many conclusions offered by so-called forensic "experts"); see also, e.g., David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire> [http://perma.cc/F9DH-6WLW]; Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, WASH. POST (Apr. 16, 2012), http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html [http://perma.cc/EE2Y-DPW5].

municipal court practice in wide swaths of the country is revenue generation.³⁸

- In courtrooms across America, people are sent to jail every day on the basis of a single witness's testimony (often a police officer) with no supporting evidence, even though, as a matter of common sense, it is impossible for a reasonable person not to have a doubt about the observations or motivations of a single human witness.³⁹ Instead, most lawyers and judges typically view the motion for a directed verdict as a meaningless formality rather than as a fundamental obligation to ensure that no conviction is entered if a reasonable person would have had a reason to doubt guilt.⁴⁰

- In a society that requires prisoners to be treated humanely, American jails and prisons are cesspools of disease⁴¹ and trauma.⁴²

B. *The Distribution of Legal Labor*

Contemporary American policing creates, every day, an enormous need for civil and criminal legal services for the poor. When people talk vaguely about a legal services “crisis” for the poor, they are describing a system in which the basic legal rights of the poor are ignored because there are not enough lawyers offering quality legal services for the poor. For example, even apart from the millions of pending criminal cases for which people are not being provided a well-resourced and zealous attorney, every one of the thousands of unlawful stops, searches, home raids, beatings, taserings, shootings, and arrests that take place every day forms the basis for a freestanding constitu-

³⁸ See, e.g., Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

³⁹ See, e.g., *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited Apr. 8, 2015) [<http://perma.cc/7BCG-KHKS>].

⁴⁰ For example, although courts created a doctrine that a person cannot be convicted of perjury based only on the testimony of a single other witness, see *Weiler v. United States*, 323 U.S. 606, 607 (1945) (“The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment.” (quoting *Hammer v. United States*, 271 U.S. 620, 626 (1926)) (internal quotation marks omitted)), American courts nonetheless allow such convictions for much more serious crimes, like murder, and routinely allow police officers to secure convictions for entirely victimless crimes that may not even have occurred.

⁴¹ See, e.g., COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, VERA INST. OF JUSTICE, *CONFRONTING CONFINEMENT* 13 (2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf [<http://perma.cc/8UK8-USMJ>] (“Every year, more than 1.5 million people are released from jail and prison carrying a life-threatening contagious disease.”).

⁴² See, e.g., ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, NCJ NO. 241399, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12*, at 6 (2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<http://perma.cc/N2R5-VV8W>] (finding that 3.2% of jail inmates reported being sexually abused during their current stay in jail).

tional civil rights suit. A quiet tragedy of the legal system is that these rampant daily violations are almost never litigated.

Although lawyers have a moral and professional responsibility to address the policing and incarceration crisis, although they possess the training to engage in the intellectual and practical work that needs to be done, and although they possess a virtual monopoly on the ability to use the law to vindicate those rights, the distribution of legal labor is woefully inadequate to deal with this crisis.

We must totally rethink the distribution of legal labor in order to force the system of modern policing adequately to internalize the costs of the human rights violations on which it is predicated. Just as the court system could not physically accomplish the transfer of 2.3 million bodies into cages while also providing in each case a zealous defense and rigorous scrutiny, so too modern policing would cease to function if every constitutional violation was pursued with vigor. The modern criminal legal system thrives on the fact that the Constitution is not self-executing — it needs people vigilantly devoted to making its promises real. Imagine a world in which lawyers stood ready, en masse, to use their skills and training and intellects to vindicate these constitutional rights every day. Such a social movement of lawyers would dramatically alter the nature of the legal system and our society. The system of modern policing, which depends on callous indifference to vindicating basic rights, would crumble at our simple willingness to hold it to its own formal rules. We can do it, but only through massive collective action to act on our professional and moral values.

Lawyers and the schools that produce them must begin thinking through this challenge of redistributing legal labor. We must organize collective action to refuse to participate in constitutional violations caused by enormous caseloads and inadequate investigative resources that plague nearly every American indigent defense system. We must also work to create better models for legal careers, using law schools to help create well-resourced spaces for graduates to work together as a new vanguard of lawyers who make a living by vindicating the rights of marginalized people until a system predicated on those violations can no longer exist.

Legal academics, judges, and lawyers of conscience must take up this two-pronged challenge: we must bring intellectual rigor to legal discourse and doctrine on these issues, and we must use the energy that animates our bodies to ensure that the legal system looks in practice as it appears in our scrolls and on our marble monuments.