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Let Us Live with All the People

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Introductions

Let Us Live with All the People

Judith Colenback Savage*

* Distinguished Jurist in Residence, Roger Williams University School of Law (2014 to date) (assisted *Roger Williams University Law Review* in hosting historic symposium on mass incarceration, entitled *Sounding the Alarm on Mass Incarceration: Moving Beyond the Problem and Toward Solutions* (March 27, 2015)); taught Criminal Procedure: Adjudication and *The New Jim Crow: Incarceration in the Age of Colorblindness* (a perspectives course based on Michelle Alexander's groundbreaking book of the same title (2015–2016)); Co-Chairperson, Governor's Justice Reinvestment Working Group (2015-16); Keynote Speaker, Rhode Island Mental Health Summit (2015); Associate Justice, Rhode Island Superior Court (1993–2013); Executive Counsel to Rhode Island Governor Bruce Sundlun (1991–1993); Edwards & Angell (Partner, 1989–1991; Associate, 1984–1989); Law Clerk to the late Ruggero J. Aldisert, former Chief Judge of the United States Court of Appeals for the Third Circuit (1982–1984); J.D., Case Western Reserve University School of Law (1982); B.A., Wellesley College (1979).

The *Roger Williams University Law Review* symposium on mass incarceration, to which this edition of the *Law Review* is dedicated, attracted one of the largest audiences in the history of the law school, including most of the judges of the Rhode Island state and federal judiciary, a large swath of the state and federal criminal bar, public officials, justice-involved individuals, students and faculty, and a plethora of individuals and organizations involved in the criminal justice arena. The symposium helped to jumpstart a statewide conversation on criminal justice reform that continues to reverberate today. This edition of the *Roger Williams University Law Review* publishes much of material presented at the symposium concerning our national problem of mass incarceration and our distinctly Rhode Island problem of mass probation and seeks to continue the conversation about criminal justice reform in Rhode Island.

On January 29, 2016, Roger Williams University School of Law honored me as its 2016 Champion for Justice. In accepting the award from the

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Let us celebrate justice. Fair justice. Better justice. Justice for all. The kind of justice about which Eleanor Roosevelt spoke: “Justice that cannot be for one side alone but must be for both.”¹ The moral imperative of our time.

Let us also celebrate a law school that is carrying out a mission so prized by Justice Louis D. Brandeis a century ago when he wrote *The Living Law*:² education that combines the intellectual and the practical.³ “The intellectual tends to breadth of view; the practical to [the realities of contemporary society] which are essential to the wise conduct of life.”⁴

Justice Brandeis was fearful of a society where lawyers and judges would become disconnected from the broader community.⁵ He revered the lawyers of old—the general practitioners who came from small towns across America that brought them into contact with diverse cases and clients of diverse standing.⁶ “[T]he same lawyer was apt to serve at one time or another both rich and poor, both employer and employee.”⁷ Put in broader terms, lawyers were apt to know both victims and the accused, the educated and the uneducated, those who worked and those who did not, those who suffered in silence with mental illness and addiction and those who were well, those who wielded great power and those who had none.

Deep connections in the community gave lawyers a social and economic education beyond the intellectual rigors of their legal education.⁸ “[N]early every lawyer . . . took some part in political

Feinstein Center for Pro Bono and Experiential Education, I delivered remarks, now recast in lengthier form for publication in this article. I accepted the award on behalf of those at the law school and in the broader community who have worked, are working and will work for greater justice.

I dedicate this piece to Dean Michael J. Yelnosky, who gave me voice, and to those law students who worked tirelessly to help all of us get closer to those who are imprisoned or on probation or parole and to the most significant criminal justice issues of our time.

1. ELEANOR ROOSEVELT, *THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT* (Harper Publishing 1961).

2. LOUIS D. BRANDEIS, *The Living Law*, 10 ILL. L. REV. 461 (1916) (delivering an address to the Chicago Bar Association on January 3, 1916).

3. *Id.* at 469.

4. *Id.*

5. *Id.* at 469–70.

6. *Id.* at 469.

7. *Id.*

8. *Id.*

life.”⁹ “Our greatest judges,” he observed, “had secured this training.”¹⁰

The revered justice warned of the dangers of an increasingly industrialized and urbanized society that would transform lawyers from generalists to specialists.¹¹ They would practice in discrete areas of the law with a narrow range of clients.¹² Their professional lives would become decidedly more intense, with little time for involvement in public affairs.¹³ “[T]his contraction of the lawyers’ intimate relation to contemporary life” would come at the expense of “accurate and broad knowledge of present day problems essential to the administration of justice.”¹⁴ They would have “deep[] . . . knowledge in certain subjects . . . purchased at the cost of vast areas of ignorance [with the] grave danger [that they would suffer] distortion of judgment.”¹⁵ Lawyers would become distanced from the people and simply be lesser lawyers.¹⁶

Judges, drawn from this pool of lawyers, would lack the breadth of knowledge and life experience essential to wise judicial decision-making.¹⁷ The lawyers appearing before those judges, suffering from the same malady, would not be able to fill the gap.¹⁸ It would be the blind leading the blind.¹⁹

Justice Brandeis recognized that this trend toward legal specialization and an increasingly divided society would be unlikely to change.²⁰ “We are powerless to restore the general practitioner and general participation in public life,” he bemoaned.²¹ But he saw the remedy in making sure that lawyers and judges engaged in the “fresh study of social conditions,”²² delving deep into the lives of all people in the community.

He told the story of a learned man from an ancient city off the

9. *Id.*

10. *Id.*

11. *Id.* at 469–70.

12. *Id.*

13. *Id.*

14. *Id.* at 470.

15. *Id.*

16. *Id.* at 469–70.

17. *Id.* at 470.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (quoting statement of Professor Hendeson).

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coast of Dalmatia—now Croatia—who was a keen student of the law and then a distinguished professor.²³ This wise man of old was called upon by the emerging nation of Montenegro—only a few miles distant from his own country—to draft its code of law.²⁴ But he did not stay at his university desk to undertake this task, confident that his intellect would be the only tool he would need to make good law and good decisions.²⁵ He instead moved to the fledgling nation of Montenegro “and for two years literally made his home with the people,—studying everywhere their customs, their practices, their needs, their beliefs, their points of view.”²⁶ “Then he embodied in law the life which the people of Montenegro lived.”²⁷ And the citizens of Montenegro held him in great esteem and “respected that law [] because it expressed the will of [all of] the people.”²⁸

This story provides a powerful lesson that can guide us through these turbulent times of racial and social unrest and criminal justice reform.²⁹ It is reminiscent of the profound,

23. *Id.* at 470–471.

24. *Id.*

25. *Id.* at 471.

26. *Id.*

27. *Id.*

28. *Id.*

29. The year of the symposium marked a national sea change in criminal justice. The killing of unarmed African American men by white police officers, often captured on videotape, sparked protests and riots, ignited a national conversation about race, crime, and mass incarceration, and prompted state and federal criminal justice reform initiatives designed to address racial bias in policing and lower rates of incarceration and probation that disproportionately affect African Americans and Latinos. See Peter Dreier, *Cold Anger in Restless Times: The Growing Movement for Racial and Social Justice*, HUFFINGTON POST (Dec. 6, 2014, 11:17 AM), http://www.huffingtonpost.com/peter-dreier/the-growing-movement-for-racial-and-social-justice_b_6280412.html; Lauren-Brooke Eisen, *Criminal Justice Reform in 2015: Year End Review*, HUFFINGTON POST (Dec. 28, 2015, 2:07 PM), http://www.huffingtonpost.com/laurenbrooke-eisen/criminal-justice-reform-i_b_8885572.html; see also Katherine Gregg, *Rhode Island to Review Prison, Parole, Probation Systems*, PROVIDENCE J. (July 7, 2015, 12:01 AM), <http://www.providencejournal.com/article/20150707/NEWS/150709582>; John Hill, *People of Color Sent to Prison, Put on Probation Far More than Whites*, PROVIDENCE J. (Dec. 5, 2015, 10:30 PM), <http://www.providencejournal.com/article/20151205/NEWS/151209537>. For a series of articles on these issues, see the series *Race in Rhode Island*, published by the *Providence Journal* from May 11, 2015–Dec. 26, 2015, available at <http://www.providencejournal.com/special-reports/race-in-rhode-island>.

The *Roger Williams University Law Review* started planning its symposium on mass incarceration in 2014 before “Ferguson”—the riots in Ferguson, Missouri that erupted in August 2014 after Darren Wilson, a white police officer, shot Michael Brown, an unarmed 18-year-old African American man, and erupted again three months later when the Grand Jury declined to indict the officer for any crimes in connection with the shooting. See Julia Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>; Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>. At that time, many people in Rhode Island, including people working in the criminal justice system, were unfamiliar with the term “mass incarceration,” notwithstanding its less public discussion for over a decade by academicians, writers, journalists, and criminal justice reform advocates. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Mary Pattillo, Bruce Western & David Weiman eds., 2004); Randolph N. Stone, *Mass Incarceration: Perspectives on U.S. Imprisonment*, 7 U. OF CHI. L. SCH. ROUNDTABLE 91 (2000); Adam Gopnik, *The Caging of America*, NEW YORKER: MAG. (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>; see generally *The Sentencing Project News*, SENT’G PROJECT, <http://www.sentencingproject.org/template/index.cfm>.

The Sentencing Project, for example, has studied the issue for thirty years and advocated for reforms in sentencing policy and alternatives to incarceration. Marc Mauer, its Executive Director, was the Featured Speaker at the Roger Williams University Law Review symposium on March 27, 2015 at which he made a presentation, republished at 21 *Roger Williams U. L. Rev.* 447 (2016), entitled “*Race to Incarcerate: The Causes and Consequences of Mass Incarceration.*”

When people inquired at that time about my work at the law school, I would talk about the students’ intent to shine the light on the issue of mass incarceration at the spring Law Review symposium the following year. I recall several memorable responses: (1) “Did you say mass transportation?”; (2) “Is mass incarceration like mass torts?”; (3) “Why are you focusing on incarceration in Mass[achusetts] rather than Rhode Island?” I knew those comments bode well for a major consciousness-raising event.

And then came “Ferguson”—an event that seized the attention of the nation, provided context helpful to an understanding of mass incarceration and rapidly propelled that issue into our national consciousness. See Nicholas Kristof, *When Whites Just Don’t Get It*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/opinion/sunday/nicholas-kristof-after-ferguson-race-deserves-more-attention-not-less.html>; Nicholas Kristof, *When Whites Just Don’t Get It, Part 2*, N.Y. TIMES (Sept. 6, 2014), <http://www.nytimes.com/2014/09/07/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-2.html>; Nicholas Kristof, *When Whites Just Don’t Get It, Part 3*, N.Y. TIMES (Oct. 12, 2014), <http://www.nytimes.com/2014/10/12/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-3.html>; Nicholas Kristof, *When Whites Just Don’t Get It, Part 4*, N.Y. TIMES (Nov. 16, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-4.html>.

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reverent message delivered by death penalty lawyer Bryan Stevenson³⁰ in his keynote address at our historic symposium on mass incarceration in March of 2015.³¹ Through the power of personal narrative, he told us to “get proximate”—to “get close”—to the people and issues that matter most, to inequality and injustice in our community, to those people who live on the margins, behind bars or with the stain and stigma of criminality.³² It is the same message that the wise man taught us

[p://www.nytimes.com/2014/11/16/opinion/sunday/when-whites-just-dont-get-it-part-4.html](http://www.nytimes.com/2014/11/16/opinion/sunday/when-whites-just-dont-get-it-part-4.html); Nicholas Krisof, *When Whites Just Don't Get It, Part 5*, N.Y. TIMES (Nov. 29, 2014), <http://www.nytimes.com/2014/11/30/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-5.html>; see also Heather Ann Thompson, *Inner-City Violence in the Age of Mass Incarceration*, ATLANTIC (Oct. 30, 2014), <http://www.theatlantic.com/national/archive/2014/10/inner-city-violence-in-the-age-of-mass-incarceration/382154/>.

The “I Can’t Breathe” protests that followed the Grand Jury’s failure to indict the white police officer who caused the death of Eric Garner, an African American man, by placing him in a chokehold after he was discovered selling untaxed cigarettes on the streets of Staten Island, New York, coming close on the heels of the failure of the Grand Jury to indict the officer who shot Michael Brown in Ferguson, further invigorated the conversation about race and criminal justice in America. See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2015), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>. By the time of the symposium in March 2015, the term “mass incarceration” was heard frequently as part of the national conversation on criminal justice, and the *Roger Williams University Law Review* looked prescient for hosting such a timely conference on the topic.

30. Bryan Stevenson is Executive Director of the Equal Justice Initiative; Professor of Clinical Law, New York University School of Law; and author of *Just Mercy: A Story of Justice and Redemption* (2014).

31. Audiotope 1: Bryan Stevenson’s Keynote Address for the Roger Williams University Law Review Symposium: *American Injustice: Mercy, Humanity and Making a Difference*, held by the Roger Williams University School of Law Library (Mar. 27, 2015).

32. Bryan Stevenson first learned the power of proximity while in the loving embrace of his grandmother:

When I visited her, she would hug me so tightly I could barely breathe. After a little while, she would ask me, “Bryan do you still feel me hugging you?” If I said yes, she’d let me be; if I said no, she would assault me again. I said no a lot because it made me happy to be wrapped in her formidable arms. She never tired of pulling me to her.

“You can’t understand most of the important things from a distance, Bryan. *You have to get close,*” she told me all the time. The distance I experienced the first year in law school made me feel lost. *Proximity* to the condemned, to people unfairly judged; that is what

when he went to Montenegro and lived among the people.³³ Getting proximate, as we did at the symposium, can be transformative.

History undoubtedly will judge Bryan Stevenson as one of the most influential lawyers of our time—a kind of modern day prophet.³⁴ Through decades of tireless work in the field, he is changing the criminal justice landscape, all the way up to the United States Supreme Court.³⁵ He has secured the release of innocent people from death row who were condemned to die there because they were black.³⁶ He has put a near end to the

guided me back to something that felt like home.

BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 14 (2014) (emphasis added).

33. Brandeis, *supra* note 2, at 470–71.

34. Desmond Tutu, Nobel Peace Prize Laureate, has referred to Bryan Stevenson as “America’s young Nelson Mandela—a brilliant lawyer fighting with courage and conviction to guarantee justice for all.” *Praise for Just Mercy*, <http://bryanstevenson.com/the-book/> (last visited Apr. 9, 2016); Nicholas Kristof, “When Whites Just Don’t Get It, Part 3”, N. Y. TIMES (Oct. 12, 2014), <http://www.nytimes.com/2014/10/12/opinion/sunday/nicholas-kristof-when-whites-just-dont-get-it-part-3.html> (endorsing Desmond Tutu’s apt characterization of Bryan Stevenson).

35. *See infra* notes 36–37.

36. In one of his most renowned cases, Bryan Stevenson secured the exoneration and release of Walter McMillian, also known as Johnny D., after he had served six years on death row in Alabama. *See McMillian v. State*, 616 So.2d 933, 942–48 (Ala. Crim. App. 1993) (reversing McMillian’s murder conviction and death sentence and remanding the case for a new trial because the state had withheld impeachment and other exculpatory evidence in violation of the defendant’s constitutional right to due process); *see also McMillian v. Monroe County, Ala.*, 520 U.S. 781, 783–84 (1997) (detailing history of underlying criminal case, including the prosecution’s ultimate dismissal of the case). In pressing the defendant’s motion to dismiss on remand, Bryan Stevenson argued:

It was far too easy to convict this wrongfully accused man for murder and send him to death row for something he didn’t do and much too hard to win his freedom after proving his innocence.

STEVENSON, *supra* note 32 at 225. *See also* PETE EARLEY, *CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE, AND JUSTICE IN A SOUTHERN TOWN* (1995) (chronicling the story of Walter McMillian); *60 Minutes* (CBS television broadcast Nov. 22, 1992) (same), available at <https://www.youtube.com/watch?v=shzMjyuijRU>.

In another celebrated case that he argued before the United States Supreme Court, Bryan Stevenson secured the exoneration and release of Anthony Ray Hinton after he served almost 30 years on death row. *See Hinton v. Alabama*, 134 S.Ct. 1081 (2014) (vacating state court judgment denying post-conviction relief for ineffective assistance of counsel on the grounds that defense counsel’s performance in failing to request state funds

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sentencing of juveniles to life without parole.³⁷ He reminds us

to hire a qualified ballistics expert, and instead employing an expert who he deemed unqualified, was deficient and remanding case back to the lower court for a determination of whether counsel's deficient performance was prejudicial); *Equal Justice Initiative Wins Release of Anthony Ray Hinton*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/deathpenalty/innocence/hinton>, (referencing the dismissal of Hinton's case for lack of evidence and exonerating Hinton) (last visited Apr. 9, 2016). When he appeared in court and learned of his exoneration, Hinton said:

For all of us that say that we believe in justice, this is the case to start showing, because I shouldn't sit on death row for 30 years. *Bryan Stevenson's client released after nearly 30 years on death row*, NYU LAW (April 3, 2015), <http://www.law.nyu.edu/news/bryan-stevenson-client-anthony-ray-hinton-freed-after-30-years-on-death-row>. In speaking about the case, Bryan Stevenson said:

Race, poverty, inadequate legal assistance, and prosecutorial indifference to innocence conspired to create a textbook example of injustice. I can't think of a case that more urgently dramatizes the need for reform than what has happened to Anthony Ray Hinton.

Id.

37. Bryan Stevenson first argued that life without parole sentences for juveniles convicted of non-violent crimes are unconstitutional. See Oral Argument, *Sullivan v. Florida*, 560 U.S. 181 (2009) (per curiam) (No. 08-7621), <https://www.oyez.org/cases/2009/08-7621>. Though the United States Supreme Court later dismissed the *Sullivan* case, his arguments carried the day in a related case argued the same day. See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that imposition of life without parole sentences for persons under 18 years of age constitute cruel and unusual punishment in violation of the Eighth Amendment); *Sullivan*, 560 U.S. at 181 (ordering that "[t]he writ of certiorari is dismissed as improvidently granted"). Based on *Graham*, the trial court vacated the life without parole sentence imposed on *Sullivan*. After prevailing with that argument, Bryan Stevenson carried the logic one step further and argued, again successfully, that statutes requiring imposition of mandatory life without parole sentences for juveniles convicted of murder are also unconstitutional. See *Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012) (holding that mandatory life without parole sentences for juveniles are unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment). While the United States Supreme Court did not ban all sentences of life without parole for juveniles, it cautioned that such sentences should be "uncommon" and that courts imposing sentence must take into account "how children are different"—recognizing their "diminished culpability and heightened capacity for change"—and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. These cases illustrate Bryan Stevenson's strength as an advocate — using science and social science to help the court better understand human behavior and employing each sequential case to build upon the holdings that preceded it to gradually dismantle core aspects of punitive sentencing practices. *Id.* at 2466 (restating "*Graham's* . . . foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.") (citing *Roper v. Simmons*, 543

that those people who are accused or convicted of crimes are human beings, flawed like the rest of us, who may warrant punishment, but also merit our compassion and mercy.³⁸ As he has written:

[T]he true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness, and equality cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.

We are all implicated when we allow other people to be mistreated. An absence of compassion can corrupt the decency of a community, a state, a nation. Fear and anger can make us vindictive and abusive, unjust and unfair, until we all suffer from the absence of mercy and we condemn ourselves as much as we victimize others. The closer we get to mass incarceration and extreme levels of punishment, the more I believe it's necessary to recognize that we all need mercy, we all need justice, and—perhaps—we all need some measure of unmerited grace.³⁹

How lucky we are to have Bryan Stevenson; how lucky we were to hear him.

Our problems of injustice today are a reflection of decades of doing the very thing that Justice Brandeis and Bryan Stevenson counseled against—framing lawyering, judging and justice through the narrow lens of narrow life experience.⁴⁰ This myopic

U.S. 551 (2005) (holding the death penalty for juveniles unconstitutional)). These cases have future implications for the continued viability of the death penalty and challenges to the harsh sentencing of adults.

38. “*Each of us is more than the worst thing we’ve ever done.*” STEVENSON, *supra* note 32 at 17–18 (alteration in original).

39. *Id.* at 18.

40. For a perspective on how many African-Americans may view criminal justice and mass incarceration in the United States, see Ta-Nehisi Coates, *Between the World and Me* 18 (2015). In a letter to his 15-year-old son, Coates profoundly illuminates what it is like to be black in America: “This is your country, this is your world, this is your body, and you must find some way to live within all of it.” *Id.*; see also Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (October 2015), <http://www.the>

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view has given us a plethora of United States Supreme Court decisions that outrage so many of my students, particularly those students who use a wider lens.⁴¹

Chief among these decisions is *McCleskey v. Kemp*⁴²—described as “the Dred Scott decision of our time”⁴³—in which the

atlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/; ALEXANDER, *supra* note 29.

41. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 808–18 (1996) (stopping a motorist upon probable cause to believe that he committed a minor traffic violation does not violate the Fourth Amendment’s prohibition against unreasonable searches, even if the stop is pre-textual); *United States v. Armstrong*, 517 U.S. 456, 459–68 (1996) (holding that a defendant is not entitled to discovery on his claim of selective prosecution based on race absent a showing that the government declined to prosecute similarly situated suspects of other races—the very information that defendant sought to obtain in discovery—because considerable deference is owed to the government in its exercise of prosecutorial discretion in determining who to charge, absent proof of conscious intentional bias on the part of the government); *Purkett v. Elm*, 514 U.S. 765, 766–69 (1995) (holding that once the defense has made out a prima facie case of racial discrimination with respect to the prosecution’s exercise of a peremptory challenge to excuse a black juror, the prosecution need not respond with a race-neutral explanation for its challenge that is “persuasive or even plausible”; once the explanation is offered, a trial judge may choose to believe or disbelieve any “silly or superstitious” reason offered by the prosecution for the challenge); *McCleskey v. Kemp*, 481 U.S. 279, 306–12 (1987) (holding that a studying showing systemic racial disparity in the imposition of the death penalty does not establish a violation of either the Eighth or Fourteenth Amendments to the United States Constitution, absent proof that imposition of the death penalty was intended to discriminate against the defendant or arbitrarily imposed on him based on race); *see also Alexander v. Sandoval*, 532 U.S. 275, 291–93 (2001) (holding that Title VI of the Civil Rights Act provides no private right of action based on disparate impact when challenging a state regulation requiring English-only driver’s license examinations); *California v. Acevedo*, 500 U.S. 565, 600 (1991) (Stevens, J., dissenting) (“In the years from [1982 to 1991], the Court has heard argument in 30 Fourth Amendment cases involving narcotics. In all but one, the government was the petitioner. All save two involved a search or seizure without a warrant or with a defective warrant. And, in all except three, the Court upheld the constitutionality of the search and seizure. In the meantime, the flow of narcotics cases through the courts has steadily and dramatically increased. No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive’s fight against crime.”).

42. 481 U.S. 279 (1987).

43. Transcript of Interview with Anthony G. Amsterdam, Session Three, in COLUMBIA UNIV., THE RULE OF LAW ORAL HISTORY PROJECT, THE REMINISCENCES OF ANTHONY G. AMSTERDAM 139, 143 (2010), <http://www>.

United States Supreme Court held that overwhelming statistical evidence of systemic racial disparity in the administration of the death penalty implicated neither the Equal Protection Clause of the Fourteenth Amendment nor the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution.⁴⁴ Writing for the majority, Justice Powell reasoned that racial disparity in sentencing is simply “an inevitable part of our criminal justice system.”⁴⁵ That is a stunning statement, made less than 30 years ago: racial disparity in sentencing is “inevitable”—unavoidable—in criminal justice and must be countenanced, even when the odds of being condemned to death are much greater if the defendant is black and the victim is white.⁴⁶ The majority’s fear that a holding to the contrary would undermine the discretion that pervades our criminal justice system and open the door to widespread challenges to all aspects of criminal sentencing⁴⁷ caused Justice Brennan, in dissent, to accuse it of being afraid of “too much justice”⁴⁸—what Dr. Martin Luther King, Jr. referred to as favoring “order” over “justice.”⁴⁹ *McCleskey* is the one decision that Justice Powell regretted in hindsight.⁵⁰ It effectively closed

columbia.edu/cu/libraries/inside/ccoh_assets/ccoh_8616918_transcript.pdf.

44. *McCleskey*, 481 U.S. at 292.

45. *Id.* at 312.

46. *Id.* at 286–87, 312.

47. *Id.* at 314–15.

48. *Id.* at 339 (Brennan, J., dissenting).

49. Rev. Martin Luther King, Jr., *Letter from Birmingham Jail* (April 16, 1963), http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html. In the letter, Dr. King wrote:

First, I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro’s great stumbling block in the stride toward freedom is not the White Citizen’s Council or the Ku Klux Klanner, but the white moderate who is more devoted to “order” than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says “I agree with you in the goal you seek, but I can’t agree with your methods of direct action”; who paternalistically feels he can set the timetable for another man’s freedom; who lives by the myth of time and who constantly advises the Negro to wait until a “more convenient season.”

Id.

50. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (responding to his biographer’s question “whether he would change his vote

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the courthouse doors to challenging racial bias in criminal justice—be it racial profiling in policing, racial bias in prosecution or racially disparate sentencing—absent proof of an intentional act of discrimination.⁵¹ And we know, in our colorblind society that is so often filled now with implicit, rather than explicit bias,⁵²

in any case,” Justice Powell answered: “Yes, *McCleskey v. Kemp*.”)

51. See ALEXANDER, *supra* note 29, at 111 (“[T]he McCleskey decision was not really about the death penalty at all; rather, the Court’s opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias. The best evidence in support of this view can be found at the end of the majority opinion where the Court states that discretion plays a necessary role in the implementation of the criminal justice system, and that discrimination is an inevitable by-product of discretion. Racial discrimination, the Court seemed to suggest, was something that simply must be tolerated in the criminal justice system, provided no one admits to racial bias.”); *id.* at 97–138, 139 (discussing *McCleskey*, *Whren*, *Armstrong* and *Purkett*, as well as numerous other United States Supreme Court decisions in criminal law and civil rights, to conclude that “[t]he United States has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing”); Interview of Bill Moyers with Bryan Stevenson and Michelle Alexander, in *Transcript: April 2, 2010*, PUB. BROADCASTING SYS. (Apr. 2, 2010), <http://www.pbs.org/moyers/journal/04022010/transcript1.html> (quoting Alexander, who stated that “[*McCleskey*] has immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge any aspect of the criminal justice process for racial bias in the absence of proof of intentional discrimination, conscious, deliberate bias. Now, that’s the very type of evidence that is nearly impossible to come by today.”).

52. See *generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (challenging the self-perceptions that people have that they know their own minds and can assess others in a fair and accurate way by exploring the hidden biases we all carry from a lifetime exposure to cultural attitudes about age, gender, race, ethnicity, religion, social class, sexuality, disability status and nationality). Mahzarin Banaji gave the Keynote Address, entitled “Blindspot: Hidden Biases of Good People,” as part of the biennial Thurgood Marshall Memorial Lecture series at Roger Williams University School of Law (April 14, 2016); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005) (“Recent social cognition research [a mixture of social psychology, cognitive psychology, and cognitive neuroscience] . . . reveals that most of us have implicit biases [in the form of negative beliefs (stereotypes) and attitudes (prejudice)] against racial minorities notwithstanding sincere self-reports to the contrary. These implicit biases have real-world consequence—in how we interpret actions, . . . interact with others, and even shoot a gun.”).

Professor Kang writes:

Troubling is what’s on the local news. Sensationalistic crime stories are disproportionately shown: “If it bleeds, it leads.” Racial minorities are repeatedly featured as violent criminals.

intentional discrimination is almost impossible to prove.⁵³ The decision makes elusive our bedrock constitutional promise of “equal justice under the law.”⁵⁴

We are left to wonder whether this decision and so many others in the area of criminal justice would have been different if the justices had gone to Montenegro and lived with all the people—if they had witnessed first-hand the cumulative effects of racial bias in the name of the War on Drugs on the streets in their communities; if they had watched the volume of cases that prosecutors feed into the system on a daily basis and the pleas and probation violations that follow, with much time spent on ensuring compliance with the formalities of justice and all too little time spent on the human beings behind the cases, procedural justice⁵⁵ and the need to counter systemic racial bias;⁵⁶ if they

Consumption of these images, the social cognition research suggests, exacerbates our implicit biases against racial minorities.

Kang, *supra*, at 1495. “In other words, as we consume local news, we download a sort of Trojan Horse virus that increases our implicit bias.” *Id.* at 1490.

53. See *supra* note 41; see also JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN McCLESKEY AND THE AMERICAN DEATH PENALTY 163 (Oxford Univ. Press, 2015) (explaining that after *McCleskey*, “it is nearly impossible for capital defendants to prove a discriminatory motive.”); Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. FOR SOC. JUST. 263, 288 (2011) (explaining that “because people are not making intentional decisions based on explicit racial animus, but rather based on learned, unconscious stereotypes, the Intent Doctrine is powerless to combat implicit bias.”).

54. See Interview of Bill Moyers with Bryan Stevenson and Michelle Alexander, *supra* note 51 (Bryan Stevenson’s statement to Bill Moyers).

55. Procedural justice (sometimes called procedural fairness) describes the idea that how individuals regard the justice system is tied more to the perceived fairness of the *process* and how they were treated rather than to the perceived fairness of the *outcome*. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (identifying five critical elements of procedural justice: (1) *voice*—the perception that your side of the story has been heard; (2) *respect*—the perception that system players treat you with dignity and respect; (3) *neutrality*—the perception that the decision-making process is unbiased and trustworthy; (4) *understanding*—the comprehension of the process and how decisions are made; and (5) *helpfulness*—the perception that system players are interested in your personal situation to the extent that the law allows).

56. See Andrew Kahn & Chris Kirk, *What It’s Like to be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_crimi

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had seen the caging of so many men—especially men of color—in America and experienced the sights, sounds and smells of life behind bars; if everyone on the streets in their neighborhoods were on probation or parole or had felony records that prevented them from getting work, education, or housing, stopped them from being full citizens of this country with strictures on their right to vote or serve on a jury, and branded them for life with the stigma and stain of their past;⁵⁷ if they had witnessed their family members who were mentally ill or addicted get carted off to prison rather than afforded treatment; or if they had seen sane men go mad in solitary confinement or smelled the burning flesh on death row. We must ask if those who have the loudest voices about injustice in the criminal justice system today are the people who have lived among the people, while those who sense little outrage are people of privilege who have not.

We cannot do justice unless we have first stood in the shoes of all of the people.⁵⁸ If we broaden our life experiences, we broaden our education. We pass better laws and make better decisions. We bridge the growing divide between right and left; black, brown and white people; rich and poor; privileged and unprivileged; young and old; educated and undereducated; police and community; victims and the accused; citizens and non-citizens; those with different religious beliefs; those who count themselves as part of the LGBTQ community and those who do not; those who are mentally ill or addicted and those who are well; those with disabilities and those without; people who are locked up and those

nal_justice_system_eight_charts_illustrating.html (providing eight charts suggesting there are racial disparities at every phase of the criminal justice system).

57. See generally *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002).

58. “[Y]ou never really know a man until you stand in his shoes and walk around in them.” HARPER LEE, *TO KILL A MOCKINGBIRD* 322 (HarperCollins, 1960) (referencing Atticus Finch’s iconic line to his daughter Scout). Indeed, it is people from all walks of life that our society holds in remarkably high esteem and puts at the table together as equals when they are selected as jurors. We know that there is wisdom in the jury, in gathering all voices around the table, in bringing rich, diverse life experiences to bear on the most important issues of the day. Jurors are people—who at least for one day or one trial—have an equal voice and an equal vote, no matter what. It is this swath of our citizenry, this equality in voice and vote that is a bulwark against injustice. We prize the ideal of the jury. We now must make it real and mirror it in life.

who are free; people who vote and people who should. People tend to mistrust, misunderstand or dismiss—or even fear or hate—one another, until they break bread together, until they get to know each other.

So we must “appeal to the better angels of our nature”⁵⁹ to mend the tattered fabric of our society and become one. We must accept that we are all flawed human beings who should not be defined by our worst days.⁶⁰ We must embrace our interconnectedness and accept that we cannot be fully human without one another.⁶¹ If we can deepen our connection with and understanding of our fellow citizens, then injustice can give way to justice, fear to trust, evil to good, hate to love. We can lessen violence, strengthen the criminal justice system, and advance social justice and the rule of law. And, most importantly, we can deepen our humanity.

For when we “get proximate,” injustice takes a back seat. We saw it when slavery gave way to freedom, when women gained the right to vote, when Jim Crow gave way to civil rights, when marriage equality became law. We felt the power of proximity at the symposium when we listened to Bryan Stevenson’s stories⁶² and witnessed First Circuit Court of Appeals Judge O. Rogeriee Thompson engage in a fireside chat with folks who were willing to share the raw, unvarnished truth about life on the inside of prison and the life that follows on the outside.⁶³

59. Abraham Lincoln, *First Inaugural Address* (March 4, 1861).

60. See STEVENSON, *supra*, note 38.

61. This concept is known in South Africa as “Ubuntu.” Defined by Desmond Tutu:

It speaks of the very essence of being human. . . . It is to say, “My humanity is caught up, is inextricably bound up, in yours.” We belong in a bundle of life. We say, “A person is a person through other persons.” . . . A person with ubuntu . . . know[s] that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.

Desmond Tutu, *No Future Without Forgiveness* 53–54 (1999).

62. Stevenson, *supra* note 31.

63. Audiotape 2: *A Fireside Chat: Our Mistakes Do Not Define Us* (Moderator: Judge O. Rogeriee Thompson, United States Court of Appeals for the First Circuit, Moderator; Participants: James Monteiro, Founder and Executive Director, Billy Taylor House; Director of Prison Programs, College Unbound; former Youth Programs Coordinator, Institute for the Study & Practice of Nonviolence; Luis Estrada, Paralegal/Office Manager, Sullivan,

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We got proximate with James Monteiro when he admitted so movingly to Judge Thompson that doing time is easy but being locked out of society upon release is so hard.⁶⁴ We got proximate again when James' son appeared coincidentally the same week on the Everett Theater stage in Providence in the Freedom Project, talking about growing up without a father at the same time his father was on the symposium stage talking about life behind the walls without a son.⁶⁵ We got proximate with Luis Estrada when he confessed to us during the fireside chat that even though he had paid his dues long ago and is now working and living a full life, he will remain on probation in Rhode Island until he is eighty-three.⁶⁶ He told us that he had to stop to call his probation officer on his way to Bristol, Rhode Island to speak to us at the symposium in order to obtain permission to travel out of state because his unfamiliar route down Interstate 195 to Route 24 was about to take him briefly over the Rhode Island state line into Massachusetts.⁶⁷ Their stories taught us how difficult it is to shed the past, even when you have the support of family and community; we were left to imagine how hard it is for others who lack that support and feel no sense of hope.

Getting proximate can sneak up on you and leave you changed. It happened to me last summer when I spoke at Rhode Island's Mental Health Summit about the criminalization of mental illness and addiction and the need to take better care of those among us who suffer so often in silence.⁶⁸ A young employee of the hotel that hosted the conference approached me in

Whitehead & DeLuca; Member, Board of Directors of RICARES; Member, Board of Directors of OpenDoors; Teny Gross, former Executive Director, Institute for the Study & Practice of Nonviolence; Sol Rodriguez, Executive Director, OpenDoors).

64. *See id.* (quoting statement of James Monteiro).

65. *Id.* Freedom Project is a multi-year organizational initiative exploring the roles theater and performance can play in the movement to end mass incarceration in America. *Freedom Project*, EVERETT CO. STAGE & SCH., <http://www.everettri.org/the-freedom-project/> (last visited Apr. 12, 2016).

66. *See id.* (quoting statement of Luis Estrada).

67. *Id.*

68. *See* Rich Salit, *Summit examines ways to deliver proper treatment to RI's mentally ill*, PROVIDENCE J. (June 8, 2015, 11:15 PM), <http://www.providencejournal.com/article/20150608/NEWS/150609371>; *see also* G. Wayne Miller, *Mental Health in Rhode Island*, PROVIDENCE J., www.providencejournal.com/news/health/mental-health (March 3, 2015) (beginning ongoing series of articles).

the hallway after I finished speaking. He confessed that he had stopped working to listen to what I had to say. Looking up at me with tears in his eyes, he said “Lady, you really get it,” and then he turned, head hung low and started to walk away. I put my arm on his shoulder and tried to reassure him, knowing that there was so much I did not really know and feeling powerless to ease his pain. Yet, in that moment, he inspired me more than he will ever know to keep working for change.

It happened to me again a few months later at a community meeting for Justice Reinvestment⁶⁹ when a woman stopped me on her way out the door to say she was still on probation and lived her life in fear every day that she would be falsely accused of doing something wrong, be violated and go back to jail. She had just had a successful job interview and had been offered the job, subject to what for many would be considered a simple, routine requirement: a background check. But for people on probation or with felony records, a background check can reveal the scarlet letter that they carry for years, often keeping employment just outside their grasp.⁷⁰ She was so scared, fearful that the background check would change the employer’s impression of her, would prevent her from making a living, would stop her from having a life. I left wondering how we can consider ourselves just when the promise of second chances is so hollow.

When we fail to get proximate, those still on the margins, those who do not look like us or act like us, and those who desperately need our help to become all they can be pay a huge price for our continued inattention and neglect. Those among us who have felt the pain of discrimination but have been lucky enough to have been freed of its bonds—or those of us who have gotten proximate with injustice and inequality—have an obligation to reach back and lift up those who are still left behind. And those who have been disconnected from the people have the responsibility to alter course.

69. Community Advocates Meeting, R.I. Justice Reinvestment Working Group (Oct. 15, 2015) (hosted by The Council of State Gov’ts Justice Ctr., D.A.R.E., OpenDoors, and R.I. for Cmty. & Justice).

70. Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply:” The Case for Reforming Criminal Background Checks in Employment* (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

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History teaches us that change often comes slowly. But change does come. If not tomorrow, then the day after tomorrow. The law school symposium stands as testament to the power of change. We sounded the alarm on mass incarceration, illuminated Rhode Island's distinct problem of mass probation, and raised consciousness about the collateral, invisible consequences of felony conviction. We proved that big things can happen in small places. We can all stand proudly together, for we have seen criminal justice, social justice and the law with fresh eyes. And we have changed the hearts and minds of so many of our fellow Rhode Islanders in such a short period of time.

As we walk the road ahead, we all must endeavor to follow in the footsteps of the wise man of Montenegro, becoming true students of the law and big legal thinkers, but also making our homes with *all* of the people—studying “their customs, their practices, their needs, their beliefs, their points of view.”⁷¹ We must encourage our fellow citizens to do the same. If we do, we will foster greater understanding and less dissonance, and we will reach a higher place. Combining the intellectual and the practical will make us better lawyers and better judges—the kind of lawyers and judges that Brandeis idealized.⁷² In the end, we will strengthen our justice system. Just like the wise man of Montenegro, we will help ensure that the rule of law is respected because it will reflect the will of all of the people.⁷³ Our community then will be a fairer place, a more just place—not just “for one side alone, but . . . for both.”⁷⁴ And in the end, hope, compassion, and love will triumph.

71. Brandeis, *supra* note 2, at 471.

72. *Id.* at 469–70.

73. *Id.* at 471.

74. ROOSEVELT, *supra* note 1.