

November 29, 2017

Greetings, APDs, NC REN, and friends of PD CORE!

2017 has been quite a year hasn't it?! Whatever else may be said about it, it's been a big one for innovative, ground-breaking books exploring systemic, racialized problems plaguing our criminal legal system. A number of recent publications have taken on the causes, consequences, and possible solutions to the vexing problem of racialized mass incarceration from several different vantage points. In this Race Judicata update, we'll highlight a few of the more significant contributions to this growing body of work.

Race and Criminal Justice: 2017 Books of Note

In *Chokehold: Policing Black Men*, Georgetown Law Professor and former federal prosecutor Paul Butler asserts that “[t]here has never, not for one minute in American history, been peace between black people and the police. And nothing since slavery – not Jim Crow segregation, not lynching, not restrictive covenants in housing, not being shut out of New Deal programs like social security and the GI bill, not massive white resistance to school desegregation, not the ceaseless efforts to prevent blacks from voting – nothing has sparked the level of outrage among African Americans as when they have felt under violent attack by the police.” According to Professor Butler, this elusive peace will not be achieved through reform, but only through a total transformation of American society and American policing. One essential element of this transformation would be a massive shift in our investments. Noting a Brennan Center report observing that approximately 40% of the American prison population could be released without compromising public safety, he suggests shifting billions of dollars in costs associated with such unnecessary incarceration into public school teachers, community health care, and jobs for low-income Americans.

In *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, Fordham Law Professor John F. Pfaff examines the role of prosecutors in the production of mass incarceration, arguing that a toxic mix of virtually unchecked prosecutorial discretion, ambition, incentives to appear tough on crime, and growth in the number of American prosecutors is the most important and under-recognized factor explaining the rising number of Americans—disproportionately Black and Brown—under correctional control. While he agrees that race and bias are major factors in creation of the carceral state, he argues that the so-called “standard story” of racialized mass incarceration—in which over-policing of minority communities, criminalization of poverty, private prisons, the war on drugs, mandatory minimums, and crippling collateral consequences of convictions—is incomplete, and reforms focused on these very real and interconnected problems will fall short of achieving the results reformers seek. Professor Pfaff holds a PhD in Economics from the University of Chicago, and the book is a data-driven analysis of the factors contributing to prison admission rates, one that foregrounds the number of prison admissions (9.6 million between 2000 and 2014) instead of the often-focused on, but much smaller, growth in the prison population over the same amount of time (from 1.25 million to 1.35 million). He suggests that reforms focused on the prosecutorial

function—such as appointing rather than electing prosecutors, electing reform-minded prosecutors (foreshadowing [recent election results](#)), and developing more formalized guidance on how to charge and offer plea bargains—along with reforming the length of prison sentences for violent offenses, are among those most likely to turn the tide against the persistent growth of racialized mass incarceration.

Policing the Black Man: Arrest, Prosecution, and Imprisonment, is a significant collection of essays addressing the policing of Black men edited by American University Washington College of Law Professor and noted activist Angela J. Davis. In a powerful introduction, Professor Davis shines a spotlight on a number of Black men killed by police in recent years and explains how Black men in particular fare worse at each stage of the criminal process, from arrest, to the likelihood of injury or death during a police encounter, to detention, to imprisonment, to sentencing. Long before Professor John Pfaff's book sounding the alarm about the role of prosecutors in the production of mass incarceration, Professor Angela Davis raised similar arguments in her 2009 book *Arbitrary Justice: The Power of the American Prosecutor*. Her essay in this volume expresses concern over the dangerously broad discretion afforded prosecutors, while most of the other essays focus on various aspects of racial profiling in policing. The collection includes notable contributions from Sherrilyn Ifill, Marc Mauer, Bryan Stevenson, and law professors Renée McDonald Hutchins and Kristen Henning.

In ***Locking Up Our Own: Crime and Punishment in Black America***, Yale Law Professor James Forman, Jr. explores Black support for the policies that ultimately created the phenomenon of mass incarceration. He focuses on the political and material realities in Black America in the 1970's and 1980's that led many Black leaders to call for a stronger, more emphatic response to the problems facing their neighborhoods. He explains that, while many prominent Black politicians, clergy, activists, and others (including then-US District Attorney for the District of Columbia Eric Holder and politician Jesse Jackson) often called for a multi-pronged approach to poverty and crime—one that would include housing, job, and educational investments—ultimately only one of the goals they sought was realized: tough-on-crime policies and legislation. While Forman's take on mass incarceration is sometimes characterized as a counterpoint to Michelle Alexander's seminal work, *The New Jim Crow*, it complicates rather than undermines the narrative about the criminal justice system's role in maintaining a racialized social order through intentionally racist laws, policies, and practices, helping to explain why, even in places where most of the important criminal justice decision-makers are Black, racialized outcomes in policing, prosecution, and sentencing are an entrenched and seemingly intractable fact of life.

The provocative title of ***The End of Policing*** by Brooklyn College Sociology Professor Alex S. Vitale is matched by a similarly provocative argument that echoes some of what Professor Butler argues in *Chokehold*: that policing is in need of a complete and radical re-envisioning. The cover of the book lays out the gist of Vitale's argument: "The problem is not police training, police diversity, or police methods. The problem is the dramatic and unprecedented expansion and intensity of policing in the last forty years, a fundamental shift in the role of police in society. The problem is policing itself." He argues that we have mistakenly come to rely on policing to address problems that it cannot solve and can in fact only worsen. Replacing policing with public health, harm reduction, legalization, and restorative justice practices are some of Professor

Vitale's prescriptions for undoing the modern police state where police play a primary role in responding to a vast array of social problems and maintaining the racialized, class-based social order.

Other Recent Publications of Note

[Criminalizing Race: Racial Disparities in Plea Bargaining](#). This recent study of racial disparities in plea bargaining has received significant attention, not only because of its findings but also because of its broad scope. Loyola Law School Professor Carlos Berdejo examined over 30,000 misdemeanor cases in Wisconsin over a seven-year period and found significant disparities in plea offers: "White people facing misdemeanor charges were more than 74 percent more likely than Black people to have all charges carrying potential prison time dropped, dismissed, or reduced. And White people with no criminal history were substantially more likely to have charges reduced than Black people who had no criminal history."

[The State of Pretrial Justice in America](#). The Pretrial Justice Institute has released its first ever comprehensive report evaluating the state of pretrial justice across the United States. States' grades are based upon three metrics: the rate at which people are detained before trial; the extent to which each state uses evidence-based pretrial assessment; and whether or not a state has functionally eliminated money bail. North Carolina earned the national average, which is a D.

[Statistics for Batson Challenges](#). In the latest journal of *Law, Probability & Risk*, Carnegie Mellon Statistics Professor Emeritus Joseph Kadane suggests that various statistical methods – namely Frequentist and Bayesian – could aid in judicial assessment of the strength of *Batson* claims. Professor Kadane is currently working on translating these insights into a user-friendly tool that will allow North Carolina trial lawyers and others to analyze strike data using robust statistical methods in real time; stay tuned for updates on this exciting project.

Steven Bright and Katherine Chamblee, the team that represented Mr. Foster in *Foster v. Chatman*, recently published a short and handy publication titled **[Litigating Race Discrimination Under Batson v. Kentucky](#)**. The publication identifies two main mistakes courts make in analyzing *Batson* challenges: (1) conflating the second and third steps of the *Batson* test (the second step asks the prosecutor to identify race-neutral reasons underlying his/her peremptory strike(s), the third asks if those reasons are, in fact, true); and (2) failing to consider the totality of the circumstances in analyzing the credibility of a prosecutor's race-neutral reasons for a strike.

Upcoming Trainings

[Seeking Racial Justice in your Case, Court, and Community](#), NCAJ's annual award-winning seminar on addressing racial bias and racial disparities in the criminal justice system, will be held

in Raleigh on Friday, Jan 19, 2018. Have you registered yet? This event tends to sell out – don't forget to register!

Michelle Alexander will be delivering the [MLK Week Keynote Address](#) at UNC Asheville on Thursday January 18, 2018. Doors open at 6pm and her presentation begins at 7pm. The event is open to the public and seating is available on a first-come, first-served basis.

This Thurs Nov. 30, 2017 @ 9:30am EST: If you get this update in time, consider checking out the NAPD's two-hour webinar with Andre Vitale, King County Department of Public Defense Assistant Training Director, titled [Implicit Bias: Its Negative Impact on Our Clients and Ourselves](#).

NAPD will also be hosting a 60 min. webinar titled [Litigating Race](#) on January 11, 2018. The webinar will be led by Tejas Bhatt, Senior Assistant Public Defender at that Division of Public Defender Services in Hartford, Connecticut, and active member of the NAPD's Racial Justice Task Force.

Watch this space: the [NC Racial Equity Network](#) website will updated with videos from past presentations in the coming months, along with other archived materials from past programs and a searchable database of current NC REN members. Keep an eye on renapply.web.unc.edu to see updates as they're added.

We would love for you to join our committee! You will find the link to do so on the bottom right portion of the [webpage](#). If you have feedback about Race Judicata, we'd love to hear from you; feel free to reply to the original poster.

Emily Coward

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