
**WE ARE ALWAYS ALREADY IMPRISONED: HYPER-
INCARCERATION AND BLACK MALE IDENTITY
PERFORMANCE**

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INTRODUCTION

An unexamined impact of drug-war-induced racial profiling is that the possibility of being imprisoned has become fundamental to black masculine subjectivity. Take for example the episode, “A Date with the Health Inspector,” from Aaron McGruder’s critically acclaimed animated television show, *The Boondocks*.¹ At the beginning of the episode, Tom DuBois is arrested and jailed. This is quite surprising because DuBois is a model citizen. Other than being a black man, DuBois is your typical successful prosecutor living in the suburbs. But being a black man has led him to be mistaken for a criminal. With the phone call he is allowed after his arrest, DuBois reaches out to his neighbor, genius black nationalist and ten-year-old Huey Freeman.

DuBois’s concern is not that he will be mistakenly charged, but that remaining in jail for even one night will be ruinous. Specifically, he worries

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¹ *The Boondocks: A Date with the Health Inspector* (BET J television broadcast Mar. 29, 2006).

that he will be made “somebody’s bitch” by means of anal rape.² Put aside DuBois’s misogyny and homophobia and accept his concern on its own terms.³ He envisions being in the jailhouse shower and dropping his soap. A huge black man tells DuBois to pick it up. DuBois says he is done washing, but the man says he is the “health inspector” and insists that DuBois pick up the soap.⁴ As DuBois bends over, the camera slowly pans down from the man’s waist, revealing a penis that seems to stretch on forever.⁵ DuBois says that he has always been haunted by this vision. We see him as a child telling a friend he is going to study hard so he does not get sent to jail and raped. On the phone with Huey, DuBois is hysterical and insists that Huey find a way to prove DuBois’s innocence before he is sent to the main jail that night.

McGruder’s characters are not the only ones concerned about imprisonment. Michelle Alexander’s book, *The New Jim Crow*,⁶ was one of the most celebrated books of the past two years.⁷ Therein, Alexander argues that the hyper-incarceration⁸ of men of color is an extension of U.S. oppression of black people that is traceable to slavery, the black codes, and Jim Crow segregation.⁹ The book followed much criticism of the explosion in incarceration since President Reagan’s declaration of a “War on Drugs,”¹⁰

² *Id.*

³ As Michael Kimmel explains, homophobia is constitutive of the hegemonic form of U.S. masculinity. MICHAEL S. KIMMEL, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 35 (2005).

⁴ *The Boondocks: A Date with the Health Inspector*, *supra* note 1.

⁵ Of course, the black male penis has long been a fetish object. *See generally* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315, 1320 (2004); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 *OR. L. REV.* 457, 458-59 (1997).

⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁷ *See* Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, *N.Y. TIMES*, Mar. 6, 2012, at C1.

⁸ “Hyper-incarceration” is the term I use to describe the extremely high rate of incarceration of racial minority men observed in the United States today. Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, 37 *WASH. U. J.L. & POL’Y* 67, 68-69 (2011). I have adopted this term based on Loic Wacquant’s trenchant analysis. *See* Loic Wacquant, *Forum: Loic Wacquant, in RACE, INCARCERATION, AND AMERICAN VALUES* 57, 59 (2008) (defining hyper-incarceration).

⁹ ALEXANDER, *supra* note 6, at 175. For a critique of Alexander’s work, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 21, 23 (2012).

¹⁰ Although the Reagan Administration’s War on Drugs sparked the high rates of incarceration discussed in this Essay, Reagan’s drug war is only the “most recent manifestation of America’s ongoing war against drugs.” Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 *J.*

especially because of the grossly disproportionate imprisonment of black men.¹¹ As I will discuss, the drug war initiated by Ronald Reagan in 1982 has basically amounted to a war against men of color, particularly black men. Despite the fact that rates of drug use are essentially equal across races,¹² black men are grossly disproportionately detained, charged, and incarcerated for petty drug offenses. For example, researchers found clear disparities in policing of men of color in general:

Arrest data indicate that during the 1990s the primary focus of [New York City Police Department “Quality of Life”] policing became smoking marijuana in public view (MPV). By 2000, MPV had become the most common misdemeanor arrest, accounting for 15% of all NYC adult arrests and rivaling controlled substance arrests as the primary focus of drug abuse control. Of note, most MPV arrestees have been black or Hispanic. Furthermore, black and Hispanic MPV arrestees have been more likely to be detained prior to arraignment, convicted, and sentenced to jail than their white counterparts.¹³

That scholarship is just a snapshot of the overwhelming evidence that black men are grossly disproportionately targeted and incarcerated for petty drug use.

In light of that scholarship, it is strange that Hanna Rosin argues we are just now facing the prospect of the “end of men.”¹⁴ Rosin’s claim is that trends toward greater female educational success, the conversion of our economy from being one based on brawn to one based on knowledge, and women’s greater power in romantic relationships signal that women will soon become the predominant sex (or at least equal).¹⁵ She talks as though she is revealing a new problem for men in general, but ignores the longstanding war on men of color. That omission becomes less surprising when one sees that she previously wrote an article suggesting that the spread of poor people to the once-homogenous suburbs spread crime to those areas.¹⁶ In that view, men of color equal crime. The war on men of color thus becomes explicable as the

GENDER RACE & JUST. 381, 381 n.1 (2002). Much of the rhetoric of the War on Drugs was established during the Nixon Administration in the late 1960s, which “set the pattern” for drug wars waged by future presidents. *Id.* (citing STEVEN WITSOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY, at xviii (1990)).

¹¹ See, e.g., MICHAEL TONRY, MALIGN NEGLECT – RACE, CRIME, AND PUNISHMENT IN AMERICA 4 (1995) (describing rates of incarceration); Nunn, *supra* note 10, at 395 (describing rates of drug use).

¹² See ALEXANDER, *supra* note 6, at 97; Nunn, *supra* note 10, at 395.

¹³ Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL’Y 131, 131 (2007).

¹⁴ Hanna Rosin, *The End of Men*, ATLANTIC, July/Aug. 2010, at 56, 58.

¹⁵ *Id.* at 58-59.

¹⁶ Hanna Rosin, *American Murder Mystery*, ATLANTIC, July/Aug. 2008, at 40.

ordinary workings of the criminal justice system,¹⁷ and only purported signs of a new decline in white men's power suggest the end of men.

In this Essay, I want to re-center the experiences of men of color, particularly those of black men. The mainstream's depiction of black men as always already imprisoned disciplines us into the never-finished quest to prove we are a "Good Black Man," rather than a "Bad Black Man."¹⁸ In order to propose greater empathy for black men's imprisonment, I will proceed in the following manner. In Part I, I set the stage for considering the impact of drug-war racial profiling on black men's senses of self and the identities attributed to us by summarizing the components of the circuit of identity. In Part II, I consider black men's attributed identities by demonstrating that drug-war racial profiling has naturalized the idea that black men deserve to be disproportionately imprisoned. I also argue that Rosin's "end of men" thesis suffers from this assumption and identify a similar lack of empathy in Supreme Court jurisprudence on strip searches. In Part III, I explicate my theory of the bipolarity of black men's attributed identity in relation to hyper-incarceration. I conclude with some personal thoughts about black men's internalization of the possibility of imprisonment into our self-identities.

I. THE CIRCUIT OF IDENTITIES

This Part serves as a prelude to my more detailed discussion of black men's identities in the era of hyper-incarceration. My consideration of those identities will benefit from a general outline of the circuit of identity. In sum, we all have a sense of self-identity and identities that others attribute to us. We are then required to evaluate any conflict between those identities and perform our identities in the manner we think will produce our desired result. As we interact with others, we must integrate responses to our identity performances into our own sense of self-identity. The first step in this process is the formation of our self-identity, or our internal perception of who we are.¹⁹ We have explicit or implicit senses of our gender, race, sexual orientation, class, religion, and so on. Those perceptions change over time and in different contexts, but if we could take a snapshot of a person's self-image, we could identify particular self-concepts along each of these axes.²⁰

¹⁷ See Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1064-65 (2010).

¹⁸ Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 853 (2006) [hereinafter Cooper, *Against Bipolar Black Masculinity*]; Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633, 644-45 (2009) [hereinafter Cooper, *Our First Unisex President?*].

¹⁹ Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1261 n.2 (2000).

²⁰ Cooper, *Our First Unisex President?*, *supra* note 18, at 638.

Second, our sense of our own identities contrasts with our attributed identities.²¹ These are our identities as others see us.²² Often, they are based on stereotypes,²³ and in the case of black men, we often confront assumptions that we are dangerous.²⁴ Third, confronted with the dangerous-black-man stereotype, we proceed to the next stage of identity formation: identity evaluation. We have to ask ourselves, “Is that me?” Assuming one finds being viewed as dangerous to be inconvenient, which is the case for the vast majority of black men, a conflict arises between self-identity and attributed identity.²⁵ Fourth, having evaluated whether we wish to be seen according to current attributions of our identities, we then make choices about how to perform our identity. We could act in ways that confirm other people’s image of us, in ways that entirely resist that depiction, or somewhere in between.²⁶ Those identity performances bleed into the final stage of the circuit of identity: identity reintegrations. We are constantly rethinking our sense of self-identity in light of the responses to our identity performances.²⁷

Like everyone else, black men have both external (attributed) identities and internal (self) identities. I will explain how hyper-incarceration constructs black men’s attributed identities in Part II. I will then dig deeper into the bipolarity of black men’s attributed identities in Part III. Finally, I will suggest how black men’s attributed identities influence our self-identities in the Conclusion.

II. NATURALIZATION OF THE HYPER-INCARCERATION OF BLACK MEN

My primary concern in this Part is the formation of the externally attributed identities of black men as criminals. The hyper-incarceration of men of color has become naturalized to the point of being the “common sense” way of viewing us. Concepts become common sense because they are consistent with the ideologies promoted by mainstream institutions.²⁸ That is, the viewpoint of a particular group on ideas, institutions, events, or other groups becomes

²¹ See *id.* at 639.

²² Carbado & Gulati, *supra* note 19, at 1261 n.2.

²³ Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect,”* 56 OKLA. L. REV. 833, 843 (2003).

²⁴ See, e.g., Tracey Maclin, “Black and Blue Encounters” – *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 260-61 (1991) (demonstrating that police have long viewed black men as dangerous).

²⁵ See Cooper, *supra* note 23, at 844.

²⁶ Cooper, *Our First Unisex President?*, *supra* note 18, at 639.

²⁷ See Cooper, *supra* note 23, at 844.

²⁸ See Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VILL. L. REV. 851, 859 n.55 (2002) (citing Martin Barker, *Stuart Hall, Policing the Crisis*, in *READING INTO CULTURAL STUDIES* 81, 91 (Martin Barker & Anne Beezer eds., 1992)).

naturalized.²⁹ This will only happen when groups with power have their view become the predominant, mainstream, and reasonable view. What may have started as one viewpoint becomes the consensus and baseline. For instance, when Republican President Ronald Reagan declared his War on Drugs, two percent of the populace thought this was a major issue.³⁰ Eventually, future Democratic presidents took the War on Drugs to be a given.³¹ We may now be seeing an unraveling of the consensus that a war on drugs is necessary.³² Nonetheless, hyper-incarceration remains common sense in that mainstream U.S. society sees vastly disproportionate incarceration of men of color as natural.³³ As legal scholar Ian Haney-López observes: “For many Americans, racial disparities in the criminal justice system not only fail to evoke a sense of moral outrage, but engender instead a belief in the basic fairness of the world as currently organized.”³⁴

A. *How the Drug War Naturalized the Image of Black Men as Criminals*

While some refer to the carceral result of the War on Drugs as “mass incarceration,” I accept Loic Wacquant’s definition of it as “hyper-incarceration.”³⁵ My reasons for doing so are two-fold. First, hyper-incarceration is “hyper” in the sense that it represents an out-of-control explosion in incarceration.³⁶ Second, hyper-incarceration is “hyper” in the sense that it is targeted at specific groups of people.³⁷ This Section demonstrates that the War on Drugs has created a situation where hyper-incarceration of men of color is presumed to be normal.

The explosion in incarceration has its roots in the so-called War on Drugs.³⁸ The War on Drugs is ongoing and consists of a constellation of policies designed to discourage the production, distribution, and consumption of illegal

²⁹ See Barker, *supra* note 28, at 85.

³⁰ ALEXANDER, *supra* note 6, at 49.

³¹ See, e.g., RON CHEPESIUK, THE WAR ON DRUGS: AN INTERNATIONAL ENCYCLOPEDIA 36-38 (1999) (describing the Clinton Administration’s struggle to deal with the War on Drugs, which it inherited from previous Republican administrations).

³² See, e.g., *NAACP Backs Marijuana Legalization in Colorado*, HUFFINGTON POST (Aug. 23, 2012, 11:57 AM), http://www.huffingtonpost.com/2012/08/23/naacp-backs-marijuana-leg_n_1824351.html.

³³ See Cooper, *supra* note 28, at 859 (citing Jennifer Daryl Slack, *The Theory and Method of Articulation in Cultural Studies*, in STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES (David Morley & Kuan Hsing Chen eds., 1996)); Haney-López, *supra* note 17, at 1065 (summarizing studies showing that most whites approve of racially disproportionate incarceration).

³⁴ Haney-López, *supra* note 17, at 1064.

³⁵ See Wacquant, *supra* note 8, at 59.

³⁶ Cooper, *supra* note 8, at 68-69.

³⁷ *Id.* at 69-70.

³⁸ *Id.* at 69.

psychoactive drugs such as heroin, cocaine, methamphetamine, and marijuana.³⁹ While there have been spectacular attempts to stop production and high-level distribution of drugs, the drug war has mostly focused on the low-level distribution and day-to-day consumption of drugs.⁴⁰ Moreover, a large percentage of drug-war arrests are for possession of personal-use amounts of marijuana,⁴¹ a low-level drug that significant percentages of the population, across races, have tried at some point. Some people think of marijuana as a black drug. That assumption may come from frequent mentions of marijuana in rap songs.⁴² Despite this perception, rates of drug use are very similar across races.⁴³ Accordingly, one would expect rates of drug arrests to be similar, but they are not.⁴⁴ As I often tell my law students, if the police focused the drug war on college dormitories, they would catch many more drug users than they do by concentrating on minority neighborhoods. I view the nervous laughter that usually follows as confirmation of my hypothesis.

The War on Drugs is the primary reason for the racial disproportionality in hyper-incarceration.⁴⁵ There are stark racial disparities in arrests and convictions for drug crimes. In some major cities, eighty percent of young black men have criminal records.⁴⁶ Nationwide, one in three young black men is under the control of the criminal justice system.⁴⁷ That includes those in jail, but also those on probation or parole.⁴⁸

Perhaps the most important consequence of a conviction is the fact that a person can be required to report it on job applications.⁴⁹ Making such a report obviously taints one's application. It should come as no surprise, then, that ex-convicts are often unemployed and overwhelmingly underemployed.⁵⁰ Other post-conviction disabilities, such as deprivation of the right to vote, perpetuate the notion that people who have contact with the criminal justice system are

³⁹ See Nunn, *supra* note 10, at 386-88 (discussing rates of drug arrests and use across races).

⁴⁰ RYAN S. KING, SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA'S CITIES 31 (2008).

⁴¹ See Dan Eggen, *Marijuana Becomes Focus of Drug War*, WASH. POST (May 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301638.html> (reporting that in 2005 marijuana accounted for nearly half of all drug arrests nationwide, surpassing arrests for hard drugs such as heroin and cocaine).

⁴² See, e.g., DR. DRE, *THE CHRONIC* (Death Row Records 1992).

⁴³ See ALEXANDER, *supra* note 6, at 7.

⁴⁴ See *id.* (explaining race disparities between drug users and arrestees).

⁴⁵ Nunn, *supra* note 10, at 393.

⁴⁶ ALEXANDER, *supra* note 6, at 7.

⁴⁷ See DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 3 (2007).

⁴⁸ See *id.*

⁴⁹ *Id.* at 37-38.

⁵⁰ *Id.* at 68.

permanently excluded from mainstream society. It is this overall sense of second-class citizenship that Alexander refers to when she calls hyper-incarceration the New Jim Crow,⁵¹ tracing its roots to U.S. chattel bondage of Africans.⁵²

The history of racism in the United States shows common sense at work. Slavery, the United States' "peculiar institution,"⁵³ required not just force, but ideology. Poor whites had to be systematically inculcated with the idea that they were different from blacks.⁵⁴ White supremacy was explicit during this time. The contradiction between liberalism and slavery was resolved by considering Africans to be categorically inferior.⁵⁵ After the abolition of slavery, there was a period of racial uncertainty⁵⁶ in which there were possibilities for black-white coalitions.⁵⁷ These coalitions did not materialize, however, as Northern whites capitulated to Southern whites' desire for control of their region.⁵⁸ Northern whites knew this would mean Southern white domination of blacks, but forged ahead with the Great Compromise anyway upon Southern whites' word that they would uphold equality.⁵⁹ The inevitable revitalization of white supremacy came in the form of Jim Crow segregation of the races. Black codes established a system of peonage designed to control the recently freed black slaves. Among the most relevant laws for our purposes were those establishing a presumption in criminal cases that white women would not consent to sex with a black man.⁶⁰ It was a presumption that black men were rapists.⁶¹ As in all common sense, a perspective – biologically based white supremacy – was made the baseline, and could thus become ingrained in the normal workings of mainstream institutions.

Our more recent history shows a new perspective – presumed white cultural superiority – that has allowed for the naturalization of black men's hyper-

⁵¹ See ALEXANDER, *supra* note 6, at 185-95.

⁵² *Id.* at 22.

⁵³ KENNETH M. STAMPP, PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 3 (Vintage Books 1989) (1956).

⁵⁴ See generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 9-10 (1978); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 37-38 (Harper Perennial rev. & updated ed. 1995) (1980).

⁵⁵ See Duru, *supra* note 5, at 1339.

⁵⁶ See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 130-31 (1989) (describing difficulties in unlearning the master-slave relationship); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 32-33 (2d rev. ed. 1966).

⁵⁷ See FONER, *supra* note 56, at 193; WOODWARD, *supra* note 56, at 28.

⁵⁸ ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL 134 (1998).

⁵⁹ *Id.* at 134-36. The federal government's weakness also played a role. See *id.* at 264-66 (comparing South African apartheid to Jim Crow laws in the southern United States).

⁶⁰ See Duru, *supra* note 5, at 1338.

⁶¹ *Id.*

incarceration. The 1960s Civil Rights Movement and equality laws created another opening for positive black-white relations, but those hopes were soon dashed. The very same bureaucrats who enforced segregation now enforced civil rights laws,⁶² and they quickly established new barriers to equality. In law these were the intent standard and the bar against remedying societal discrimination.⁶³ In culture the retrenchment took the form of calling for “Law and Order.” This narrative characterized the black civil rights protests as representing a general unraveling of society.⁶⁴ This was, of course, a coded message about blacks as bad actors and was understood as such at the time. Richard Nixon used the call for Law and Order as an appeal to whites in his strategy of capitalizing on Southern white resentment of black equality.⁶⁵ Ronald Reagan’s 1976 campaign consciously added a “Welfare Queens” narrative to the Law and Order discourse as a means of cultivating white resentment of blacks.⁶⁶ These narratives set the stage for Reagan’s declaration of the War on Drugs in 1982.⁶⁷

Alexander draws a clear link between the Law and Order narrative and the establishment of the New Jim Crow.⁶⁸ She correctly sees the Law and Order narrative as a wedge issue designed to peel whites away from the Democratic coalition.⁶⁹ She then observes that only two percent of the population believed drugs were a major problem when Reagan declared his War on Drugs.⁷⁰ It thus appears that Reagan was not responding to a popular concern, but creating one through the demonization of drug users. As with the Law and Order narrative, whites knew that blacks were being blamed for the problem even though the language used was superficially colorblind.⁷¹ As Alexander puts it, the neutral language of the War on Drugs allowed whites to express hostility toward blacks and other racial minorities while shielding themselves from charges of

⁶² See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xvi (Kimberlé Crenshaw et al. eds., 1995).

⁶³ *Id.* at xvii.

⁶⁴ See MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s, at 4 (2005).

⁶⁵ See JEREMY D. MAYER, RUNNING ON RACE: RACIAL POLITICS IN PRESIDENTIAL CAMPAIGNS, 1960-2000, at 96 (2002).

⁶⁶ See *id.* at 154.

⁶⁷ See Nunn, *supra* note 10, at 389-91.

⁶⁸ See ALEXANDER, *supra* note 6, at 44-48.

⁶⁹ See *id.* at 45-46.

⁷⁰ *Id.* at 49.

⁷¹ Cf. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 136 (2001) (“The public knows, without having to be told, that these ‘superpredators’ and high-rate offenders are young minority males, caught up in the underclass world of crime, drugs, broken families, and welfare dependency.”).

racism.⁷² The result was popular acceptance of an explosion in incarceration that was obviously aimed at blacks.

In support of Alexander's argument about the New Jim Crow, consider legal scholar Kenneth Nunn's argument that the War on Drugs is better understood as a war on blacks.⁷³ Despite the fact that "African Americans 'are *less* likely to . . . [use] drugs than whites are, for all major drugs of abuse except heroin,'" ⁷⁴ the War on Drugs is the primary reason for hyper-incarceration.⁷⁵ Nunn says explicitly that "African American males in particular . . . are the real targets of the country's drug enforcement efforts."⁷⁶ That means that "police expend greater resources and time looking for drug infractions in Black neighborhoods than in white neighborhoods and focus the bulk of their energies on Black suspects rather than white ones."⁷⁷ As Nunn says, this has produced "entirely predictable[] results."⁷⁸ The drug war as a war on men of color is what has produced racially stratified hyper-incarceration.

Why do drug-war policymakers implicitly seek such a result? Because "[i]n the minds of the criminal justice system's managers, planners and workers, drugs are frequently associated with African American citizens and their communities."⁷⁹ The reason behind this perception has its roots in the history of anti-black ideology. Specifically, says Nunn, "[i]t is the . . . representation of crime as the unique province of communities of color that has fostered and encouraged racism in American society."⁸⁰ The War on Drugs thus predictably resulted in the hyper-incarceration of blacks because it both drew upon and exacerbated the naturalization of black men as criminals.

B. *The Naturalization of Lack of Empathy for Black Men*

1. The "End of Men" as Naturalizing Black Men's Imprisonment

Having traced how the drug war naturalized the hyper-incarceration of black men, I now wish to show an effect of that naturalized "common sense" on culture. The topic of this Symposium issue, Rosin's claimed "end of men," provides an example.⁸¹ Hanna Rosin claims that we are facing the end of

⁷² ALEXANDER, *supra* note 6, at 53.

⁷³ See Nunn, *supra* note 10, at 384.

⁷⁴ *Id.* at 395 (alterations in original) (quoting TONRY, *supra* note 11, at 108).

⁷⁵ *Id.* at 393.

⁷⁶ *Id.* at 382.

⁷⁷ *Id.* at 383; see also *id.* at 384 (discussing "the police strategy of concentrating aggressive street-based law enforcement measures on the low income communities where the vast majority of African Americans live").

⁷⁸ *Id.* at 383.

⁷⁹ *Id.* at 382.

⁸⁰ *Id.* at 435.

⁸¹ For my original presentation, see BULawVideo, *Panel 6: Could These Both Be True?: Reconciling the "End of Men" with Women's Continuing Inequality*, YOUTUBE (Dec. 18,

patriarchy.⁸² She contends that women have made such progress – and men have so declined – that women will eventually become the dominant sex.⁸³ Rosin’s work can be connected to earlier and concurrent claims that there is an ongoing “war on men.”⁸⁴ A telling fact about this claimed war on men is that the War on Drugs has long served as a war on men of color. I argue that Rosin and others have failed to make this connection because racially disproportionate hyper-incarceration has become naturalized, and thus invisible.

Hanna Rosin’s July 2010 article, *The End of Men*, caused quite a stir. She argued that women’s progress has reached a point where we can foresee the end of men’s reign as the dominant gender.⁸⁵ Rosin began the article by describing an interview with biologist Ronald Ericsson, who helped discover a method of separating the gender chromosomes.⁸⁶ Ericsson says that despite a perceived preference for sons, by the 1990s couples were requesting more girls than boys.⁸⁷ Ericsson suggests that the new phenomenon calls into question whether male dominance ever existed,⁸⁸ and Rosin frames this new development as the end of an era where boys were favored.⁸⁹

Rosin also bases her argument on the idea that economic change influences culture.⁹⁰ This concept is familiar in critical theory as the idea that the supposedly distinct realms of law and culture are co-constituted. That is, law influences culture and culture reciprocally influences law.⁹¹ As I have noted elsewhere in my work, the decision in *Brown v. Board of Education*⁹² is an example of law influencing culture, and the decision in *Grutter v. Bollinger*⁹³ is an example of culture influencing law.⁹⁴ Rosin makes a similar argument

2012), <http://www.youtube.com/watch?v=PJOm9fNdG8> [hereinafter *End of Men Symposium: Panel 6*].

⁸² HANNA ROSIN, THE END OF MEN: AND THE RISE OF WOMEN 4 (2012); Rosin, *supra*, note 14, at 58 (“Man has been the dominant sex since, well, the dawn of mankind. But for the first time in human history, that is changing – and with shocking speed.”).

⁸³ See Rosin, *supra* note 14, at 58.

⁸⁴ See, e.g., KAY S. HYMOWITZ, MANNING UP: HOW THE RISE OF WOMEN HAS TURNED MEN INTO BOYS 14-16 (2011); CHRISTINA HOFF SOMMERS, THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN 14 (2000).

⁸⁵ Rosin, *supra* note 14, at 60-61.

⁸⁶ *Id.* at 56.

⁸⁷ *Id.* at 57-58.

⁸⁸ See *id.* at 58.

⁸⁹ See *id.*

⁹⁰ See *id.* at 59-60.

⁹¹ See Frank Rudy Cooper, *The “Seesaw Effect” from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH 139, 151 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006).

⁹² 347 U.S. 483 (1954).

⁹³ 539 U.S. 306 (2003).

⁹⁴ Cooper, *supra* note 91, at 151.

that the global economy is developing in a way that erodes the prior cultural preference for boys over girls.⁹⁵ Her example is South Korea.⁹⁶ She contends that although parents previously preferred boys over girls, once women gained significant participation in the labor force, their social status rapidly improved.⁹⁷ The reason for the cultural change is that the economy now values thinking and communicating over strength and stamina.⁹⁸ That is, in the service and technology economy there are increasingly more jobs for managers than physical laborers.⁹⁹ Rosin uses South Korea's rise in the international economy as an example of how countries that adjust to the new economy will flourish, and their women all the more so.¹⁰⁰

Extending her argument to the United States, Rosin next contends that the characteristics most prevalent in women as a group – “social intelligence, open communication, [and] the ability to sit still and focus” – are now those most valued in the economy.¹⁰¹ The old economy valued men's physical skills through jobs in manufacturing and labor. Those were overwhelmingly male jobs.¹⁰² As the economy has shifted, men have suffered massive job losses and have failed to adapt.¹⁰³ According to Rosin, the feminist movement is what forced women to learn the skills most valued in today's economy.¹⁰⁴ She seems to think this is so because moving out of the domestic sphere but still maintaining the home has made women more adaptable.¹⁰⁵

To support her contention that the economy has become female friendly, Rosin cites a variety of statistics. In 1980 women held 26.1% of managerial and professional jobs, but as of 2010 women held 51.4% of those jobs.¹⁰⁶ Women are 54% of accountants and about half of all bankers and insurance professionals.¹⁰⁷ While only about 33% of all doctors and 45% of law firm associates are women, those numbers are rising quickly.¹⁰⁸ Further, a study by

⁹⁵ Rosin, *supra* note 14, at 58. Rosin uses the idea of the economy influencing culture in more of a neoliberal manner. She seems to agree with reactionary economist Milton Friedman that greater economic liberty in the form of increasingly free markets necessarily leads to positive forms of democratization. See Robert Ashford, *Milton Friedman's Capitalism and Freedom: A Binary Economic Critique*, 44 J. ECON. ISSUES 533, 537 (2010).

⁹⁶ Rosin, *supra* note 14, at 58-59.

⁹⁷ *See id.* at 58.

⁹⁸ *See id.*

⁹⁹ *See id.* at 60.

¹⁰⁰ *See id.* at 58-59.

¹⁰¹ *See id.* at 59.

¹⁰² *Id.*

¹⁰³ *Id.* at 64.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 63.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Columbia Business School and the University of Maryland found a “relationship between firm performance and female participation in senior management.”¹⁰⁹ Having women at the top correlated with better performance.¹¹⁰ To Rosin, this means that in the new female-friendly economy companies that promote women are the ones that succeed.¹¹¹

Rosin makes her strongest case for the ascendancy of women based on their educational achievement. Rosin posits that a college degree is now a minimum requirement for obtaining the good life and points out that women are now earning close to sixty percent of those degrees.¹¹² Meanwhile, men have passed women as those most likely to have only a high school degree.¹¹³ Women are also earning “60 percent of all master’s degrees, about half of all law and medical degrees, and 42 percent of all M.B.A.s.”¹¹⁴ Moving to anecdotal evidence, Rosin describes interviews with female students in which they distinguish themselves from their male peers.¹¹⁵ Women, they say, are more hardworking and driven than men.¹¹⁶

Rosin caps off her argument by contending that the reason women are working harder is because they see a smaller pool of motivated male peers.¹¹⁷ Women, she assumes, are refusing to settle for non-viable mates.¹¹⁸ Since they see the men around them as immature and unsuccessful, women continue pursuing their own success.¹¹⁹ So Rosin is effectively arguing that men’s educational decline has inspired women to outperform them in education and, eventually, the economy. Extrapolating this in (Social) Darwinist terms, Rosin predicts the end of men.

Rosin’s book takes the same stance, although often by means of different stories. She begins in Virginia with the story of Bethenny, whom she wants to stereotype as a “pitiable single mother type.”¹²⁰ Surprisingly to Rosin, Bethenny has depth and even a pitiful baby daddy named Calvin.¹²¹ She uses their story to launch into statistics suggesting the economy has turned against men.¹²² As sociologist Philip Cohen has noted in this Symposium, Rosin

¹⁰⁹ *Id.* at 65.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 66.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 66-68.

¹¹⁷ *See id.* at 66.

¹¹⁸ *See id.*

¹¹⁹ *Id.* at 70.

¹²⁰ *See ROSIN, supra* note 82, at 2.

¹²¹ *See id.* at 2-3.

¹²² *See id.* at 4.

misinterprets the gender significance of most of those statistics.¹²³ For Rosin, though, these statistics and stories show that men (or a hypothetical group of working-class white men) have “lost the old architecture of manliness” and replaced it only with what Susan Faludi calls “ornamental masculinity.”¹²⁴ Rosin’s book is a longer argument for the view that men are no longer “the man,” particularly in relationships.

For instance, in a rare (for Rosin) foray into the status of men of color, she reports on a group of men at a court-sponsored session who declare, of women making more than their partners, “That’s right. She’s the man.”¹²⁵ Rosin’s read on men of color seems to be that they are the miner’s canary for white men: “This script has played out once before in American culture,” she claims, referring to black men’s loss of jobs beginning in the early 1970s.¹²⁶ For Rosin, this is where hyper-incarceration comes in, as a seemingly inevitable result of natural changes in the economic structure.

It is telling that war-on-men proponents such as Rosin fail to see the war on men of color as the end of men, even though hyper-incarceration started at least four decades ago.¹²⁷ I was curious about why Rosin does not consider the hyper-incarceration of men of color until I researched some of her earlier work. It turns out she wrote a long article arguing that the Section 8 housing voucher program spread crime from the inner-city to the suburbs, implicitly because it sent black people to those previously homogenous areas.¹²⁸ Now her lack of concern about the war on men of color makes sense. Rosin’s Section 8 theory implies that, to her, men of color are disproportionately criminal. If men of color are considered criminals, it is no surprise that they are disproportionately jailed. Never mind that police overwhelmingly target poor minority inner-city drug users even though drug rates have long been proven to be equal across races.¹²⁹ In that light hyper-incarceration amounts to a targeted campaign to remove men of color from society. As Ian Haney-López has demonstrated, however, many whites see the startling disparities in incarceration as natural.¹³⁰ “Partly through colorblindness and partly through the accumulated weight of

¹²³ See Philip N. Cohen, *The “End of Men” Is Not True: What Is Not and What Might Be on the Road Toward Gender Equality*, 93 B.U. L. REV. 1159 (2013).

¹²⁴ See ROSIN, *supra* note 82, at 8-9 (quoting SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 85 (1999)).

¹²⁵ See *id.* at 90.

¹²⁶ See *id.* at 88. Are blacks anything more than a miner’s canary for Rosin? Seemingly not. Consider this dire warning from Rosin: “The whole country’s future could look much as the present does for many lower-class African-Americans . . .” *Id.* at 94. Or this one: “Connie has noticed, too, that it’s not just the poorer African-American girls getting pregnant in high school anymore.” *Id.* at 101.

¹²⁷ See Cooper, *supra* note 36, at 67.

¹²⁸ Rosin, *supra* note 16, at 45-46.

¹²⁹ See ALEXANDER, *supra* note 6, at 7.

¹³⁰ Haney-López, *supra* note 17, at 1064-66.

cultural beliefs and historical practices,” Haney-López observes, “most Americans accept that major American institutions are race neutral *and* that these institutions produce vast racial disparities.”¹³¹ *The End of Men* seems to fit within that trend.

If racially disproportionate incarceration is invisible to and even deemed appropriate by the mainstream, it is because of the process of naturalization. The war-on-men proponents’ real concern is with white men. Men of color’s suffering through the War on Drugs hardly registers. And that is the fundamental problem. Talking about wars on men without talking about the results of the drug war is representative of a culture that lacks empathy for men of color.

2. Strip Search Doctrine as Naturalizing Lack of Empathy for Black Men

Perhaps unsurprisingly, we see the cultural naturalization of the idea that those who are imprisoned are appropriately incapacitated mirrored in the Supreme Court’s assumption that those who are arrested are legitimately seized.¹³² In the legal context, though, we see a more concrete form of the lack of empathy for men of color. The Court’s opinion in *Florence v. Board of Chosen Freeholders* naturalizes the presumed legitimacy of strip searching adult males arrested for petty offenses.¹³³ The fact that the Court seems very concerned about strip searching in other contexts, such as searches of girls in school,¹³⁴ reveals the Court’s lack of empathy for men of color.

To consider the Court’s lack of empathy for those who are arrested, we must keep in mind that arrests, as well as instances of incarceration, are grossly racially disproportionate.¹³⁵ Then it is less of a surprise that the Court seems to think that the fact of arrest distinguishes people from other rights-bearing citizens.¹³⁶ For instance, in his important *Thornton v. United States* concurrence, Justice Scalia states: “In *United States v. Robinson* we held that authority to search an arrestee’s person does not depend on the actual presence of one of *Chimel*’s two rationales in the particular case; rather, the fact of arrest alone justifies the search.”¹³⁷ Legal scholar Seth Stoughton points out that U.S. police officers conduct more than ten million searches of people incident to arrest every year.¹³⁸ In other words, officers need not have, and often do not have, any reason to believe the suspect might possess evidence of crime or a

¹³¹ *Id.* at 1064.

¹³² See *United States v. Robinson*, 414 U.S. 218, 235 (1973).

¹³³ *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

¹³⁴ See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009).

¹³⁵ See *PAGER*, *supra* note 47, at 3.

¹³⁶ See *Robinson*, 414 U.S. at 235.

¹³⁷ *Thornton v. United States*, 541 U.S. 615, 631-32 (2004) (Scalia, J., concurring) (citation omitted).

¹³⁸ See Seth W. Stoughton, *Modern Police Practices: Arizona v. Gant’s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1727 (2011).

weapon, yet the Court grants officers an automatic search anyway.¹³⁹ As Stoughton states, “[m]odern courts, including the Supreme Court, have adopted an almost mechanical recitation of the justifications for the search incident to arrest doctrine that has led commentators to note that courts view the doctrine as a ‘categorical entitlement.’”¹⁴⁰ In practice this means that officers can use an arrest for stopping too long at a stop sign as a justification for searching the individual’s pockets and any containers in his car.¹⁴¹ And we know that the people searched incident to arrest will disproportionately be men of color.

Allowing automatic searches incident to arrest while knowing of the problem of racial profiling¹⁴² amounts to a lack of empathy for men of color because of the invasiveness of these searches. Consider the possible scope of a search incident to arrest. Jon Gould and Stephen Mastrofski discuss the fact that street versions of *Terry* frisks,¹⁴³ which are supposed to be less invasive than full-blown searches, sometimes include requesting the suspect to bend over and expose his anus for physical search.¹⁴⁴ While that is a violation when one only has the reasonable suspicion required for a frisk, a visual search of the anus is probably legal when one has probable cause to justify the search.¹⁴⁵ Is there any reason to believe the Court finds such searches of private areas to be invasive? Yes. One prominent and relatively recent example is *Safford Unified School District No. 1 v. Redding*,¹⁴⁶ where the Court found a strip search of a young girl by school officials unreasonable because strip searches are “categorically distinct” from other types of searches.¹⁴⁷ While the *Redding* Court acknowledged the invasiveness of strip searches, the Court seems less concerned with strip searches in other contexts, particularly when those likely to be searched are men of color.

If the Court lacks empathy for men of color in the search-incident-to-arrest context, matters only get worse once an individual is taken to a jail cell. Justice O’Connor wrote that “[t]he fact of arrest and incarceration abates all legitimate

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 1728 (quoting Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 385 (2001)).

¹⁴¹ *See id.* at 1746; *see also* Whren v. United States, 517 U.S. 806, 819 (1996).

¹⁴² The Court has long been on notice of the problem of racial profiling. *See, e.g.*, Atwater v. Lago Vista, 532 U.S. 318, 372 (2001) (O’Connor, J., dissenting) (flagging “racial profiling” as a concern in minor traffic stops).

¹⁴³ *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

¹⁴⁴ *See generally* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 334 (2004).

¹⁴⁵ *See Whren*, 517 U.S. at 818 (declaring that probable cause justifies all searches except those done by extraordinary means).

¹⁴⁶ 557 U.S. 364 (2009).

¹⁴⁷ *Id.* at 374.

Fourth Amendment privacy and possessory interests in personal effects, and therefore all searches and seizures of the contents of an inmate's cell are reasonable."¹⁴⁸ In this respect, I agree with always-incisive Fourth Amendment scholar Tracey Maclin that "a person who has been arrested and who will soon be incarcerated should be protected against the exercise of unnecessary police power."¹⁴⁹ Unfortunately, the law disagrees when it comes to arrestees.

The recent *Florence* case demonstrates the problem.¹⁵⁰ Florence, a black male, was stopped for a minor traffic violation.¹⁵¹ The officer's computer incorrectly informed him that there was still a warrant for his arrest for failure to pay an old fine.¹⁵² Not only had Florence paid the fine, but because, as a black man, he did not trust the police, he carried evidence of payment with him.¹⁵³ Nonetheless, he was sent to the Burlington County Detention Center and then the Essex County Correctional Facility.¹⁵⁴ At the first jail, Florence was forced to shower and be visually inspected, allegedly including the exercise of lifting his genitals and bending over to expose his anus.¹⁵⁵ At the second jail, he was again visually inspected while naked, including the "lift and bend" exercise.¹⁵⁶ Amusingly, Justice Kennedy seems to doubt that Florence was required to "lift and bend," but admits that Florence had "an officer look at [his] ears, nose, mouth . . . and other body openings."¹⁵⁷ Do human beings typically have "other" openings besides their genitals and anus? This language betrays that Justice Kennedy is not willing to speak frankly about the treatment to which he is willing to subject people, most of whom will be men of color.¹⁵⁸

¹⁴⁸ *Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) (citations omitted).

¹⁴⁹ Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 232 (1993).

¹⁵⁰ *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

¹⁵¹ Robert Barnes, *Supreme Court Upholds Jail Strip Searches, Including for Minor Offenses*, WASH. POST (Apr. 2, 2012), http://www.washingtonpost.com/politics/supreme-court-upholds-jail-strip-searches-even-for-minor-offenses/2012/04/02/gIQAAsZB4qS_story.html?tid=pm_politics_pop.

¹⁵² *Florence*, 115 S. Ct. at 1514.

¹⁵³ See Phillip Warlove, *Supreme Court Gives Its Stamp to Unwarranted Strip Searches*, YAHOO! NEWS (Apr. 3, 2012), <http://news.yahoo.com/supreme-court-gives-stamp-unwarranted-strip-searches-170500525.html>.

¹⁵⁴ *Florence*, 115 S. Ct. at 1514.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ As a doctrinal matter, Justice Kennedy's task was easier. He deferred to corrections personnel on grounds of the dangers all prisoners are assumed to present. *Id.* at 1515-17. Justice Kennedy then cited the Court's infamous case allowing police officers to subject individuals to the "gratuitous humiliation[]" of an arrest for a non-jailable seat-belt violation. See *id.* at 1518 (citing *Atwater v. Lago Vista*, 532 U.S. 318, 346 (2001)). Low-

Taken together, the *Redding* and *Florence* decisions show an understanding that strip searches are degrading accompanied by a willingness to subject any arrestee to strip searches. Men of color will be the principal subjects of those arrests and strip searches. Since *Florence* allows strip searches of any arrestee taken to jail, the Court has effectively condoned widespread strip searching of men of color. The *Redding* case suggests that the Court does have empathy for those who might be strip searched, just not when they are black men who have been arrested, even erroneously. I thus argue that strip-search doctrine is part of a naturalization of lack of empathy for those who are potential incarcerated, which mostly means men of color.

III. IMPRISONMENT AND THE BIPOLARITY OF BLACK MASCULINITY

Most scholarship on hyper-incarceration and black men focuses on our attributed identities. I argue that hyper-incarceration is not only a continuation of literal anti-black racism, but also a new wrinkle in the ways black men are thought about and think about themselves.¹⁵⁹ As I detailed in Part II.A, the term “imprisoned” certainly describes the physical state in which too many black men find themselves. And as I discussed in Part II.B, the Supreme Court seems to treat imprisonment as a continuum of compromised status beginning with arrest. But there is something more here, for imprisonment serves as a metaphor for the special compromised status of black masculinity in the United States.

In an earlier essay, I proposed a way of thinking about black masculinity – that it is “bipolar” in the sense of presumptively constructing us as “Bad Black Men” in order to discipline some of us into seeking a “Good Black Man” label conditioned on assimilation. In this Part I will engage the relationship between the concept of black masculinity as bipolar and the emergence of imprisonment as a metaphor for black masculine status.

The theory of bipolar black masculinity is based on analysis of media representations of black men.¹⁶⁰ Those images “depict us as either the

level offenders have no right to the special treatment of requiring reasonable suspicion because, according to Justice Kennedy, they themselves present dangers to corrections officers, and it would be too difficult for officers to discern when someone for whom they lack reasonable suspicion should not be forced to do the “lift and bend.” *Id.* at 1520-21.

¹⁵⁹ On masculinities in the legal context generally, see, for example, NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 1 (2010); David S. Cohen, *No Boy Left Behind?: Single-Sex Education and the Essentialist Myth of Masculinity*, 84 *IND. L.J.* 135, 138 (2009); Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, Terry Stops, and Police Training, 18 *COLUM. J. GENDER & L.* 671, 672 n.7 (2009) (cataloging most of the relevant scholarship through 2009); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 *STAN. L. REV.* 777, 780 (2000) (applying masculinities studies to policing); Ann C. McGinley, *Masculinities at Work*, 83 *OR. L. REV.* 359, 364 (2004).

¹⁶⁰ Cooper, *Against Bipolar Black Masculinity*, *supra* note 18, at 857. See generally Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 *MICH. L. REV.* 946 (2002) (discussing assumptions of black criminality and assumptions about what it takes to be

completely threatening Bad Black Man or the fully assimilationist Good Black Man.¹⁶¹ The main reason the Bad Black Man is seen as threatening is that he is assumed to be an inchoate or actual criminal.¹⁶² While the image of the Bad Black Man as threatening obviously implicates the possibility of imprisonment, it encompasses many other concepts, such as being excessively sexual.¹⁶³ The key to the Bad Black Man image, though, is that it is the default projected on any newly encountered black man.¹⁶⁴ Accordingly, in mainstream environments, black men are always suspect.

In order to overcome the presumption that he is a Bad Black Man, a black man must bring forth evidence that he is instead a Good Black Man. This usually means that he must show that he is assimilationist. He must show that he is part of the mainstream culture, not black culture.¹⁶⁵ What makes black masculinity “bipolar” is that “[t]he images . . . swing from one extreme to another with little room for nuanced depictions.”¹⁶⁶

The bipolarity of black masculinity has special implications for imprisonment. First, it helps explain why so many black men are arrested and imprisoned. People who are inherently suspect get the kind of disproportionate police attention that leads to disproportionate imprisonment. As disproportionate scrutiny yields disproportionate imprisonment, that fact is used to justify greater and more targeted scrutiny. The result is incarceration that is hyper in the two ways discussed in Part II.

Second, the fact of disproportionate imprisonment helps lead to the lack of empathy I discussed in Part II.B. Whites know that many black men are imprisoned. They come to see it as a characteristic of black masculinity. They thus tend to treat all black men as suspect.¹⁶⁷ This is a second way the bipolarity thesis helps explain imprisonment: imprisonment is how the default image of the Bad Black Man is reinforced.

Finally, the reinforcement of the Bad Black Man image through imprisonment also has implications for black men’s subjectivities. We know we are always suspect. We thus feel an even greater need to establish our status as a Good Black Man. Our efforts at distancing ourselves from the general negative image of black men, however, reinforce the notion that black masculinity is essentially bad. Therefore, black men’s attempts to distance themselves from the image of the imprisoned black man reinforce the bipolarity of black masculinity. As a consequence, imprisonment, as both fact

deemed a Good Black Man).

¹⁶¹ Cooper, *Against Bipolar Black Masculinity*, *supra* note 18, at 857.

¹⁶² *See id.* at 877-78.

¹⁶³ *See id.*

¹⁶⁴ *See id.* at 887.

¹⁶⁵ *See id.* at 886-88.

¹⁶⁶ *Id.* at 857-58.

¹⁶⁷ This is usually subconscious rather than intentional bias. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005).

and metaphor, has become crucial to the constitution of contemporary black masculinity.

CONCLUSION: A BAD DREAM

This Essay has been about the increasing significance of imprisonment. I have argued that because of hyper-incarceration, the drug war has already wrought the end of men of color. Accordingly, I cannot believe, but at some level am not surprised, that Hanna Rosin can write a book called *The End of Men* and leave men of color outside of her world. I have revealed a similar lack of empathy on the part of the Supreme Court by highlighting its treatment of arrestees, who will largely be men of color. That is why I argue that the very idea of imprisonment has become a way of tagging most black men as Bad Black Men in order to discipline remaining black men into seeking the label of Good Black Man. But the argument is not just about the external world's treatment of black men, it is also about what we have come to internalize.

On the topic of internalization, I refer you to the notion of the "Health Inspector" from the Introduction of this Essay. Here's how real this is to me: On December 26, 2012, I woke up in the middle of a dream where I was screaming, "Commanding Officer! Commanding Officer!" For some reason, in the dream a white male colleague and I were on the lower level of a police station. A group of men started wandering into the large room we were in. The men prowled toward us menacingly. One of them started talking about how there might be a gang rape about to happen. As the tension built, I started running up the stairs seeking a police officer, yelling, "Commanding Officer! Commanding Officer!"

I woke up. I went downstairs and wrote this vignette. Maybe the dream was triggered by thoughts about this Essay, which would soon be due. But this was not the first time I had dreamt of being threatened with jailhouse violence, and I doubt it will be the last. Instead, this dream seems to be part of the psychic structure of being a successful black man. We know that society depicts some black men as bad men. We know that society expects those men to suffer a violent fate. We black men whom society designates as "good" spend our days disproving that we are part of the Bad Black Man group that society exiles to poverty or prison. In that sense, we are always already imprisoned within black masculinity.