

Crime and Affirmative Action*

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Let me begin, as critical race theorists often do, with a story. Earlier this year, in the city of Los Angeles, a three-generation Korean American family moved into a new home.¹ The grandfather from the family left to take his customary evening stroll. "Don't go too far, and please come back soon," his daughter requested. As he returned from his walk, Tong-Sik Chong became disoriented and tried to enter the wrong house. "Let me in, let me in!" he cried out in Korean. The occupants of the house became alarmed and called the police. Police helicopters and squad cars rushed to the scene. Mr. Chong, an eighty-three-year-old grandfather, was spread-eagled, handcuffed, and hauled down to the police station. At the station, he could not understand the officers who confronted him and he could not explain his predicament. In the meantime, his family searched frantically for him and filed a missing person report with the police.

At 3:00 a.m., the police, having made no charge against him, turned Mr. Chong out of the station. He was left on a strange street, in a dangerous neighborhood, in the middle of the night, with no way to get home. He was mugged and viciously beaten, and when he was found, he was rushed to an emergency room. There, at the hospital, he encountered for the first time someone who spoke Korean. A nurse, who had heard on Korean radio the story of the family frantically searching for their grandfather, called the station, and the family was finally reunited. Mr. Chong's injuries had a lasting effect. He became afraid to leave the house and no longer went for walks. Shortly after the incident he passed away, never having recovered his prior vigor and enjoyment of life.

* Banquet address at *The Journal of Gender, Race & Justice* Symposium (Oct. 18, 1996).

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1. For background on the Tong-Sik Chong incident, see *Briefs: LAPD Practices Called into Question*, ASIANWEEK, Feb. 9, 1996, at 9; Julie Ha, *LAPD Admits Detention of Elderly Asian Man*, RAFU SHIMPO, Feb. 1996; K. Connie Kang, *Family Grieves for Man They Say Police Failed to Protect*, L.A. TIMES, Apr. 24, 1996, at B3; K. Connie Kang, *Ordeal Spurs Criticism of L.A. Police*, L.A. TIMES, Feb. 7, 1996, at B1; Alethea Yip, *Advocates Demand LAPD Investigation: Tragedy Results in Three Incidents of Alleged Misconduct*, ASIANWEEK, July 4, 1996, at 8; Letter from Robin S. Toma, Chair, Asian Pacific Islander Advisory Council to the Los Angeles Police Commission, to Commissioner Deirder Hill and Chief Willie Williams (Jan. 17, 1996) (on file with author).

Here is another story: Thien Minh Ly² was a Vietnamese American with a bachelor's degree in biology and English from UCLA and a master's in physiology and biophysics from Georgetown. One evening he decided to go rollerblading in his hometown of Tustin, California. Tustin is a nice bedroom community, the kind of place with new housing developments and strip malls, a place people move to because they believe it is a better place to raise kids than the city. This day in suburbia, however, had a dark side. Thien Minh Ly was attacked and beaten to death on the tennis court where he was in-line skating. At first the police said the crime lacked a motive. Mr. Ly was carrying no money, and he had no enemies. Given the violence of the repeated stab wounds to the victim's heart, the police speculated that the killer was someone close to Ly who was enraged at him. After pressure from Asian American civil rights groups, the police began investigating the murder as a possible hate crime. In the end, the racial motive for the murder was undeniable—one of the assailants, a self-described white supremacist, sent a letter to a friend bragging about the murder of a "J. P."³

My last introductory story recalls a student who told me of his family's experience in the Los Angeles uprising of 1992. Most Americans are aware of the widespread burning and violence that engulfed that city in the wake of the "not guilty" verdict in the trial of the police officers who had assaulted Rodney King. Not everyone knows of the particular experience of Korean American merchants during that urban conflagration. My student's family ran a small store in Koreatown. Like many immigrants, his family was forced into entrepreneurship because the normal channels of employment were closed to them. Like most immigrant-owned businesses, theirs was marginally capitalized, marginally profitable, and self-insured.⁴ These are business terms

2. For background on the Thien Minh Ly case, see Anna Cekola, *Hate Crime Adds to Charges Filed in Stabbing of Ly*, L.A. TIMES, May 2, 1996, at B1; Anna Cekola, *Tustin Man, Teen Charged in Skater's Slaying*, L.A. TIMES, Mar. 6, 1996, at B4; Julie Ha, *Killing of Asian Man to Be Tried as Hate Crime*, RAFU SHIMPO, May 2, 1996; Briefs: *FBI Probes Slaying of Vietnamese American Student*, ASIANWEEK, June 20, 1996, at 8; Thao Hua, *Man Fatally Stabbed While out Skating*, L.A. TIMES, Jan. 30, 1996, at B4; Thao Hua, *Stabbing Victim Probably Knew Killer, Police Say*, L.A. TIMES, Feb. 1, 1996, at B1; Thao Hua, *Tustin Stabbing Baffles Family, Friends*, L.A. TIMES, Jan. 31, 1996, at A1; Jeff Kramer, *Hate-Crime Charge Added in Killing of Ex-UCLA Student Leader*, ORANGE COUNTY REG., May 2, 1996, at B5; Lee Romney, *Police Rule out Race Hatred as Motive in Tustin Stabbing Death*, L.A. TIMES, Mar. 5, 1996, at B4; *Special Circumstances*, ASIANWEEK, May 10, 1996, at 1; Letter from Karen K. Narasaki, Executive Director, National Asian Pacific American Legal Consortium, to Attorney General Janet Reno (Apr. 3, 1996) (on file with author); Vietnamese Community of Orange County, Inc., Press Release (May 2, 1996) (on file with author).

3. See Briefs: *FBI Probes Slaying of Vietnamese American Student*, ASIANWEEK, June 20, 1996, at 8; Ha, *supra* note 2; Anna Cekola, *Hate Crime Adds to Charges Filed in Stabbing of Ly*, L.A. TIMES, May 2, 1996, at B1; *Special Circumstances*, *supra* note 2.

4. See THE STATE OF ASIAN PACIFIC AMERICA. REFRAMING THE IMMIGRATION DEBATE: A PUBLIC POLICY REPORT 149, 166, 213-14 (Bill Ong Hing & Ronald Lee eds., 1996); PYONG GAP MIN, *CAUGHT IN THE MIDDLE: KOREAN MERCHANTS IN AMERICA'S MULTICULTURAL CITIES* (1996); PYONG GAP MIN, *The Social Costs of Immigrant Entrepreneurship: A Response to Edna Bonacich*, in AMERASIA 187 (1989); Fran Rensbarger, *The Changing Face of Washington Business*, WASH. BUS. J., Aug. 14, 1989.

that describe a hard reality. These businesses survive through intensive commitment of family time and effort—long hours are put in for limited remuneration with no economic safety net in the event a business is shut down.

Against this background, the merchants of Koreatown watched anxiously as news reports showed the rebellion quickly spreading beyond the confines of south central L.A. and moving across the city. They watched as the police cars converged at Olympic Boulevard, the gateway to Koreatown, and they watched the police turn and leave as the violence descended. They were stunned at this abandonment, which meant that their shops would soon fall to arson and looting. Quickly, they put out the call for self-defense. My student's father prepared to leave home to guard his own store. His sons prepared to follow, but the father said, "You must stay here because if anything happens to me, you have to take care of your mother." The sons begged to go with their father, but they were ordered to stay home. My student, the younger son, stopped while telling this story to his classmates, and his shoulders quivered as he attempted to restrain emotion. He described the family waiting at home all night and all of the next day with no word from their father. They waited while hearing the news estimates of casualties in Koreatown. They waited while watching the live-action helicopter footage showing Korean merchants engaged in gun battles from the roofs of their stores, while everywhere the smoke was rising. Thankfully their father did return home from this urban battleground.

When I returned to work at UCLA law school in the wake of the rebellion, the smell of smoke was still in the air. I could say anything I wanted to about racism and class oppression, about how pervasive and terrible these are, about what an absolute imperative it is that we do something. No one called me paranoid, oversensitive, separatist, idealistic, anti-white, or myopic. This lasted for about as long as you could still smell smoke in the air in Los Angeles.

UCLA is located in the tony neighborhood of Westwood, whose boutiques and restaurants were an obvious target in the rebellion. When the first rock went through the first window in Westwood, the entire village was surrounded by the police. Westwood escaped the brunt of the uprising. Koreatown was offered up in exchange. That is my opinion, shared by many in the Asian American community. UCLA lost Korean American students after the rebellion. The loss of their families' businesses meant they could no longer afford to go to school.

What do we lose when we lose those students? And how is that loss related to an analysis of crime and punishment in the United States? This essay is about affirmative action and crime. The failure to achieve equality—the failure to use aggressive, affirmative means to redress inequality—constructs both the material and the ideal nature of crime in our nation. It shapes the material world of crime: whose bodies receive violence, who is incarcerated, who is

at 12; Jane Seaberry, *Universal Marketplace: Immigrant Entrepreneurs Set up Shop*, DALLAS MORNING NEWS, Nov. 1, 1995, at 1A; Cristina Lee, *Minority Businesses Multiplying*, L.A. TIMES, Oct. 4, 1991, at D5.

killed by the state in the name of crime prevention, who engages in activity we call criminal, whose crimes pay. All of these consequences reflect structures of subordination.

So, too, is the ideal world of crime shaped by subordination. Ideas about crime: what is a crime, who is a criminal, and how we choose to punish and prevent crime—none of our ideas in this regard are developed free from the intellectual poisons of racism, sexism, homophobia, and class oppression. The material and the ideal are not separate, of course. Racist ideas about who is criminal play out in disproportionate arrest, conviction, and incarceration rates for African American men. Patriarchal ideas about women as objects play out in the concrete reality of rape and battering and in the ineffectual public response to those crimes. Homophobia, called morality; genocide, called progress; state killing of the mentally ill, called deterrence. These are ideas and justifications that impact on material well-being. The articles in this volume of *The Journal of Gender, Race & Justice* are an effort to call attention to the way in which mainstream thought about crime and punishment both reflects and creates the degradation of certain members of the human family.

Affirmative action is part of the fight-back. To prevent crime, to change law enforcement for the better, and to rethink crime and punishment altogether—to do all of these things intelligently and effectively—we need affirmative action. I deliberately opened with stories from the Asian American community because of the myth that “Asians don’t need affirmative action.” This is a lie that many in the Asian American community want to believe. “We can make it; we don’t need to be part of the civil rights coalition. Maybe no one will notice that we are not white, if we keep quiet and work hard.”

Then one day your grandfather ends up at the police station and there is no one there who sees him as a human being. There is no one there who thinks, “This could be *my* grandfather,” no one who has any life experience that makes them react to Tong-Sik Chong as an elderly man in need rather than a worthless criminal or vagrant. There was no one in leadership who thought to establish protocols requiring translators when a non-English person is arrested, who thought in advance about the consequences of the horrible misunderstandings likely to result when no one at the police station knows how to speak Korean, and when there is no set procedure for translation. A simple phone call to any number of Korean American groups or individuals could have spared Mr. Chong from violence. But no one was there who cared. This has to change, and it will change with affirmative action. The only way in which Asian Americans have made it onto police forces is through affirmative action. The only way Asian Americans with bilingual abilities will make it onto police forces will be through affirmative action. The only way they will get promoted into policy-making positions is through affirmative action. This has nothing to do with lack of qualifications, and everything to do with racism. When decision makers think “good cop,” they do not picture a Korean. When people think “chief of police,” or “police commissioner,” they do not picture a Korean. In part, this is because the people who are in the business of constructing images in this

country—the news editors, the film makers, the advertising executives, the publishers—are virtually all white. The Glass Ceiling Commission Report found that white men hold ninety-five percent of senior news editorial positions.⁵ Without affirmative action in these critical image-making positions, we cannot counter the stereotypes that make “Asian” and “human” two separate sets in the minds of many Americans.

Professor Charles Lawrence and I just finished writing a book arguing for the expansion of affirmative action.⁶ One of the main arguments we hear in response to our arguments is a form of due process: “It’s not fair—how do we know who is subordinated? If we start rearranging things to help those groups, how can we keep from disadvantaging new groups as we ask some people to step aside in order to provide room for the excluded? It’s arbitrary, it’s chaotic, it disrupts the status quo.”

I tell the story of the Koreatown merchants as a deliberate response to this argument. A world that is arbitrary, chaotic, and dangerous to vested rights is the world we will live in if we do nothing about subordination. The small business operators who face that world every day from behind bulletproof glass in their tiny stores know this truth. The Korean American community was remarkable in its response to the destruction in Los Angeles. As they marched by the thousands to memorialize the deaths and the losses they sustained in the 1992 uprising, they also called for greater civil rights for all and an end to police brutality.⁷ They turned their anger not toward the young people who let loose their rage on the city but toward the broader society that had allowed urban rage to smolder for years without any attention to the poverty and police violence that was fueling it, and toward the police who failed utterly in their duty to protect Korean Americans who became the targets of that rage.

How would we respond to the crime that plagues urban America if we thought seriously about its genesis? We would move directly and aggressively to re-enfranchise the urban poor.⁸ We have disenfranchised the urban poor

5. FEDERAL GLASS CEILING COMM’N, U.S. DEP’T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL (1995).

6. CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

7. Irene Chang & Greg Krikorian, *A City in Crisis: 30,000 Show Support in Koreatown March Demonstration*, L.A. TIMES, May 3, 1992, at A2; Angela E. Oh, *Platform: Avoiding Traps*, L.A. TIMES, May 1, 1992, at B7 (Op. Ed.); Angela Oh, *Platform: Build Alliances*, L.A. TIMES, May 12, 1992, at B7 (Op. Ed.); *Out of Chaos, a New Voice*, L.A. TIMES, July 20, 1992, at E1.

8. See generally Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1223-24 (1995) (“[The] wave of crime in urban black America . . . is an inevitable outgrowth of social conditions created by the coincidence of racial segregation and high rates of black poverty.”); Margaret Weir, *Breaking Barriers, Forging New Bonds*, 1 GEO. J. ON FIGHTING POVERTY 77, 77 (1993) (“Public action in the 1990s must help reduce the distance between the poor and the rest of society by folding the poor into broader social programs whenever possible and by breaking down the economic and social barriers that currently separate cities and suburbs.”); Thomas J. Sugrue, *The Impoverished Politics of Poverty*, 6 YALE J.L. & HUMAN. 163 (1994) (reviewing CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY AND THE*

from social citizenship. The entire infrastructure of functional life has left: no jobs of any kind, no supermarkets, no movie theaters, no parks, no safe schools, no libraries, no sports programs. In Washington, D.C., where I now live, there are schools where children have to wait for their turn to use a textbook because there are not enough to go around, and schools that are regularly shut down because of health and fire code violations.⁹ There are children trying to do their homework in crowded homeless shelters that require residents to leave during the day and come back in the evening unless the temperature drops to freezing.¹⁰ There are children subject to abuse who are literally lost in the social service system—federal judges issue one restraining order after another upon finding out about files that disappear—and children who sleep on hallway floors while the social workers try to figure out what to

UNDERCLASS (1992); LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992); E. Britt Patterson, *Poverty, Income Inequality, and Community Crime Rates*, 29 *CRIMINOLOGY* 755 (1991) (finding strong association between absolute poverty and neighborhood crime rates). Cf. KATHERYN K. RUSSELL, *THE COLOR OF CRIME* 29-30 (1998); Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, in *DOUBLE EXPOSURE: POVERTY AND RACE IN AMERICA* 135 (Chester Hartman ed., 1997).

9. See Sari Horwitz, *D.C. Delays Opening of School; Smith Puts off Start Until Monday; 49 Schools Still Have Fire Hazards*, WASH. POST, Sept. 6, 1994, at A1 (reporting that D.C. School Superintendent Franklin L. Smith announced the delay of all city public school openings due to significant fire hazards); Sari Horwitz, *D.C. Officials Fear Judge May Shut Schools; New Fire Code Violations Worry Superintendent, Others as Court Deadline Nears*, WASH. POST, Feb. 13, 1995, at A1 (“Two weeks ago, [D.C. Superior Court Judge Kaye K.] Christian ordered sections of five schools sealed because school and fire officials opened them last fall without her approval and because there was no documentation to show that the schools were safe.”); Martin Weil, *Five Schools Added to List of Closings; D.C. Judge Orders More Repairs*, WASH. POST, Aug. 17, 1996, at A1 (“Five schools were added yesterday to the 16 D.C. schools barred by court order from opening Sept. 3 until potentially serious fire code violations are corrected.”); DeNeen L. Brown, *D.C. Superintendent Probes Text Shortage, Vows Action*, WASH. POST, Dec. 16, 1995, at B1 (“[S]tudents . . . still [are] without textbooks four months after the first day of school.”); Sari Horwitz, *Underestimating a Judge Kept School Doors Closed*, WASH. POST, Sept. 12, 1994, at A1; DeNeen L. Brown, *D.C.’s First Day of School Is Orderly but Stressful; Classes Start Late at Some Alternative Sites*, WASH. POST, Sept. 4, 1996, at A1 (reporting that six schools were closed due to fire code violations).

10. See *School Board Actions: Homeless Children*, WASH. POST, Apr. 28, 1988, at J5 (quoting D.C. Department of Human Services Director M. Jerome Woods: “[C]hildren [living in city homeless shelters] suffer the abuse of other students with homes . . . [and] have no opportunity or quiet place to concentrate on their homework”); Caryle Murphy, *Carpenter’s Shelter: Facility a Window to Pain, Resilience of Homeless*, WASH. POST, Dec. 22, 1988, at V1 (“With nighttime temperatures dipping into the low 20s, the Alexandria facility for the homeless is going over its legal limit of 150”; describing one family that lives at the shelter, the Clarks, in a “cubicle about 10 feet square While they talked, their son, who goes to school every day, was doing his homework.”); Lan Nguyen, *A Place to Stay—Till Morning; Falls Church Buses out Homeless Each Day*, WASH. POST, Mar. 9, 1996, at A1 (reporting that the Falls Church homeless shelter requires the poor who stay there to “get out of town at daybreak” and contrasting the shelter with “shelters for homeless in other Washington area jurisdictions [that] also have limited times when they’re open, but none have the provisions that force the homeless to leave the area when the shelters close”).

do with them.¹¹ At one school in the District, teachers have instituted bullet drills after a series of shootings right outside the schoolyard fence.¹² Little kindergarten children are taught to drop flat on the ground and close their eyes—the teachers do not want them to see the blood.¹³

These are no longer horror stories or aberrations. Pick any city, and you will find large numbers of children living in circumstances that will make it a miracle if they ever grow up, stay in school and get a job. We are raising a generation that sees crime as the only source of employment in their neighborhoods, that sees no pay off for playing by the rules of a foreign world “out there”—the world in which people work hard and are rewarded for that work, in which people obey rules that are logical, fair and beneficial to all.

I know that world “out there” because most of the time I live in it. I gasp right along with those nice families that have moved to the suburbs when I read the stories about random crime invading places that are supposed to be safe: an armed robbery in the parking lot of an upscale shopping mall;¹⁴ a young public interest lawyer killed at an ATM machine;¹⁵ a suburban mom killed while she desperately tries to hang on to her stolen car because her baby is in the car seat in the back.¹⁶ All of this happened recently in the city where I live. These crimes were sensationalized because they were not supposed to happen. They breached the implicit understanding that the social dislocation we have allowed to grow in the inner city will not transgress boundaries and assault the rest of us. I will not read you the race and class subtext here, because if you live in this country and pay attention, you can read it yourself.

11. See Marcia Slacum Greene, *'Sitting on a Time Bomb Waiting for Kids to Die'; D.C. Child Welfare Services Overmatched*, WASH. POST, Sept. 12, 1989, at A1 (“Sometimes children are lost within the system because of a defective computer tracking system. . . . One worker with a caseload of 60 families and about 130 children said he handled the cases by ‘ignoring most of them.’ . . . In August, agency officials said, there was a backlog of 185 cases involving 771 children that either had not been investigated or had not been completed. Some social workers said the backlog was closer to 300 cases.”); Saundra Torry, *Stakes Are High, Resources Low for D.C.’s Child Neglect Unit*, WASH. POST, Apr. 2, 1990, at A1 (“[The Corporation Counsel’s Office] is understaffed, underfunded and overwhelmed. . . . Some private lawyers who work in the neglect field say there is no way of knowing for certain how many other distressed children may have fallen between the cracks.”); Nancy Lewis, *Child Neglect Cases Break Daily Record in D.C. Court*, WASH. POST, May 10, 1994, at A1 (reporting that increased abuse and neglect hearings are overwhelming the legal system).

12. See Robert E. Pierre, *Frightening Lessons from Mean Streets; As Crews Battle Near District School, Students Learn to React to Sound of Gunfire*, WASH. POST, Oct. 2, 1996, at D1.

13. D’Vera Cohn, *Classrooms Caught in the Crossfire*, WASH. POST, Mar. 14, 1992, at A1 (reporting that school children were taught “drop-and-cover drills”).

14. John W. Fountain, *Bank Robber Killed at Tysons Corner*, WASH. POST, Oct. 18, 1996, at C3; Doug Struck, *Malls Begin to Face Ugly Reality of Violent Crime*, WASH. POST, Nov. 24, 1996, at A1.

15. Ruben Castaneda, *D.C. Woman Stabbed to Death at Cash Machine*, WASH. POST, Dec. 18, 1995, at B3.

16. Graciela Sevilla & Dan Beyers, *Mother Killed in Apparent Carjacking; Baby in Car Seat Tossed from Vehicle*, WASH. POST, Sept. 9, 1992, at A1.

In the meantime, all kinds of crimes never make the front page. When my co-author and I were checking the footnotes for our book, we came across a figure that seemed wrong. "Seven hundred young people were killed in gang warfare in Los Angeles County in 1992, the year of the uprising." That was too high, the editor suggested, maybe a typo, or maybe the figure was for a broader period, say "since 1992." We asked a research assistant to check the figure. It was wrong, she found out. It should have been eight hundred, not seven hundred, in 1992.¹⁷ If eight hundred white youngsters were killed in one year in any American city, we would all know that figure and the President would declare a national emergency. Am I being paranoid, oversensitive, anti-white, when I say this?

That is certainly not my intent. I seek merely to call attention to how we see some crimes and erase other crimes. In response to public fear of crime, our Congress and President gave us the Crime Bill, which created more crimes and offered up more punishment—including applying the death penalty to children—as the solution to crime.¹⁸ This same Congress and President gave us so-called welfare reform, taking from the poor to give to the rich, while retaining all forms of corporate welfare. From California, we got so-called immigration reform, which will result in more children born into poverty, more children born into circumstances they cannot overcome.¹⁹ We assault pregnant immigrant women, denying them prenatal care and adequate nutrition.²⁰ Similarly, most cities have no programs or facilities for pregnant women addicted to drugs or alcohol.²¹ We thus allow children to come into this world

17. Jesse Katz, *County's Yearly Gang Death Toll Reaches 800*, L.A. TIMES, Jan. 19, 1993, at A1.

18. See MARI J. MATSUDA, *Feminism and the Crime Scare*, in WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 37, 38 (1996) (discussing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796).

19. See Barbara Nesbet & Sheryl K. Sellgren, *California's Proposition 187: A Painful History Repeats Itself*, 1 U.C. DAVIS J. INT'L L. & POL'Y 153 (1995); Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998); Geoffrey Mohan, *Prop. 187 Has Done Damage*, L.A. TIMES, Nov. 23, 1995, at B3 (reporting that the number of women visiting clinics dropped after Prop. 187 was passed); Laura Mecoy, *Confusion Swirls Around Prop. 187*, SACRAMENTO BEE, Dec. 14, 1994, at A1 (citing that attendance at walk-in clinics and prenatal care programs dropped after the election). See generally Pamela Burdman, *Woman Who Feared Prop. 187 Deportation Dies at S.F. General*, SAN FRANCISCO CHRON., Nov. 26, 1994, at A14; Lee Romney, *Youth Dies as Medical Treatment Is Delayed Health Care: Parents Say They Feared Being Reported If They Went to Hospital*, L.A. TIMES, Nov. 23, 1994, at A3 (reporting that a 12-year-old boy died after his illegal immigrant parents delayed seeking medical treatment out of fear of deportation). As this Article was going to press, Proposition 187 was judicially overruled. See *League of United Latin Am. Citizens v. Wilson*, No. 94-7569MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998).

20. Nesbet & Sellgren, *supra* note 19, at 166.

21. See Dawn Marie Korver, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of a Bodily Function*, 32 B.C. L. REV. 629, 630 (1991); Molly McNulty, *Combating Pregnancy Discrimination in Access to Substance Abuse Treatment for Low-Income Women*, 23 CLEARINGHOUSE REV. 21, 22 (1989) ("Most drug treatment programs categorically do not admit pregnant addicts, because clinics lack obstetrical expertise, because a

without even the benefit of fully functioning brain cells. We underfund school lunches for poor children, Head Start and special education—the things that would give them a fighting chance—and we respond with greater criminal penalties when they engage in the anti-social behavior that is inevitable²² given the way in which we have abandoned them.

There are many strands floating in my lament, including, first, crime prevention. Right now prevention is an abandoned goal in public discourse. Punishment reigns in complete hegemony over prevention or rehabilitation. Even well-meaning, compassionate citizens are convinced there is nothing we can do to lift up the forgotten children, to bring them back to the circle of productive living. This is an ideological trap with tragic consequences. We do know how to retrieve forgotten children. We have repeated, longitudinal studies proving that the most effective intervention to keep a person on track for a useful and productive life is early intervention.²³ We could build and operate twice as many prisons at a cost greater than what we would pay to fund Head Start in full, and never make a dent in crime.²⁴ Our love affair with

pregnant addict is considered 'high-risk' and drains away a disproportionate share of treatment resources, or because they fear obstetrical malpractice suits."). See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997).

22. In saying the abandonment of children inevitably produces crime, I do not reject individual responsibility. Individuals are responsible for the crimes they commit. My call for collective responsibility is additive: individuals are responsible for their own choice to participate in crime *and* we are all responsible for the creation of social circumstances that increase bad choices.

23. See Craig T. Ramey & Sharon Landesman Ramey, *At Risk Does Not Mean Doomed*, NATIONAL HEALTH/EDUCATION CONSORTIUM OCCASIONAL PAPER #4, at 3 (1992) (finding children who received early education intervention had, on average, higher IQ scores and intellectual performance than those in control group); Craig T. Ramey & Sharon Landesman Ramey, *Early Educational Intervention with Disadvantaged Children—To What Effect?*, 1992 APPLIED & PREVENTIVE PSYCHOL. 1:131-140 (citing Abecedarian Project's finding that at age 12, "children who had received the early educational intervention continued to show benefits in terms of both academic achievement and IQ scores and a reduction of nearly 50 percent in the rate of repetition of at least one grade in the elementary school years"); see also Abigail Trafford, *A Head Start on Health*, WASH. POST, Sept. 16, 1997, at Z6 (quoting Ura Jean Oyemade Bailey, director of Howard University Hospital's Center for Drug Abuse Research: "If we are ever going to reverse the poverty cycle, if we are ever going to reverse the upsurge of the underclass, we have to begin at birth."); Rachel L. Jones, *Despite High Marks, Headstart Still Struggles at 30*, NEW ORLEANS TIMES-PICAYUNE, Apr. 23, 1995, at A28; Christina M. Parker, *Carbon Protests Help in Sparing Headstart*, ALLENTOWN MORNING CALL, Mar. 12, 1995, at B1; LAWRENCE III & MATSUDA, *supra* note 6, at 253-56 (citing examples of the benefits of programs like Head Start in reducing dropout rates, welfare dependency, crime rates, etc.); J. BERRUETA-CLEMENT ET AL., *CHANGED LIVES* (1984).

24. At the state level, see Rosalind Jackler, *Archer Takes Aim at Proposal to Build Pricey Federal Prison; Says Cost Estimates out of Line for Facility*, HOUS. POST, Feb. 26, 1995, at A9 ("Texas has some 50 [state] prisons under construction ranging from \$18,000 to \$35,000 per bed for . . . maximum security facilities."); Don Thompson, *Critics: "Truth in Sentencing" Just Expensive Political Ploy*, PANTAGRAPH (Bloomington), Apr. 9, 1995, at A6 ("It currently costs \$66,000 to build a new prison cell and \$18,085 to keep an inmate imprisoned for a year, according to the Illinois Department of Corrections."); Richard P. Jones & Peter Maller, *Surge of Older Inmates Coming: New Laws to Tax Prison System*, MILWAUKEE J. SENTINEL, May 25, 1996, at 1 ("Wisconsin is now holding a record 12,000 convicts, nearly 3,000 over capacity. On average, it costs nearly \$25,000 a year to imprison each one . . . [I]t costs roughly \$60,000

punishment has eclipsed what we know about prevention: poor children who participate in Head Start are far less likely to grow up to participate in crime.²⁵

Crime prevention also requires affirmative action at every level to help the excluded become the included in jobs and in education. First generation affirmative action did this. Affirmative action sent kids from the barrio to college; it took moms off welfare and put them in the building trades.²⁶ To give a person a stake in the game is to give them a reason to follow the rules. The

a year to imprison aging convicts in poor health.”); cf. Ed Cullen, *Head Start Turns 30*, ADVOCATE (Baton Rouge), Nov. 25, 1995, at 1B (“Head Start in Baton Rouge [Louisiana], with an annual budget of \$5.6 million, spends about \$4,300 per student.”); Mark Tatge, *Crowding and Decay of Prisons Escalate*, PLAIN DEALER (Cleveland), May 14, 1996, at 4B (“Ohio now spends three times more money on housing, guarding and feeding inmates than it does educating grade school students. (It costs about \$15,867 per inmate annually compared to the \$5,365 state average spent by Ohio school districts.)”).

Congress appropriated approximately \$2.8 billion to Head Start and \$2.2 billion to federal prisons in 1993. S. REP. NO. 102-397, at 5 (1992); S. REP. NO. 102-331, at 31-33 (1992). In 1996, Head Start’s congressional allowance was increased to approximately \$3.4 billion, and the federal prison system’s allowance was increased to approximately \$3 billion. H.R. REP. NO. 104-209 (1995); H.R. REP. NO. 104-196 (1995).

It is clear that the United States spends far more on prisons than on early education when the federal and state prison systems are combined. See, e.g., Bill Glauber, *U.S. Goes on Binge of Prison Building*, BALTIMORE SUN, May 9, 1994, at 1A (“Texas will double its prison capacity to 145,000 beds by August 1995. In all, the state is building 47 prison units from scratch and adding space to 31 existing facilities at a price tag of \$1.3 billion The crime bill working its way through Congress would authorize spending \$13.5 billion for state prison building grants. By comparison, the Clinton administration proposed spending \$4 billion to fund the Head Start program in the 1995 fiscal year budget”) (emphasis added); Peter Schrag, “3 Strikes” *Spends All on Punishment, Ignores Prevention*, FRESNO BEE, Jan. 25, 1994, at B5 (reporting that California will spend more, through the Three Strikes crime bill, on additional prison operating costs than the federal government spends annually for Head Start for the entire nation).

25. See SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, ANNUAL REPORT FOR THE YEAR 1992, H.R. REP. NO. 102-1080, at 49 (1992) (“Early intervention programs aimed at high-risk children, such as Head Start, are among the most effective antidrug and anticrime programs available. Every dollar spent on Head Start saves approximately \$4.75 in future social costs”); Stephen J. Schulhofer, *Youth Crime—and What Not to Do About It*, 31 VAL. U. L. REV. 435, 445 (1997) (“At an average cost of \$4500 per pupil per year, Head Start is not cheap. But the data show with reasonable confidence that such programs easily pay for themselves in improved educational outcomes along with their crime prevention benefits.”); Janette Rodrigues, *Disparities in U.S. Still Growing*, FORT WORTH STAR-TELEGRAM, Mar. 2, 1998, at 1 (reporting that the Milton S. Eisenhower Foundation “urges the federal government to invest \$56 billion . . . to expand funding for programs with successful track records, like Head Start and Safe Haven”); see also LAWRENCE J. SCHWEINHART ET AL., SIGNIFICANT BENEFITS: THE HIGH-SCOPE PERRY PRESCHOOL STUDY THROUGH AGE 27, at 59 (1993) (“[T]he program group had a significantly higher regular high school graduation rate than did the no-program group. . . . As compared with the no-program group, the program group averaged a significantly lower number of lifetime [juvenile and adult] criminal arrests 38 percent of the program group and 21 percent of the no-program group had at some time enrolled in what appeared to be academic or vocational post-secondary programs The most recent evidence indicates that, compared with the no-program group, the program group at age 27 . . . had significantly higher monthly earnings . . . [and] nearly significantly higher annual earnings [S]ignificantly fewer members of the program group than of the no-program group had received social services sometime in the ten years before the age-27 interview and records searches.”); sources cited *supra* note 23.

26. See, e.g., LAWRENCE III & MATSUDA, *supra* note 6 (describing individuals who used affirmative action to rise out of poverty).

scariest thing in the world to see, the corrections officers and police officers and prosecutors tell us, is the person who does not care, who fears no consequences, who puts no value on his or her own life or the life of any other person. We have to give our citizens a reason to care for the sake of all of us, and affirmative action works to do this.

Another strand to consider in thinking about crime and affirmative action is control of the criminal justice system: we need community access to and community control of the state mechanisms for enforcing the criminal law. In too many cities it is common for the police to generate crime even as they purport to enforce it. Corruption, police violence, and even police participation in drug rings and fencing operations are regularly reported. The L.A. uprising was an inarticulate but nonetheless unmistakable protest against this.

Community control of the police is a longstanding demand of the civil rights coalition.²⁷ Community control means that those with a stake in infusing true equality into law enforcement are represented on oversight committees that have real clout, including hiring and firing and budgetary powers in police departments, prosecutors' offices, and corrections departments. Affirmative action initiatives can place people of color, gays and lesbians, people on welfare, people with disabilities, and feminists on such oversight committees. The business of societal response to crime requires this kind of oversight because the criminal justice system is a primary location of racist, sexist, homophobic, and class-biased oppression in this country. We have to be there because our lives are literally at stake.

The final strand is the control of ideology. My neighbor's twelve-year-old son was riding his bicycle home from the 7-11 when he was stopped and hauled down to the police station for questioning about a suspected drug operation. No crime was charged and his frantic mother was called to come

27. For example, the Wisconsin State Committee of the United States Commission on Civil Rights found in their 1972 report that minority groups were increasingly calling for "programs involving a degree of community control" over "intensified programs in community or human relations." WISCONSIN STATE COMMITTEE, U.S. COMM'N ON CIVIL RIGHTS, POLICE ISOLATION AND COMMUNITY NEEDS 81 (1972). The proponents of community control claimed that the reduction in the size of a police jurisdiction allows for better communication between the police and the public, which in turn results in two tangible benefits: "1. [w]orking in smaller areas, police will be better informed about the area they serve[, and] 2. [c]itizens will have more capability to articulate demands for service, will be better informed about the police, and will provide more support for the local police." *Id.*; see also Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2250 (1993) ("The most consistent and prevalent demand of radical Black Nationalists during the sixties and seventies was for 'community control' over the police and other institutions of law enforcement."); Dwight L. Green, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2053 (1992-1993) ("Subjecting the police to localized minority community control should make law enforcement more sensitive to and responsive to the priorities of black communities."); Edward J. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 UNIV. DETROIT J. URB. L. 5, 8 (1981) ("Long-term intense dissatisfaction with internal complaint procedures, particularly among minority groups and civil rights organizations, led to demands for civilian review boards."); Allen Parachini, *An Unreconstructed '60s Radical Still Takes His Case to the Streets*, L.A. TIMES, July 27, 1986, at 3 (citing the Coalition Against Police Abuse as a "longtime radical organization working for civilian control of the police").

pick him up. Professor Patricia Williams said in her book, *The Rooster's Egg*,²⁸ that if she reads a story and it does not make sense, she figures race has something to do with it. You may have guessed that my young neighbor is Black. He was taken in by the police because it is a crime for him to exist: young, Black, male, and beautiful in the eyes of his family but not in the eyes of the police.

In the meantime, as you know and as some of the speakers at this symposium have explained, there are all kinds of crimes we do not see as crimes. Why is discrimination not a crime? It took a real fight to even include civil damages in Title VII.²⁹ If someone steals my hubcap, they can go to prison. Under "three-strikes-you're-out," this is happening now.³⁰ If someone steals my job through discrimination, they might pay a fine if I could ever prove them guilty, but the state will provide no prosecutor to help me. If someone shoplifts a can of baby formula from the supermarket, they can go to prison, but if a politician cuts off a life-line to an infant on AFDC,³¹ that is not called a crime. When my brother was working as a resident pediatrician, he told me of babies who came into the emergency room with seizures because of water poisoning—something that happens when a baby's system shuts down from too much water saturating the cells in a tiny body. How does this happen? Poor mothers water down their formula to make it stretch, and the babies drink and drink, trying to assuage hunger. "What about the WIC program?"³² I asked,

28. PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* (1995).

29. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1994)).

30. See Morton Feldman, "Three-Strikes-and-You're Out"—Pragmatic, Political, or Pacification, 20 U. DAYTON L. REV. 727 (1995); Michael G. Turner et al., "Three Strikes and You're Out" Legislation: A National Assessment, 59-SEP FED. PROBATION 16 (1995); Symposium, *Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 715 (1995); Alan Abrahamson, *Jesse Jackson Calls "3-Strikes" Laws Unfair and "Fear-Driven,"* L.A. TIMES, Mar. 12, 1996, at B8 (quoting Judge Yaffee as saying that 75% of those charged with a second or third strike are charged with a "nonviolent, nonserious" felony); Center on Juvenile and Criminal Justice, *Introduction: The People Behind the Headlines* (visited May 5, 1998) <gopher://gopher.well.sf.ca.us:70/11/Politics/three_strikes>.

31. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (ending Aid to Families with Dependent Children and imposing new limits on availability of welfare).

32. 7 U.S.C. § 612(c) (1994) (WIC Amendments of 1987). The special nutrition program for low-income pregnant women, infants, and children (WIC) is funded through the Department of Agriculture, which "finances vouchers for special food, such as infant formula, juices and cereals, for about 4.6 million women, infants and children up to age 5 who are determined by public health centers and clinics to be at risk of serious nutritional deficiencies." Spencer Rich, *Food Costs Curb Nutrition Program; WIC Rolls to Be Cut Because of Rising Prices, State Directors Say*, WASH. POST, June 27, 1990, at A3. "The \$2.1 billion Congress provided for the program in fiscal 1990 is enough to serve half of those who are eligible, according to Dennis H. Bach, president of the National Association of WIC Directors." *Id.* (emphasis added); see also Spencer Rich, *Hunger Said to Afflict 1 in 8 American Children*, WASH. POST, Mar. 27, 1991, at A4; Brooke A. Masters, *Food Program Cuts Thousands in Area*, WASH. POST, Mar. 12, 1991, at A1; *HHS Seeks Notice on Special Food Aid*, WASH. POST, Jan. 2, 1991, at A13.

In 1992, the problem became worse. "One-third of the women, infants and children eligible for

shocked that this happens. I thought that we gave them formula, at least. "There's a waiting list to get on WIC," he answered. Why is that not a crime, in this, the richest nation in the world? We do less to provide public health services and nutrition for pregnant women, babies, and children than any other developed nation, and less, even, than many underdeveloped nations.

I could go on and on, about the Savings and Loan scandal that stole millions that we are all paying for, about DES and asbestosis and herbicides and environmental destruction and run-away shops, about crimes that destroy our bodies and wreck our economy for which no one spends a day in prison. I can also say as a woman and a feminist that I live in fear of crimes against women, that I am enraged that rape is not treated as a national emergency, as it would be if men everywhere were regularly singled out for violent attack because of their gender. I am enraged that women who are battered and stalked find no protection from the state.

That I am at least allowed to rage this way in a forum for creation of ideology is a direct result of affirmative action. That is the final point I will make. What is criminal and what we are going to do about crime is part of an ideological system. To change that ideology, we need to end exclusion of members of subordinated groups in the places where ideology is formed: in the academy, in the media, in the arts, in politics, in the think-tanks and policy-making groups that shape public opinion.

I would not be standing before you if not for affirmative action. Doors were opened for me in my education and my career because of affirmative action. I am not ashamed to say this because I know it is a lie that the beneficiaries of affirmative action are unqualified. What affirmative action did was give me a chance to prove what I could do. When I saw Professor Sumi Cho at this symposium, I nearly burst into tears, thinking of all the years I went to legal conferences as the only Asian woman. When I started teaching there was no community of women of color to greet me because almost none of us were allowed to teach. I was fortunate in those early years to find a community of white feminist law professors who took my ideas seriously and held out a welcoming hand. Affirmative action made a small space for outsiders to go to law school, become professors, and participate in conferences like this one. The end of affirmative action will mean the end of this representation, and the end of a needed counterweight to the relentless barrage of reactionary ideas about crime. We need to write and speak and talk to our fellow citizens, to tell them that their fears of crime are legitimate, and that the gimmicks proposed by politicians will not end crime. More prisons, more death penalty, longer sentences—those who have studied the empirical reality of crime tell us this

the Supplemental Food Program for Women, Infants and Children (WIC) *are actually served* by that federally funded program. Because WIC is not an entitlement program, eligible residents are eliminated from the lists or refused service as federal funding dwindles." Lynne K. Varner, *Food Programs Underused as Children Go Hungry*, *Group Says*, WASH. POST, May 7, 1992, at M3 (emphasis added).

will not work.³³ The demands of the civil rights coalition—jobs, education, affirmative action, a guaranteed minimum income, and broad-scale initiatives in public health, including mental health—is what will make a difference.

We need the kind of thinking that sees substantive justice as the best response to crime for more than pragmatic reasons. Affirmative action and substantive justice represent forms of thinking that in and of themselves reduce crime. The punishment model, born in patriarchy, is at its core violent and subordinating. When we respond to crime by making the criminal the other and subjecting that other to state violence, we teach subordination: hurt what is not you, kill it, lock it up, make it go away. When lesbian couples fear walking down the street holding hands, when working women fear walking to their cars in the parking garage at night, when mothers in the projects keep their children locked inside small apartments all day because the playground is too dangerous, the danger they fear is created, in part, by the punishment model. We teach through the way we respond to crime. We teach physical force as the first response to any threat, and brutalization as the proper measure of something we call “manhood.” We teach a dehumanizing, violent means of addressing social fears. These lessons are learned all too well by rapists, gaybashers, and teenage gang members.

There is a better way, and our struggle on the ideological plane at this symposium is part of the path to it. It is a small part, because the grassroots activists on the front lines of the struggle for gay rights, labor rights, racial justice, and human dignity for all are certainly the vanguard in this cause. Nonetheless, the world of ideas counts.

When Thien Minh Ly was murdered while rollerblading in Tustin, the Asian American community called immediately for the investigation of a hate crime. This seemed a poor assumption to the Tustin police, because in their view the evidence did not point one way or another. The outrageous violence against Ly implied to investigators intimacy betrayed, not its converse: rage turned on a dehumanized other. When a gay person is murdered in Washington, D.C., the same script is followed. The gay/lesbian community demands an

33. Congress appropriated \$700 million for the 1991-92 fiscal year for the construction and operation of ten regional prisons. H.R. REP. NO. 102-405, at 117 (1991); *The Controversy Over Deterrence and Incapacitation*, in *THE DEATH PENALTY IN AMERICA* 154 (Hugo Adam Bedau ed., 1997); see Charles Ogletree, *Getting Tough on Crime: Does It Work?*, 38-APR BOSTON BAR J. 9 (1994); see also Sherri Jackson, *Too Young to Die—Juveniles and the Death Penalty—A Better Alternative to Killing Our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391 (1996); Emanuel Cleaver II, *The Proactive Approach to Preventing Crime*, 20 U. DAYTON L. REV. 733 (1995); Elaine R. Jones, *The Failure of the “Get Tough” Crime Policy*, 20 U. DAYTON L. REV. 803 (1994); Tim Novak, *Blacks Hardest Hit by Habitual-Offender Law*, CHI. SUN-TIMES, July 20, 1997, at A8 (reporting that the three-strikes law disproportionately affects young African American males); Clarence Johnson, *Radical Gap in Sentences Is Growing*, SAN FRANCISCO CHRON., Feb. 13, 1996, at A1; Larry Daughtrey, *Prison Supply About to Meet State Demand*, TENNESSEAN, Jan. 19, 1996, at 1B; J.L. Schmidt, *Nelson Unveils Crime Proposal*, ASSOCIATED PRESS, Dec. 27, 1995; David Nyhan, *Three Strikes and You’re Nowhere*, BOSTON GLOBE, June 5, 1994, at 71; Penelope Lemov, *Justice by the Grid*, 7 GOVERNING MAG. 27 (1994).

investigation of a hate crime, and the police say they have no evidence of a homophobic motive.

The evidence is our lives. The fear we live under, the reality of pervasive homophobia and racism, and the constancy of violence against us create a presumption that hate crimes happen. The police are innocent of this knowledge, and through affirmative action we can rescue them from that innocence. For it is indeed a crime not to know how your fellow citizens live, not to know that their lives are connected to your own. I believe there is judgment in the end—not the simple judgment of vengeance and punishment that our criminal justice system currently embraces, but the broad, cosmic judgment that will exact payment in human misery if we do not stand up for justice now.

This is why we need affirmative action: it represents both a practice and a belief in the command to regard the interests of the least advantaged as fundamentally important to all of us. There, in the eyes of a young man throwing a Molotov cocktail through a storefront window in Koreatown in April of 1992, there in the eyes of the merchant watching his store go up in flames, there is the price we pay for disowning any part of the human family. Affirmative action is reclaiming, bringing back to the circle of inclusion, so that we can all find peace. I speak not of the uneasy peace of suburban communities or sweet towns like Iowa City where the pulse of the excluded beats less loudly but with no less persistence. Let us seek the true, peaceful good night and sweet dreams known only in communities where all are cared for and no one is forgotten. And with that wish, I say, good night to you.