

# Locking Up My Own: Reflections of a Black (Recovering) Prosecutor

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## I.

### THE PAST: LOCKING UP MY OWN

I was a prosecutor in the District of Columbia during the era of *Locking Up Our Own*.<sup>1</sup> I am African American. I represented the United States in the city's criminal court and I used that power to lock up my own. If you were to go to the D.C. courthouse then, you would have thought that white people do not commit crimes.<sup>2</sup> In 1990, they were almost 30 percent of the city's population, but they were almost utterly absent from the criminal court.<sup>3</sup> That is one of the reasons that I was hired to be an African American prosecutor.

It turned out that I was skilled at performing both aspects of my job description.

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1. I was a trial attorney in the U.S. Department of Justice in the early 1990s. Most of my work was in the Public Integrity Section at Main Justice, but for approximately one year I was detailed to the misdemeanor section of the U.S. Attorney's Office for the District of Columbia. The U.S. Attorney's Office serves as the main prosecuting office in the District of Columbia for crimes committed by adults.

2. See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (discussing the rarity of white defendants in D.C. Superior Court).

3. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, TBL. 23 DISTRICT OF COLUMBIA – RACE AND HISPANIC ORIGIN: 1800 TO 1990, <https://web.archive.org/web/20080726045433/http://www.census.gov/population/www/documentation/twps0056/tab23.pdf> [<https://perma.cc/QLW8-H33E>].

Most of the jurors were black like me. And they were usually elderly black people—the main folks in career-obsessed D.C. who bothered to show up for jury duty—and they arrived at the superior court in their Sunday go-to-church clothes. They seemed not far removed from the 1950s, when they might have migrated to D.C. from North Carolina.<sup>4</sup> It was probably a bother to be called for jury duty, but it was also an honor, because they could remember when black people were not allowed to be on juries at all.<sup>5</sup>

They had expected that the defendant was going to be black, and they were right. But what they had not expected was this other African American man in a suit and tie, loudly proclaiming that his name was Paul Butler and that he represented the United States of America. These old black people would beam at me like they were thinking, “You go, boy, you represent the United States of America!”

At the time I did not know the phrase “politics of respectability,” but I did know how, when I cross-examined a defendant, to mock his diction and references to his “baby’s mama.”<sup>6</sup> I knew how, at the end of my frothy mouthed closing statement, to button up my jacket and let my eyes roam from the defendant to the jury in a way that communicated that the jurors and I were good Negroes, but that the defendant was a thug who needed to be locked up. I won most of my cases, and Forman’s book helps me understand that it was not only because of my trial advocacy skills.

In *Locking Up Our Own*, James Forman tells a story about Brandon, a fifteen-year-old black boy who pled guilty to possession of a gun and a small amount of marijuana. An African American judge sentenced Brandon to six months incarceration at Oak Hill, D.C.’s notorious “kiddy jail.” But first Brandon got a lecture about how he had betrayed the legacy of Martin Luther King: “Dr. King didn’t march and die so that you could be a fool, so that you could be out on the street, getting high, carrying a gun, and robbing people. No, young man, that was not his dream. That was not his dream at all.”<sup>7</sup>

To the African American jurors in D.C., I was the fulfillment of Martin Luther King’s dream. My presence in the courtroom represented the journey from slavery to freedom and the promise of America. The Supreme Court has said that it is important to have diverse actors in the criminal legal process

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4. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICAN’S GREAT MIGRATION* (2010).

5. See *Strauder v. West Virginia*, 100 U.S. 303 (1880), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

6. The “politics or respectability” were first articulated by the historian Evelyn Brooks Higginbotham. See generally EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT, 1880–1920* (1993). The basic tenet of this politics is that is important for blacks to probe that they “are capable of meeting the established moral standards of white middle-class Americans.” RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 17 (1997).

7. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 13 (2017).

because it strengthens “public respect for our criminal justice system and the rule of law.”<sup>8</sup> I have described this as the “legitimization function.”<sup>9</sup>

I was hired to be an African American prosecutor because of course these jurors were aware of the absence of white people from the criminal court. My blackness was intended to send the soothing message that everything was cool.

It worked some of the time but not all of the time. During training, we rookie prosecutors were instructed by the experienced prosecutors that sometimes, we could persuade a jury beyond a reasonable doubt that the cretin—that was one of the names used to refer to generic defendants by my fellow prosecutors, along with “bad guy” and “douche bag”—was guilty, but if it were a non-violent drug case, the jurors would often acquit anyway. The jurors would do so, one old-timer explained while rolling his eyes, because they did not want to send another black man to jail.

It was true. It happened in my cases.

Years later, when I stopped being a prosecutor, I came to understand that what the jurors were doing was a form of self-help and a form of political protest. It was a way of preventing at least one black man from being saddled with a criminal conviction and a way of walking up to a system that treated their grandbabies like cretins and slapping that system in the face.<sup>10</sup>

But when the jurors left the courthouse, they would return to their homes, often in the less safe areas of the city. It was the height of the crack epidemic, and the streets could be mad rough.

This is the consistent story of African Americans and the criminal law, though it can seem inconsistent. Black folks lament that the cops are never there when you need them—that “911 is a joke,” as the Public Enemy song goes—and then they complain that their communities are “over policed.” These gripes are not so much inconsistent as they are underdeveloped, or at least they have been until now.

## II.

### NO EQUAL PROTECTION; NO EQUAL JUSTICE

*Locking Up Our Own* has been received as a revelation in some quarters based on a reductive analysis: that its thesis is that African Americans can be as tough on crime as any other group of Americans. But much of what Forman reports would not surprise anyone who has spent time at a black church, barbershop, or in the company of my mother, who in the 1960s marched with Malcolm X and during the 1980s said, after the public school where she taught was vandalized, “Those niggers should be put under the jail.”

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8. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

9. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 713 (1995).

10. *Id.* at 679.

My mom's ideas about criminal justice policy are informed by her getting held-up at gunpoint in front of our house on Chicago's South Side, seeing family members suffer from addiction, and watching the cops treat my stepfather like a criminal after he got into a fender-bender with a car driven by a white man. This dynamic of needing (a) the criminal legal process to help keep you safe, (b) to be merciful when people have run afoul of the law, and (c) to be fair in its investigations and punishments explains much of African American politics, from the anti-lynching campaigns of the early twentieth century to the Black Lives Matter movement today. Black folks have been vigilant, often to no avail, about two kinds of equality enshrined in our nation's ideals: equal protection of law, and equal justice under the law.

The problem of equal protection has been, historically, the most vexing. The NAACP was founded in 1909 as a response to the federal and state governments turning a blind eye to white violence against African Americans. When, near the end of the century, open-air drug markets flourished in inner city neighborhoods, black activists perceived a similar form of racist neglect by the state. Not only would the police have shut down those markets had they existed in white communities, but also many activists thought that the power structure actually condoned the availability of drugs in the hood as a means to keep the black man down.<sup>11</sup> The black revolutionary Stokely Carmichael, speaking at a historically black college in 1970, said that “[f]ighting against drugs is revolutionary because drugs are a trick of the oppressor.”<sup>12</sup>

During this era many white progressives were, let's say, 420-friendly, and not inclined to see drug prohibition as part of a revolutionary utopia. African American suspicion of white liberals is a recurring theme throughout *Locking Up Our Own*. One reason that the 1975 effort in Washington, DC to decriminalize marijuana failed is that it was sponsored by two white men. Forman quotes the singer Gil Scott-Heron, who wrote, about a young white member of Students for a Democratic Society, “He is fighting for legalized smoke . . . All I want is a good home and a wife and children and some food to feed them every night.”<sup>13</sup>

Scott-Heron's very traditional wish list—a good home, a wife, and children—evidences another important explanation for black support for law and order. Many middle-class African Americans adhered to the “politics of respectability,” which suggested that the black race advances when African Americans demonstrate that they are capable of living up to white standards of

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11. In those days it was the black man who was seen as principally injured by racism, a fallacy that made its way into government policy under the guise of the infamous Moynihan Report. See generally DANIEL P. MOYNIHAN, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), <https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf> [<https://perma.cc/5SNU-2ZJV>].

12. See FORMAN, *supra* note 7, at 46.

13. *Id.*

morality and conduct. Advocacy for lenient criminal justice policies was seen by elite African Americans as an admission that black interests were allied with the interests of criminals. This would not help the cause. Colorism was also doing work here, with light-skin blacks making up the bulk of the middle class in cities like Washington and Atlanta. For many bougie African Americans, the fact that their hoodlum dark skin cousins were getting locked up was not a problem. Indeed, one of the primary arguments to integrate the Atlanta police department was that African American cops would supposedly be better able than white officers to distinguish between elite blacks and the riff raff.

Forman explains arguments first made by Harvard professor Randall Kennedy in *Race, Crime, and the Law*: that African Americans suffer more injury from under-enforcement of law than over-enforcement, that “racist” is an inaccurate way of describing criminal justice policies that only burden black criminals, and that the politics of respectability is a means of racial uplift.<sup>14</sup> Forman does not endorse these ideas, but instead he demonstrates how influential they were to the black body politic during an era of high crime.<sup>15</sup>

*Locking Up Our Own* mines some of the same territory as Michael Javen Fortner’s *Black Silent Majority*, which focused on African American support for New York’s tough “Rockefeller” drug laws.<sup>16</sup> Fortner’s analysis sometimes had a “gotcha” quality that suggested that because many blacks originally supported harsh sentencing in drug cases, this detracted from their later critiques of it.<sup>17</sup> *Black Silent Majority* was read by some commentators as a rejoinder to the Black Lives Matter movement.<sup>18</sup> Forman’s experience as a D.C. public defender gives him more street credibility. His stories about clients make it clear that, however well-intentioned the middle-class black powerbrokers were in fashioning conservative approaches to criminal justice, the policies that resulted were devastating to the larger community.

### III.

#### THE PRESENT: NEW POLITICS, SAME OLD CAGES

*Locking Up Our Own* is a well-timed, nuanced examination of the past, but I am glad that the story it tells is over. Beginning in the early ‘90s, crime went

14. See KENNEDY, *supra* note 6, at 3.

15. Professor Barkow’s excellent book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* encourages us to think about police violence as a denial of equal protection as well. African Americans are not safe when the men and women in blue are allowed to beat us up and kill us with little fear of retribution. See generally RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

16. See generally MICHAEL J. FORTNER, *BLACK SILENT MAJORITY* (2015).

17. *Id.*

18. Khalil Gibran Muhammad, ‘*Black Silent Majority*,’ by Michael Javen Fortner, N.Y. TIMES, (Sept. 21, 2015) <https://www.nytimes.com/2015/09/27/books/review/black-silent-majority-by-michael-javen-fortner.html> [<https://perma.cc/5EMK-ZKYC>]; Donna Murch, *Who’s to Blame for Mass Incarceration*, BOS. REV. (Oct. 16, 2015), <http://bostonreview.net/books-ideas/donna-murch-michael-javen-fortner-black-silent-majority> [<https://perma.cc/M9WJ-LXDW>].

down dramatically across the country.<sup>19</sup> It has continued, by and large, to decline. Activists have turned their attention to the problems of mass incarceration and police violence. Even mainstream civil-rights organizations now focus on reducing sentences and making the police more accountable and transparent. Gone are the days when some black activists and politicians aimed to equip cops with more-powerful guns, as then-D.C. Mayor Marion Barry wanted during the crack wave that began in the late '80s.<sup>20</sup>

As everyone knows, Barry himself got caught up in that epidemic and eventually, like a lot of the African American politicians who figure in Forman's account, changed his mind about what was in the best interests of the community.<sup>21</sup> If law-and-order policies had actually worked to make neighborhoods safer, maybe people would have been willing to tolerate them, despite the racial disparities and erosions of civil liberties they entailed. But they did not work. Most criminologists do not attribute substantial reductions in crime to aggressive policing and harsh sentencing, in part because crime went down in jurisdictions that were *not* relying on those policies.

At its best, democracy is about being creative and experimental, learning from mistakes, and trying a different approach. *Locking Up Our Own* makes a powerful case that the African American community was instrumental in creating a monster. We should be grateful that the same community—from D.C. jurors who nullify to Black Lives Matter activists to writers like Michelle Alexander to artists like Beyoncé and Kendrick Lamar—is leading the fight to take down the monster.

How successful have they been? Here's a dispatch from the front in Washington, DC. While *Locking Up Our Own* demonstrates that racial representation is not a sufficient condition of racial justice, it remains a revealing context. With the exception of the current United States Attorney, who is Asian American, all of the head prosecutors in D.C. have been African American since 1993.<sup>22</sup> African Americans remain over-represented on the city's Metropolitan Police Department (MPD). During the era that Forman writes about, the MPD was 70% black.<sup>23</sup> Now African Americans are about 55% of the city's local police officers and about 47% of the city's population.<sup>24</sup>

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19. MATTHEW FRIEDMAN ET AL., CRIME TRENDS: 1990–2016 (Apr. 18, 2017) <https://www.brennancenter.org/publication/crime-trends1990-2016> [<https://perma.cc/5E8J-7D23>].

20. See FORMAN, *supra* note 7, at 175.

21. See *id.*

22. UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA, WIKIPEDIA, [https://en.wikipedia.org/wiki/United\\_States\\_Attorney\\_for\\_the\\_District\\_of\\_Columbia](https://en.wikipedia.org/wiki/United_States_Attorney_for_the_District_of_Columbia) [<https://perma.cc/J23V-Y84U>].

23. See Harry Jaffe, *DC's Police Force May Soon Be Majority White*, WASHINGTONIAN (May 26, 2016), <https://www.washingtonian.com/2016/05/26/washington-dc-police-race> [<https://perma.cc/22E6-J229>].

24. See JOYCE A. MARTIN, ET AL., U.S. DEPT. OF HEALTH & HUM. SERV., NATIONAL VITAL STATISTICS REPORTS (Nov. 7, 2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_08-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf) [<https://perma.cc/WYF7-D8NN>].

The D.C. Council has seven African American and six white members.<sup>25</sup> The white liberal dynamic that Forman describes is still present. On some criminal issues some of the white liberals are more progressive than some of their African American counterparts. More frequently, they are joined and the city has some of the most lenient policies in the country, including legalizing marijuana possession in 2014.

But today, just as during the era Forman writes about, if you go to criminal court in D.C., you would still think that white people do not commit crimes. Of people sentenced for a felony in D.C. in 2017, 94% were black.<sup>26</sup> That's the highest proportion since the government started collecting the data. The city's population is now almost evenly split between blacks and whites. Still, every year as the city gets whiter, the percentage of blacks in the criminal legal system grows.

The politics and policy prescriptions of the black citizens of the District of Columbia have evolved far beyond the punitive turn that Forman described. But the vast racial disparities in arrest and incarceration persist even for crimes like drug offenses, which studies demonstrate are *not* disproportionately committed by blacks.<sup>27</sup>

#### IV.

##### THE FUTURE: WAY BEYOND REFORM

James Forman must be one of the hardest working people in the legal academy. In addition to being a Pulitzer Prize-winning author, he is a law professor, the co-founder of Washington, D.C.'s Maya Angelou Public Charter School, and an important public intellectual. Still, I want to conclude this commentary by encouraging Forman to be more ambitious.

When Eric Holder was the first black United States Attorney in the District of Columbia, he had this famous question that he would ask applicants to the office. If a prospective prosecutor made it to the final stage, they knew they were going to be asked, "How are you going to feel about locking up so many black men?"

I imagine Holder asked that question to see whether applicants had considered the racial dimensions of their work and perhaps to weed out those who seemed too unconcerned or too thoughtless. But the question also made the

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25. See Councilmembers, *Council of the District of Columbia*, <https://dccouncil.us/councilmembers> [<https://perma.cc/6443-DGHL>].

26. See DISTRICT OF COLUMBIA SENTENCING COMMISSION, 2018 ANNUAL REPORT (Apr. 25, 2019), <https://sdc.dc.gov/service/2017-annual-report> [<https://perma.cc/R4GQ-HHAC>].

27. See Nazgol Ghandnoosh, Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System, THE SENTENCING PROJECT (Feb. 3, 2015), <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/#A.%20Differential%20crime%20rates> [<https://perma.cc/B452-LRTB>].

point that if you are a D.C. prosecutor, then the bulk of your work was going to be putting black people in prison.

African American history can be read as a narrative of resistance to law. I do not mean law in the abstract but instead the *work of law* in the United States, which has been to a subordinate black people. Professor Forman earlier reminded us that during Black History Month, we celebrate their freedom fighters who resisted the law of slavery and the law of the old Jim Crow.

Someday we'll celebrate the freedom fighters who resist the law of the *new* Jim Crow.<sup>28</sup> The way I want Forman to be more ambitious is for him to stop thinking about reform. We didn't talk about reforming slavery. We talked about abolishing it. We didn't talk about reforming the old Jim Crow. We talked about abolishing it. We should not talk only about reforming the new Jim Crow. We should talk about abolishing it.

Prison as a way of punishing people is a relatively recent historical experiment. Eastern State Prison, the first modern prison, was erected in Philadelphia in the early 1800s.<sup>29</sup> Incarceration was intended to be a more humane form of punishment than the way that people were punished before prison, which was by killing them, hurting their bodies, banishing them from the community, or fining them.<sup>30</sup> So the idea was that they'd sit in a confined space and learn to be penitent.<sup>31</sup>

We know now that that experiment has not worked well. We know that because our expectations for prison have not been realized. We hope that it keeps us safe from people who would cause harm if they were not locked up. We hope that it makes sure people who have caused harm are accountable for what they've done. People who have been in the system—or who have loved ones in the system, or who have worked in the system—know prison doesn't do either one of those very well.

The Brennan Center for Justice published an important report that said that almost 40% of people who are now incarcerated could come home tomorrow with no detriment to public safety.<sup>32</sup> We don't have the political consensus to achieve that broad level of reform now but one day we might. If we reduced our

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28. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (arguing that mass incarceration has taken Jim Crow's place as a system of racialized social control).

29. Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 49 (1921). Now it's a museum devoted to mass incarceration. See *Eastern State Penitentiary*, [https://www.easternstate.org/?appeal=true&utm\\_expid=858297-0\\_TWot2UGRfeIJHWtqop4Aw.1&utm\\_referrer=https%3A%2F%2Fwww.google.com%2Fhttps://perma.cc/NE77-27F3](https://www.easternstate.org/?appeal=true&utm_expid=858297-0_TWot2UGRfeIJHWtqop4Aw.1&utm_referrer=https%3A%2F%2Fwww.google.com%2Fhttps://perma.cc/NE77-27F3).

30. Barnes, *supra* note 29, at 48.

31. *Id.*

32. JAMES AUSTIN ET AL., *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?* (2016) [https://www.brennancenter.org/sites/default/files/publications/Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf) [<https://perma.cc/D4AS-5DB2>].

prison population by 40 percent, the United States would still be the world's leading jail and racial disparity would be either the same or worse. Reform isn't going to get us to the equal justice under law that we need.

That's why we have to think about abolition. As one example, many people understand the racial justice arguments in favor of abolishing the death penalty. Many abolitionists believe that there's no way that, in the United States, we can select which criminals are bad enough to be killed by the state that isn't all about race and class.<sup>33</sup> Since that's true, the argument goes, we must get rid of the death penalty.

I agree. I also think that that same thing is true with other forms of punishment. We ask the criminal legal process to select out the most dangerous and/or immoral people and then decide how they should be punished. There's no way that we can do that in the United States that's not all about race and class.

And so the question is: can we use our genius and creativity to imagine ways to being safe and to make people who've caused harm responsible that don't involve locking human beings in cages?

I think we can, and so I'm going to end roughly where both Professors Forman and Barkow ended: thinking about the moral imperative of the era of mass incarceration.

If I had lived during slavery, I hope I would have been a runaway. I hope I would have been one of those people who led an uprising. But the reality is most enslaved persons did not do that.

If I had been around during the civil rights movement, I hope I would have been there with James Forman Sr., with Malcolm, with Martin, with Fannie Lou Hamer. But as James Forman Jr. reminded us, most people were not there, including most African Americans.

And as I stand here today, I agree with the suggestions that we've heard in these discussions. We should embrace the leadership of people who have been in the system. We should enroll our non-black and -brown allies. We should make some of the political appeals that Professor Barkow described in her book.

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33. See *Sister Helen Prejean on the Movement to End the Death Penalty*, U.S. CATHOLIC (July 8, 2014), <https://www.uscatholic.org/articles/201406/sister-helen-prejean-movement-end-death-penalty-29073> [<https://perma.cc/5HUH-8BLS>] (“If you’re poor, you don’t have a crackerjack of defense to really resist prosecution when they’re going to go after the ultimate penalty.”); Press Release, Equal Justice Institute; Bryan Stevenson Talks to Oprah About Why We Need to Abolish the Death Penalty (Nov. 28, 2015), <https://eji.org/news/bryan-stevenson-tells-oprah-winfrey-why-we-should-abolish-death-penalty> [<https://perma.cc/SP7A-U87N>] (“[W]e have a system of justice that treats you better if you’re rich and guilty than if you’re poor and innocent . . . Wealth—not culpability—shapes outcomes”); Press Release, Erin Looney, University of the District of Columbia David A. Clarke School of Law, Steven Bright Talks Death Penalty, Debtors’ Prisons, Mass Incarceration at 25th Annual Rauh Lecture (Dec. 5, 2017), <https://www.law.udc.edu/news/377289/Stephen-Bright-talks-death-penalty-debtors-prisons-mass-incarceration-at-25th-Annual-Rauh-Lecture.htm> [<https://perma.cc/XFH6-EDS3>] (discussing “the arbitrary nature of the death penalty . . . the tendency for its application to disproportionately affect poor people and people of color”).

We should absolutely read *Locking Up Our Own, Prisoners of Politics*,<sup>34</sup> and *Chokehold*.<sup>35</sup> But most importantly, we should dream big.

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34. BARKOW, *supra* note 15.

35. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).