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The Racialization of Crime and Punishment

Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex

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The current explosion in criminalization and incarceration is unprecedented in size, scope, and negative consequences—both direct and collateral—for communities of color. These macro systems exist in relationality to the micro dynamics of living in the midst of police scrutiny, economic marginalization, and political disenfranchisement. Critical race theory is a guide for pedagogy and praxis in exploring the racist and classist foundations of current micro and macro injustices. Using Supreme Court opinions and the voices of political prisoner/prisoners of conscience as evidence of the dominant text and the dissent, this article explores the following issues: the roots of U.S. law, criminal justice, and mass imprisonment in classism and racism; the political economy of the criminal justice system and the prison industrial complex; the intersectionality of injustices rooted in micro and macro systems; and the role of prisoners of conscience/political prisoners in inspiring resistance to micro and macro injustice.

Keywords: *prison industrial complex; color-blind racism; critical race theory; racism and the law; racism and the criminal justice system*

The post–civil rights era explosion in criminalization and incarceration is fundamentally a project in racialization and macro injustice. It is, too, a project deeply connected to political economic changes in advanced capitalism. Multinational globalization in search of cheaper and cheaper labor and profit maximization is part and parcel of the growth of the prison industrial complex. The ideological underpinnings of racialization and the political economy of inequality are at the core of this discussion. It is the latest in a historically uninterrupted series of legal and political machinations designed to enforce White supremacy with its economic and social benefits both in and with the law; "all domination is, in the last instance, maintained through social control strategies" (Bonilla-Silva, 2001, p. 103). As movements for abolition and civil rights end the institutions of slavery, lynching, and legalized

segregation, new and more indirect mechanisms for perpetuating systemic racism and its economic underpinnings have emerged. In this era of color-blind racism, there has been a corresponding shift from de jure racism codified explicitly into the law and legal systems to a de facto racism where people of color, especially African Americans, are subject to unequal protection of the laws, excessive surveillance, extreme segregation, and neo–slave labor via incarceration, all in the name of crime control. It is the current manifestation of the legal legacy of the racialized transformations of plantations into prisons, of Slave Codes into Black Codes, of lynching into state-sponsored executions. The "imputation of crime to color" (Douglass, cited in Foner, 1955, p. 379) continues to the present as racial profiling and culminates ultimately in the new plantation—in the prison industrial complex.

As Coates (2004) rightly observes,

> the reliance on social justice rather than civil justice is of critical importance. Civil justice, with its explicit links to the rights and privileges of citizenship, does not (as Chief Justice Taney clearly argued), apply to those outside the pale of societal membership. Civil justice, also reliant upon the laws of the day, is controlled and contrived to protect the powerful, often at the expense of the weak. (p. 848)

Indeed, if so-called civil justice is at the foundation of the persistent White supremacist economic and political structure, then it is futile to call for only macro-level political and legal remedies. It is, we will argue, this very civil justice that has been used in the service of a series of racial projects. It has been used to enslave, to segregate, to mete out unequal punishments for comparable crimes on the basis of race. In the past, it has been used to explicitly reify via the law the essentialist White supremacist paradigm. At present, civil justice has been at the center of legal claims of color-blindness, forwarding the notion that if race is no longer the basis for legalized discrimination, then it is no longer relevant to the law at all. It is civil justice that currently claims that when explicit racial discrimination is removed from the language of the law, it is magically removed from any societal impact and any subsequent legal remedy.

Social justice requires that the role of civil justice in racialization be made transparent. This requires social justice projects that emanate from the micro level, from stories and struggle. Using the theory and methods of Critical Race Theory (CRT), this article will attempt to begin this work. CRT proceeds from the premise that racial privilege and related oppression are deeply rooted in both our history and our law, thus making racism a "normal and ingrained feature of our landscape" (Delgado & Stefancic, 2000, p. xvii). CRT acknowledges the myriad ways in which the legal constructions of race have produced and reproduced systemic economic, political, and social advantages for Whites. Challenges to racism require micro-level efforts to expose the deep structures of racism first made possible by the legal benefits of what Harris (1993) called "whiteness as property." "Whiteness" produced both tangible and intangible value to those who possessed it:

> The concept of whiteness was premised on white supremacy rather than mere difference. "White" was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property. (Harris, 1993, p. 116)

Removing White supremacy from the law did not, of course, erase its property benefits, nor did a shift to color-blindness in the law eradicate racism. CRT offers a critique of civil rights legal reforms by noting that they failed to fundamentally challenge racial inequality. As Bell (2000) noted, "the subordination of blacks seems to reassure whites of an unspoken, but no less certain, property right in their whiteness" (p. 7). In the post–civil rights era, this subordination continues via color-blind legal mechanisms, particularly criminal justice.

(It should be noted that whereas all communities of color suffer from racism in general and its manifestation in criminal justice in particular, "Black" has been the literal and figurative counterpart of "White." Anti-Black racism is arguably at the very foundation of White supremacy [Bonilla-Silva, 2001, 2006; Feagin, 2000]. For this reason, in combination with the excessive overrepresentation of African Americans in the criminal justice system and the prison industrial complex, our analysis will largely focus on the ways in which the law has been a tool for the oppression of African Americans.)

CRT also offers the use of narratives and context to surface these deep structures. We adopt these methods here, relying on the narratives and counternarratives of both judicial opinions and political prisoners/prisoners of conscience, referred to by James (2003) as "imprisoned intellectuals." The dominant story and the dissent reveal the deep roots of current practices and the extent to which methods of legally enforcing White supremacy merely shift and change shape over time. These competing narratives provide a micro-level foundation for exposing and challenging the systemic injustice that has persisted over centuries. The words of those empowered to interpret the racial meanings of the Constitution and the words of those oppressed by these very same decisions will illuminate the law and its application as a consistent, albeit subtly changing, project in racialization.

Current Situation of Criminal Injustice

There is no dispute as to the extent of the dramatic escalation in criminalization and incarceration in the United States that has occurred during the past 35 years. Much of this increase can be traced to the war on drugs and the rise of mandatory minimum sentences for drug crimes and some other felonies. More than 47 million

Americans (or 25% of the adult population) have state or federal criminal records. An estimated 13 million Americans—6% of the adult population—are either currently serving a sentence for a felony conviction or have been convicted of a felony in the past (Mauer & Chesney-Lind, 2002, p. 51). Approximately 7 million adults are currently under some sort of correctional supervision in the United States. More than 4 million are under some sort of community correctional supervision such as probation and parole; another 2 million are incarcerated in prisons and jails. More than 3,500 of these are awaiting execution, some for federal crimes and most for capital offenses in 1 of the 38 states that still allow for capital punishment. For every 100,000 Americans, there are 699 in prison—this is the highest incarceration rate in the world (Bureau of Justice Statistics, 2004).

There is also no dispute that the poor and people of color, particularly African Americans, are dramatically overrepresented in these statistics at every phase of the criminal justice system. The overwhelming majority of those in prisons and jails were unemployed or employed in the minimum wage service sector at the time of their commitment offense (Bureau of Justice Statistics, 2004). More than three quarters of a million Black men are now behind bars, and 2 million are under some form of correctional supervision. One in every 8 Black men between the ages of 25 and 34 is in prison or jail. One in 3 African American men and 1 in 10 Latinos between the ages of 20 and 29 are under some sort of correctional supervision (Mauer & Chesney-Lind, 2002). Approximately 50% of all prisoners are Black, 30% are White, and 17% Hispanic. Whereas the adult male prison population has tripled in the past 20 years, the number of women incarcerated has increased tenfold during the same time span. Women represent the fastest growing sector of the prison population. More than 90,000 prisoners are women, and they are overwhelmingly women of color. African American women are 3 times more likely than Latinas and 6 times more likely than White women to be in prison. More than 60% of women who are in prison are serving time for nonviolent offense, especially for drugs (Bureau of Justice Statistics, 2004).

And there is no dispute as to the devastating impact of these policies and practices on communities of color. In addition to the direct impact of mass criminalization and incarceration, there is a plethora of what Mauer and Chesney-Lind (2002) refer to as "invisible punishments." These additional collateral consequences further decimate communities of color politically, economically, and socially. The current expansion of criminalization and mass incarceration is accompanied by legislation that further limits the political and economic opportunities of convicted felons and former inmates. Felony disenfranchisement is permanent in 14 states. Forty-eight states do not permit prison inmates to vote, 32 states disenfranchise felons on parole, and 28 states prohibit probationers from voting. Nationally, 40 million felons are disenfranchised; 2% of the nation on average cannot vote as a result of a felony conviction. Of African American males, 13% are disenfranchised; in 7 states, 1 in 4 are permanently barred form voting. In Florida alone, nearly one third of all Black men

are permanently disenfranchised (Mauer & Chesney-Lind, 2002). Twenty-five states bar felons from ever holding public office, 33 states place a lifetime ban on gun ownership for convicted felons, and all states require driver's license suspension for convicted drug felons. States have also increased the occupational bans for convicted felons, prohibiting them from teaching, child care work, related work with children, or law enforcement. This is accompanied by eased access to criminal records, an increase in all employers' checking criminal backgrounds, and new technology, which facilitates quick checks. Research indicates that the explosion in incarceration is negatively correlated with Black male employment rates (Travis, 2002). Drug felons are permanently barred from receiving public assistance such as Temporary Assistance for Needy Families, Medicaid, food stamps, or Supplemental Security Income. Drug use, possession, or sales are the only offenses other than welfare fraud that result in a ban on federal assistance. The welfare fraud ban is limited to 10 years. Probation or parole violations also result in the temporary suspension of federal assistance. Drug felons are also permanently prohibited from receiving federal financial aid for education. Those convicted of drug felonies "or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by others" (Rubenstein & Mukamal, 2002) are permanently barred from public housing or Section 8. A growing number of private rental properties also screen for convicted felons. More than 20,000 persons each year are denied federal housing assistance due to a felony conviction (Rubenstein & Mukamal, 2002; Travis, 2002). A felony conviction by anyone in the household is grounds for eviction from public housing. Recent legislation also creates barriers for families and has particularly devastating consequences for women. Certain convicted felons are prevented from being approved as adoptive or foster parents. Congress has accelerated the termination of parental rights for children who have been in foster care for 15 of the most recent 22 months. Nineteen states regard felony conviction as grounds for parental termination; 29 states identify felony conviction as grounds for divorce (Chesney-Lind, 2002; Ritchie, 2002). And finally, the conditions of incarceration contribute to physical illnesses (e.g., Hepatitis B and C, HIV/AIDS, tuberculosis, general lack of adequate medical care), injuries (e.g., physical and sexual assaults from correctional officers and other inmates), and mental disorders that continue to plague former inmates, families, and their communities on release (Fellner, 2004).

The reasons for this unprecedented explosion in criminalization and incarceration, however, are in dispute. The rhetoric of color-blind racism would have us believe that this situation is the unfortunate result of disproportionate Black and Latino participation in crime. These so-called "racial realists" (Brown et al., 2005) argue that racism is over, successfully eradicated by civil rights legislation, and that if racial inequality persists, it is "the problem of the people who fail to take responsibility for their own lives" (Brown et al., 2005, p. vii). This adherence to the ideology of color-blindness (a co-optation and subversion of the dream of Dr. King)

pervades conservative political and intellectual discourse, the corporate media, and the minds of the public. Racism is widely held to be an individual problem, rather than structural and systemic, an integral feature of what Bonilla-Silva (2001) referred to as "racialized social systems" (p. 57). From this vantage point, the issue then is crime, not race, and certainly not racism.

On the contrary, many contest this color-blind interpretation of contemporary racial arrangements as well as its specific application to criminal justice (Bonilla-Silva, 2001, 2006; Brown et al., 2005; Feagin, 2000; Mauer & Chesney-Lind, 2002; Walker, Spohn, & DeLone, 2004). The scale, scope, and extremes of negative consequences—both direct and collateral—for communities of color are new, especially for women,[1] but the role of criminal justice in policing, prosecuting, imprisoning, and executing people of color has deep historical roots. What is not new is the racist and classist economic and political agenda that is foundational. The paradigms shift from essentialist to color-blind and the practices of oppression are refined and renamed, but the resulting inequality remains much the same. The law and its attendant machinery were, and still are, enforcers of both White supremacy and capitalist interests.

The Past Is the Present

It is well established that our Constitution was written with a narrowly construed view of citizenship that at the time included only White, property-holding men. This property included both wives and children, but the most lucrative property of all—indeed that property that made any economic survival, let alone prosperity, possible—was slaves. By the time of the Constitutional Convention of 1787, the racial lines defining slave and free had already been rigidly drawn—White was free, and Black was slave. The Three Fifths Clause, the restriction on future bans of the slave trade, and limits on the possibility of emancipation through escape were all clear indications of the significance of slavery to the founders. Any doubt as to the centrality of White supremacy was erased a few decades later in the case of *Scott v. Sandford* (1857), where a majority of the Supreme Court denied the citizenship claims of Dred Scott and went further to declare that the Missouri Compromise requirement of balance between free and slave states in the expanding United States was a violation of the due process rights of slaveholders. Referring to the legal status of African Americans, Justice Taney's opinion for the majority makes it painfully clear:

> They are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained

> subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

The growing abolition movement could not overcome this legal bar with debates, written appeals, or legislative action. The economic and political interests of the slave states were too dependent on the rising trade in slaves and cotton. It took the armed resistance of slaves and radical abolitionists—of Vesey and Prosser, of Tubman, Turner, and finally Brown—to push the question into conflict. Frederick Douglass (1881, cited in Zinn, 2004, pp. 18-19) observed,

> If John Brown did not end the war that ended slavery, he did at least begin the war that ended slavery. . . . Until this blow was struck, the prospect for freedom was dim, shadowy and uncertain. The irrepressible conflict was one of words, votes and compromises. When John Brown stretched forth his arm, the sky was cleared. The time for compromises was gone.

The abolition of slavery did not result in the abolition of essentialist racism in the law; it merely called for new methods of legally upholding the property interests of Whiteness. In the presence of now freed Black labor, the vote was now offered to unpropertied White men, and, as Du Bois and others have argued, Whiteness played a central role in the reduction of class tensions. The "wages of whiteness" for the working class were material as well as social; "whiteness produced—and was reproduced by the social advantage that accompanied it" (Harris, 1993, p. 116).

Postslavery, White supremacy in the law was accomplished by the introduction of a series of segregationist Jim Crow laws, a new model for an essentialist racial paradigm that was now legitimated by so-called biology; the laws did not mandate that Blacks be accorded equality under the law because nature—not man, not power, not violence—has determined their degraded status (Harris, 1993, p. 118). The courts were complicit and explicit in their support for the purity and attendant property rights of Whiteness. This is made most dramatically clear in *Plessy v. Ferguson* (1896). In a challenge to the legalized segregation of public transportation in the state of Louisiana, Plessy argued that these laws denied him equality before the law. The majority disagreed and set forth the principle of separate but equal. Justice Brown wrote for the majority:

> It is claimed by the plaintiff in error that, in a mixed community, the reputation of belonging to the dominant race, in this instance the white race, is "property," in the same sense that a right of action or of inheritance is property. . . . We are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called "property." Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

The sole dissenter in *Plessy* sets up the juxtaposition of Jim Crow and color-blindness that frames the contemporary debate on race today. Justice Harlan, while acknowledging the reality of White supremacy, decries its support with the law:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law*.

The corollary to the enhanced promotion of Whiteness was—and still is—the ongoing devaluation of Blackness. The criminal justice system begins to play a new and crucial role here. Angela Y. Davis (2003), in *Are Prisons Obsolete?* traced the initial rise of the penitentiary system to the abolition of slavery; "in the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for the newly released slaves" (p. 29). There was a subsequent transformation of the Slave Codes into the Black Codes and the plantations into prisons. Laws were quickly passed that echoed the restrictions associated with slavery and criminalized a range of activities if the perpetrator was Black. The newly acquired 15th Amendment right to vote was curtailed by the tailoring of felony disenfranchisement laws to include crimes that were supposedly more frequently committed by Blacks (Human Rights Watch, 1998). And the libratory promise of the 13th Amendment—"Neither slavery nor involuntary servitude shall exist in the United States"—contained a dangerous loophole: "except as a punishment for crime." This allowed for the conversion of the old plantations to penitentiaries, and this, with the introduction of the convict lease system, permitted the South to continue to economically benefit from the unpaid labor of Blacks. As Davis (2003) noted, "the expansion of the convict lease system and the county chain gang meant that the antebellum criminal justice system, defined criminal justice largely as a means for controlling black labor" (p. 31).

After decades of resistance via legal challenges, grassroots organizing, boycotts, *Letters from the Birmingham Jail,* sit-ins, jail-ins, marches, and mass protest, legalized segregation began to come undone. Indeed, part of its undoing was the role that activists played in exposing the official and extralegal violence that had previously been cloaked in the legitimacy of the law. Emitt Till, Birmingham, Bloody Sunday, and more bared the lie. In the historic 1954 *Brown v. Board of Education* decision, *Plessy* was overturned; the essentialist racist paradigm was no longer codified in law. This was complete with the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the passage of the 24th Amendment to the Constitution. Whereas there was once hope that the law itself could be pressed into the service of racial equality, those victories now seem bittersweet. Judge Robert L. Carter (1980),

one of the attorneys who argued *Brown,* noted, "The fundamental vice was not legally enforced racial segregation itself; this was a mere by-product, a symptom of the greater and more pernicious disease—white supremacy" (pp. 23-24). Legally supported essentialist racism was about to be replaced with a more insidious counterpart—the paradigm of color-blindness.

Following the end of legalized racial discrimination, there was an especially concerted effort to escalate the control of African Americans via the criminal justice system. Marable (1983) made this point: "White racists began to rely almost exclusively on the state apparatus to carry out the battle for white supremacy. . . . The criminal justice system became, in short, a modern instrument to perpetuate white hegemony" (pp. 120-121). These practices gain primacy during the post–civil rights years as the essentialist racist paradigm gives way to the new color-blind racism where race and racism are ostensibly absent from the law and all aspects of its enforcement. The criminal justice system provides a convenient vehicle for physically maintaining the old legally enforced color lines as African Americans are disproportionately policed, prosecuted, convicted, disenfranchised, and imprisoned. The criminal justice system and its culmination in the prison industrial complex also continues to guarantee the perpetual profits from the forced labor of inmates, now justifying their slavery as punishment for crime. Finally, the reliance on the criminal system provides the color-blind racist regime the perfect set of codes to describe racialized patterns of alleged crime and actual punishment without ever referring to race. As Davis (1998a) observed, "crime is one of the masquerades behind which 'race', with all its menacing ideological complexity, mobilizes old public ears and creates new ones" (p. 62). There is no discussion of race and racism; there is only public discourse about crime, criminals, gangs, and drug-infested neighborhoods. This color-bind conflagration of crime with race is, in addition, insidious in its dishonesty and indirect effects; as Justice Powell, writing for the Supreme Court, noted, "discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others'" (quoting *Strauder v. West Virginia*, 1880, in *Batson v. Kentucky,* 1986).

There were early warnings about the potentially devastating interconnections between race, crime, and the law in the era of late capitalism. The mid-20th-century criticism of the criminal justice system as foundationally racist initially emanated from the Black Power Movement's critique of institutionalized racism and police brutality in communities of color. The writings of political prisoners (e.g., Angela Davis, Huey P. Newton, Assate Shakur) and prisoners of conscience (e.g., Malcolm X and George Jackson) brought racism and its intimate connection with the penitentiary to light. The 10 Point Program of the Black Panther Party began to make the connections between capitalist exploitation of the Black community and the criminal justice system. Their demands provided the foundations for the contemporary critiques of the role of criminal justice in upholding both capitalism and White supremacy.

> We want an immediate end to **police brutality** and **murder** of black people. We want freedom for all black men held in federal, state, county and city prisons and jails. We want all black people when brought to trial to be tried in court by a jury of their peer group or people from their black communities, as defined by the Constitution of the United States. (Foner, 1970, pp. 3-5)

These warnings went unheeded; indeed, they were too often violently suppressed. The conflation of race and crime and the resultant rise of the criminal and prison industrial complexes did and does find support in judicial decisions that legitimate the central tenets of color-blind racism. The color-blind Constitution foreshadowed in Harlan's dissent has now become the voice of the Supreme Court's majority. Color-blindness as the new legal doctrine begins to emerge—despite judicial dissent—in cases involving affirmative action and other remedies to centuries of racial inequality. The Supreme Court adopts the color-blind model in *Regents of the University of California v. Bakke* (1978), where the ruling is in favor of a White student who claimed racial discrimination in his denial of admission to medical school. If the Constitution is to be color-blind, race can only be considered with strict scrutiny, even as a remedy for past discrimination. Justices Brennan and Marshall, in separate dissents, pointed out the flaws of this approach. Brennan observed,

> Claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality . . . for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

Justice Marshall's dissent is even more prescient:

> For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

As a series of subsequent cases from *Bakke* to *Gratz v. Bollinger* (2003) have shown, that same Constitution has indeed erected a legal barrier with claims of color-blindness (Bell, 2000; Brown et al., 2005).

Perhaps the most significant barrier to the pursuit of equality before the law comes in the case of *McCleskey v. Kemp* (1987). After a series of death penalty cases wherein the court decried racial discrimination in the application of the criminal laws' ultimate penalty, it is here that the Supreme Court, in a 5 to 4 decision, clearly defined discrimination as individual, not institutionalized. Citing statistical evidence from the now famous Baldus study, McCleskey argued that the application of the death penalty in Georgia was fraught with racism. Defendants charged with killing

White victims were more likely to receive the death penalty, and in fact, cases involving Black defendants and White victims were more likely to result in a sentence of death than cases involving any other racial combination. The majority did not dispute the statistical evidence but feared the consequences. If the court were to accept McCleskey's claim, then the Equal Protection Clause of the 14th Amendment would apply to patterns of discrimination, to institutionalized racism and sexism, and to questions of structured inequality. These fears are expressed in Powell's opinion for the majority:

> First, McCleskey's claim, taken to its logical conclusion, [481 U.S. 279, 315] throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Solem v. Helm, 463 U.S. 277, 289-290 (1983); see Rummel v. Estelle, 445 U.S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence [481 U.S. 279, 316] rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and [481 U.S. 279, 317] even to gender.

Justice Brennan's impassioned dissent makes clear the implications of this decision:

> Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, *we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.*

Color-blind racism, with its call to ignore race and its treatment of any residual racism as individual and intentional, was now ensconced. Equal protection of the law was for individuals, not oppressed groups, and discrimination must be intentional and similarly individual. *McCleskey* closed off the last avenue for remedying structural inequality with the law and left us imprisoned by the past, imprisoned with the present.

Intersections: Criminal Injustice, Race, and Political Economy

The legal entrenchment of color-blind racism allowed White supremacist political and economic advantage to be pursued—unchecked by either law or public discourse—under the guise of criminal justice. Davis (1998b) noted,

> When the structural character of racism is ignored in discussions of crime and the rising population of incarcerated people, the racial imbalance in jails and prisons is treated as a contingency. . . . The high proportion of black people in the criminal justice system is this normalized and neither the state nor the general public is required to talk or act on the meaning of this imbalance. . . . By relying on the alleged "race-blindness" of the law, black people are scrumptiously constructed as racial subjects, thus manipulated, exploited, and abused, while the structural persistence of racism—albeit in changed forms—is ignored. (p. 62)

As before, this newest political and legal construction of White supremacy is intimately interconnected with capitalist economic interests. The extreme racialization of criminal justice and the rise of the prison industrial complex are directly tied to the expansion of global economy, the decline of the industry and rise of the minimum wage service sector in the United States, and the growth of privatization of pubic services. The internationalization of the labor force and the turn to robotics, computers, and hi-tech are having a profound impact on labor in the United States and globally. The prison industrial complex is an expression and re-articulation of the political economy of late capitalism. The intense concentration and privatization of wealth in a few hands continues unchecked in this country. Indeed, the unparalleled growth of corporate power is at the heart of the economic inequality African Americans and all working people are confronting.

Angela Davis (2003) again becomes important in interpreting the multiple intersections of race, economy, and the prison industrial complex. She traced the historical links between current practices and the policies that emerged during the post–civil war era:

> Vast amounts of black labor became increasingly available for use by private agents through the convict lease system and related systems such as debt peonage. *This transition set the historical stage for the easy acceptance of disproportionately black prison populations today.* . . . We are approaching the proportion of black prisoners to white, during the era of the southern convict lease and country chain gang systems. Whether this human raw material is used for purposes of labor or for the consumption of commodities provided by a rising number of corporations directly implicated in the prison industrial complex, it is clear that black bodies are considered dispensable within the "free world," but as a source of profit in the prison world. (p. 95)

This quest for dispensable labor increasingly includes women of color who, in light of globalization, deindustrialization, and the dismantling of social services, are propelled by state economic interests into the slave labor markets of the prison industrial complex.

> The prison industrial complex is not a conspiracy, but a confluence of special interests that include politicians who exploit crime to win votes, private companies that make millions by running or supplying prisons and small town officials who have turned to prisons as a method of economic development. (Silverstein, 1997)

This complex now includes more than 3,300 jails, more than 1,500 state prisons, and 100 federal prisons in the United States. Nearly 300 of these are private prisons. More than 30 of these institutions are super-maximum facilities, not including the super-maximum units located in most other prisons. The prison industrial complex consumes vast amounts of tax dollars at the expense of education and other social programs. Each year, the United States spends more than $146 billion dollars on the criminal justice system, including police, the judiciary and court systems, and corrections. More than $50 billion of this is spent directly on corrections, with the majority of those expenditures going toward incarceration and executions—the two most expensive sentencing options (Bureau of Justice Statistics, 2004). The quest for profit has led to international U.S. expansion of the prison industrial complex in the United States. Both private companies and the U.S. military industrial complex rely on the global proliferation of both U.S. prisons and their internal practices at Basra, Abu Ghraib, Guantanamo Bay, and untold other locations.[2]

In essence, the prison industrial complex is a self-perpetuating machine where the vast profits (e.g., cheap labor, private and public supply and construction contracts, job creation, continued media profits from exaggerated crime reporting, and crime/punishment as entertainment) and perceived political benefits (e.g., reduced unemployment rates, "get tough on crime" and public safety rhetoric, funding increases for police, and criminal justice system agencies and professionals) lead to policies that are additionally designed to ensure an endless supply of "clients" for the criminal justice system (e.g., enhanced police presence in poor neighborhoods and communities of color; racial profiling; decreased funding for public education combined with zero-tolerance policies and increased rates of expulsion for students of color; increased rates of adult certification for juvenile offenders; mandatory minimum and three-strikes sentencing; draconian conditions of incarceration and a reduction of prison services that contribute to the likelihood of recidivism; collateral consequences—such as felony disenfranchisement, prohibitions on welfare receipt, public housing, gun ownership, voting and political participation, and employment—that nearly guarantee continued participation in crime and return to the prison industrial complex following initial release). As Donzinger (1996) aptly noted,

> Companies that service the criminal justice system need sufficient quantities of raw materials to guarantee long term growth *in the criminal justice field, the raw material is prisoners*. . . . The industry will do what it must to guarantee a steady supply. For the supply of prisoners to grow, criminal justice policies must insure a sufficient number of incarcerated Americans whether crime is rising or the incarceration is necessary. (p. 87)

In sum, Black workers, men and women, are at the center of this prison industrial process. They are used again as exploited labor and as consumers—of products produced by prison labor. African Americans and other working people are less needed in the free labor market under current conditions of globalization. Highly exploited

global workers match cheap prison labor. So the processes of deindustrialization and economic restructuring contribute to the process of accumulation for capital and the increasing immiseration of the Black poor, and this is true because many of the decisions are explicitly racial in form. Corporate actors choose to move out of Black communities on racial grounds (Brewer, l983). Thus, private prisons play a key role in the political economy of transnational capital. But so do public prisons. These prisons are equally tied to the corporate economy "and constitute an ever growing source of capitalist growth" (Davis, 2003, p. 96).

This exploitation of Black labor continues, made permissible, indeed possible, with the law. Although the names and legal legitimations have changed, there is little to distinguish the plantation from the penitentiary. Nevertheless, in the United States, Blacks have been a central political force in checking unabashed profit realization. Historically, this occurs through political struggle. We contend that it is only through organized political struggle and radical pedagogies for change that the current situation will be transformed for social justice.

Transparency, Political Struggle, and Radical Pedagogies for Social Justice

The call for social justice is "an implicit call for solutions, a call for remedies, a call for action" (Coates, 2004, p. 850). As we have seen, the call for social justice cannot rely on civil justice or macro-level remedies alone; law has been the handmaiden of what hooks (1992) has termed "the white supremacist capitalist patriarchy" in the ever-evolving political and economic exploitation of persons of color. To paraphrase Bell (1992), the 14th Amendment cannot save us. The call for social justice requires more.

As the latest project in racialization, criminal justice and the prison industrial complex have fundamentally racist and classist roots that must be exposed and abolished. Reform is insufficient; "there can be no compromise with capitalism. . . . There can be no compromise with racism, patriarchy, homophobia and imperialism" (Marable, 2002, p. 59). The work of justice must begin at the micro level; it must emerge from the grass roots. Drawing links between the movements to abolish slavery and segregation, Davis (2003) asked us to imagine the abolition of prisons and the creation of alternatives to mass incarceration with all its racist and classist corollaries. Davis (1998b) identified three key dimensions of this work—public policy, community organizing, and academic research:

> In order to be successful, this project must build bridges between academic work, legislative and other policy interventions, and grassroots campaigns calling, for example for the decriminalization of drugs and prostitution, and for the reversal of the present proliferation of prisons and jails. (pp. 71-72)

Much of this work is in progress. Organizations such as The Sentencing Project (http://www.sentencingproject.org/), the Prison Moratorium Project (http://www.nomoreprisons.org), Critical Resistance (http://www.criticalresistance.org), Families Against Mandatory Minimum Sentencing, Amnesty International, Human Rights Watch, and the Prison Activist Resource Center (http://www.prisonactivist.org) have successfully linked a large and growing body of research with a critique of current practices and a call for legislative and policy change.

But this latest abolition movement faces a unique challenge. The paradigm of color-blind racism must be exposed before the deep connections between race, crime, and political economy become transparent. Hegemonic media coverage and misrepresentations about the reality of crime and criminal justice must be countered by multiple voices (Davis, 2003; Entman & Rojecki, 2000; Sussman, 2002). As long as the public course centers on crime—not race, class, or gendered racism—the true role of criminal justice and the prison industrial complex in preserving White supremacy in the context of advanced capitalism remains invisible. Davis (1998a) warns us,

> The real human beings, designated by these numbers in a seemingly race neutral way, are deemed fetishtically exchangeable with the crimes they have committed. . . . The real impact of imprisonment on their lives need never be examined. The inevitable part played by the punishment industry in the reproduction of crime need never be discussed. The dangerous and indeed fascist trend toward progressively greater numbers of hidden, incarcerated human populations is itself rendered invisible. (p. 63)

The true underpinnings of criminal justice and the prison industrial complex must become transparent. They must be surfaced by micro-level social justice projects. They must be surfaced via radical and relentless pedagogies of resistance; they must be surfaced in the stories, the narratives, of political prisoners and prisoners of conscience; they must be surfaced through the research, writing, and teaching of those whom Mumia Abu-Jamal (2005) called "radical intellectuals" and ultimately through the coalitions between the two that bridge the lines of difference between freedom and incarceration, as well as those of race, class, and gender.

As noted earlier, the writings of political prisoners and prisoners of conscience sounded the early warning about the role of the police, the courts, and prisons in economic and political repression of people of color. These works publicly clarified the extent to which there were political prisoners in the United States and served to raise the consciousness of what, in 1970, were the 200,000 mostly Black and Brown inmates in prisons and jails. Just as the writings of George Jackson, Assata Shakur, Huey P. Newton, and the early Angela Davis inspired an earlier generation of activists, so too do new voices rise in dissent from our prisons and jails. Leonard Peltier, Sanykia Shakur, Paul Wright's *Prison Legal News* (http://www.prisonlegalnews.org), Marilyn Buck, and the prolific Mumia Abu-Jamal have given voice to the more

than 2 million who are now incarcerated in increasingly harsh and isolated conditions. They have made the invisible horrors of the prison industrial complex visible and again sparked the call for resistance. They offer both an insider's view and a deep critique of the law. Abu-Jamal (1995) wrote of Pennsylvania's death row,

> From daybreak to dusk black voices resound in exchanges of daily dramas that mark time in the dead zone. Echoes of *Dred Scott* ring in *McCleskey's* opinion, again noting the paucity of black rights in the land of the free. Chief Justice Taney sits again, reincarnate in the Rehnquist Court of the Modern Age. . . . One hundred and thirty three years after *Scott,* and still unequal in life, as in death. (pp. 92-93)

The writings of many political prisoners might have remained suppressed were it not for the efforts of scholars to bring them forward. This coalition between "organic and radical intellectuals" (Abu-Jamal, 2005) is crucial to the uncovering of the deep structural connections between race, political economy, and crime. The work of Angela Davis and Joy James is exemplary here. Their extensive writings on these matters and their careful attendance to connecting with those inside prison walls serve as a model for future work. In *Imprisoned Intellectuals,* James (2003) gave voice to the range of political prisoners and traced the common thread of resistance across generations, nationalities, racial/ethnic differences, genders, sexual orientations, and political causes. She hopes that writing and reading will force a transformative encounter "between those in the so-called free world seeking personal and collective freedoms and those in captivity seeking liberation from economic, military, racial/sexual systems" (James, 2003, p. 4).

The call to social justice, especially when addressing complex and cloaked systems of racialization, requires critical and systematic documentation, the surfacing of deep political and economic structures, and bold confrontation. It requires the analytical tools and methods of multiple disciplines, as we have attempted to offer here. The dismantling of the White supremacist and capitalist machinery of criminal justice requires coalitions between intellectuals of all sorts. In the words of Mumia Abu-Jamal (2005),

> Yet this world and life itself, is broader than the ivory towers of academia. Make external connections. Build bridges to the larger, nonacademic community. Build social, political and communal networks. . . . The word "radical" means from the roots—so, build roots! Touch base with real folks, and work for the only real source of liberty—life! (p. 179-184)

Ultimately, the realization of social justice will require still broader coalitions. Criminal justice and the prison industrial complex represent particular manifestations of the entanglements of racialization, the law, and the global economy in late capitalism. Truly challenging this project in racialization calls for coalitions with those who are addressing different aspects of these foundation dilemmas. Audre Lorde (1984) reminded us that much of Western European history conditions us to

see human differences in simplistic opposition to each other: dominant/subordinate, good/bad, up/down, superior/inferior. In a society where the good is defined in terms of profit rather than in terms of human need, there must always be some group of people who, through systematized oppression, can be made to feel surplus, to occupy the place of the dehumanized inferior. Within this society, that group is made up of Black and Third World people, working-class people, older people, women, gays/lesbians, and physically different and physically challenged people. Lorde went on to say,

> Institutionalized rejection of difference is an absolute necessity in a profit economy which needs outsiders as surplus people. As members of such an economy, we have all been programmed to respond to the human differences among us with fear and loathing and to handle that difference in one of three ways: ignore it, and if that is not possible, copy it if we think it is dominant, or destroy it if we think is subordinate. But we have no patterns for relating across our human differences as equals. As a result, those differences have been misnamed and misused in the service of separation and confusion. (p. 115)

Most important, we must organize, continuing the legacy of struggle. We must come together across boundaries of national identity, gender, race, class, and ethnicity. We must work in alliance to realize the vision that another world is possible.

Notes

1. The extreme escalation in the female incarceration rate is new. In the United States, institutionalization has been highly gendered, with prisons largely reserved for men and psychiatric facilities as the favored source of social control for "deviant women." This is consistent with a historical pattern that has tended to "criminalize" men and "medicalize" women. Race and class, however, have always complicated this gendered division of punishment (see Ehrenreich & English, 1973). Women of color and women who are poor have always been more likely to be incarcerated than their White counterparts, and so it is unsurprising that the current expansion of the women's prison population has largely been at the expense of African Americans and Latinas. As the period of late capitalism is marked by a steady decimation of governmental funding in the areas of economics, education, and housing, these women increasingly become an important "disposable" source of profit for the prison industrial complex (Davis, 2003).

Whereas women's prisons of the past used to be less draconian, this is no longer the case. Women, on average, serve longer sentences than men and are increasingly forced into harsh conditions of labor, including, at the extreme, female chain gangs. They are often housed in more makeshift conditions, located long distances from family and friends, denied routine medical care, and at great risk for sexual assault by the too often male correctional staff (Chesney-Lind, 2002; Davis, 2003).

The direct and collateral consequences of imprisonment for women are also consistent with historical patterns of exploitation and control that women of color have faced. From slavery to the present, women of color have faced sexual exploitation, state-sponsored family disruptions, and attempts to regulate reproduction. Davis (2003) observed that the sexual assaults faced regularly by women in prison—in the forms of both attacks and routine practices such as body cavity searches—echo the sexualized punishments that accompanied slavery. In *Killing the Black Body*, critical legal scholar Dorothy Roberts (1997) documented the long history of legal control over the reproduction of women of color, particularly African Americans. One of the contributing factors to the rise of the female prison population is the criminalization

of reproduction for women of color who are poor or users of drugs. Women on welfare have been forced into the use of Depo and Norplant and offered economic incentives for having abortions. Pregnant women who have tested positive for substance use (usually crack cocaine) have been arrested and imprisoned for child abuse. These arrests and prosecutions have almost invariably involved Black women, even though they could equally apply to middle-class White women who continue to drink during pregnancies. Finally, the overwhelming majority of women in prison have children. The incarceration of women further decimates families and, in combination with new laws that speed the process of termination of parental rights, nearly guarantees a permanent loss of parental rights. In the broader sense, the prison industrial complex itself represents a new mechanism for controlling the reproduction of people of color. Just as it has replaced slavery as a new source of profit, it has also replaced the older program of suppressing Black reproduction via sterilization (Roberts, 1997) with the isolation and segregation of men and women behind prison walls.

2. The globalization of the prison industrial complex includes not only the proliferation of the structures but abusive practices as well. The horrific abuses documented at Abu Ghraib are not an anomaly; they represent regular practices at U.S. prisons across the nation. Amnesty International and Human Rights Watch have documented decades-old patterns of human and civil rights abuses by local and federal police/law enforcement officers as well as prison, jail, and Immigration and Naturalization Service detention officials. These include a variety of abusive police practices (e.g., racial profiling; excessive use of force—including the kicking and beating of restrained suspects with fists, batons, and flashlights; excessive use of dangerous chokeholds, hog-ties, and other restraints that have resulted in death; excessive use of tasers, stun guns, and chemical sprays; excessive use of deadly force—particularly in situations involving car chases or unarmed Black male suspects; inappropriate use of strip searches; use of sexual abuse and torture in police precincts to extract confessions; and prison procedures [e.g., dangerous use of restraints—including four-point restraints, the "rail," and the restraint chair—that have resulted in multiple deaths; the shackling of pregnant inmates; use of nudity, strip searches, and sexual humiliation and assault as a source of social control; failure to curtail sexual assaults on both male and female inmates by other inmates and guards; beatings by guards; denial of medical care or treatment; use of dogs, tasers, and chemical sprays; excessive use of super-max and isolation confinement; and denial of rights on religious freedom, communications, and right to counsel]) (see Amnesty International, 1998; Eisner, 2004; Fellner, 2004; Human Rights Watch, 1998, 2000).

International nonprofit human rights organizations have consistently claimed that U.S. police and prison practices are in violation of several international treaties and protocols including, but not limited to, the Geneva Conventions, International Covenant on Civil and Political Rights, Convention Against Torture, International Convention on the Elimination of All Forms of Racial Discrimination, UN Universal Declaration of Human Rights, UN Body of Principles for the Protection of All Persons Under Any Form of Detention, UN Standard Minimum Rules for the Treatment of Prisoners, UN Code of Conduct for Law Enforcement Officials, and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Human Rights Watch observed in a May 14, 2004, press release,

> Perhaps if photos or videotapes of abuse in U.S. prisons were to circulate publicly, Americans would be galvanized to protest such treatment as they have the treatment of Iraqi prisoners. Absent such graphic and unavoidable evidence, it is all too likely that abuse will continue to be a part of many prison sentences.

Or perhaps they would continue to be publicly and legally ignored. In a chillingly accurate observation made in his dissent to the recent decision of *Johnson v. California* (2005), Justice Clarence Thomas noted, "The Constitution has always demanded less within the prison walls."

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