

CONSTRUCTING A CRIMINAL JUSTICE SYSTEM FREE OF RACIAL BIAS: AN ABOLITIONIST FRAMEWORK

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I. INTRODUCTION

In her last speech before her death in 1965, playwright Lorraine Hansberry incisively described the nature of racial bias in America.¹ She did not speak about a fairer way of punishing the crimes of black people; rather, she identified “the paramount crime in the United States” as “the refusal of its ruling classes to admit or acknowledge in any way the real scope and scale and character of their oppression of Negroes.”² She did not describe racial bias as an aberration to be eliminated from the system. On the contrary, according to Hansberry, the oppression of black people

. . . is not a random, helter-skelter, hit-or-miss matter of discrimination here and there against people who just happen to be of a different color. . . . It is, as that ruling class perfectly well knows, a highly concentrated, universal, and deliberate blanket of oppression pulled tightly and securely over 20 million citizens of this country.³

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1. Lorraine Hansberry, *The Scars of the Ghetto*, 16 *Monthly Review* 588–91 (1965).

2. *Id.* at 590.

3. *Id.* at 590.

The blanket of oppression has grown even more suffocating since Hansberry spoke those words: today's imprisonment rate is five times as high as in 1972 and surpasses that of all other nations.⁴

Hansberry admonished her audience: "[t]his matter of admitting the true nature of a problem before setting about rectifying it, or even pretending to, is of utmost importance."⁵ Before trying to construct a criminal justice system free of racial bias, we must first admit the true nature of the problem. My aim in this article is to honestly assess the radical changes needed to rid American criminal justice of racial bias rather than to propose an immediately attainable strategy for reform.

The U.S criminal justice system has always functioned, in coordination with other institutions and social policy, to subordinate black people and maintain the racial caste system.⁶ Racial bias does not rest only or even primarily in the minds of those who implement the system; racism is engrained in the very construction of the system and implicated in its every aspect—how crimes are defined, how suspects are identified, how charging decisions are made, how trials are conducted, and how punishments are imposed. It would be hard to conjure up a mechanism that more effectively subjugates a group of people than state-imposed mass incarceration, capital punishment, and police terror, which not only confines and

4. The Sentencing Project, U.S Prison Populations—Trends and Implications 4, <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Sept. 30, 2007); see also David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *Mass Imprisonment: Social Causes and Consequences* 1, 1 (David Garland ed., 2001) (hereinafter *Mass Imprisonment*).

5. Hansberry, *supra* note 1.

6. David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999); see also Kathryn J. Russell, *The Color of Crime* (1998). Although the criminal justice system is biased against other peoples of color, this article focuses on its origins in the enslavement of Africans and its continued subordination of African Americans. As Andrea Smith theorizes, racism and white supremacy are built on the logics of genocide, supporting the expropriation of indigenous people's land, and orientalism, which casts certain foreigners as a threat, as well as slavery. Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy*, in *Color of Violence: The Incite! Anthology* 66–73 (Incite! Women of Color Against Violence, ed., South End Press 2006). The logics of genocide and orientalism have legitimized state violence against Native peoples, Latinos, Arab Americans, and immigrants of color. As I discuss below, the logic of slavery has particular relevance to penal policy, capital punishment, and police terror.

disenfranchises a staggering proportion of black people, but also devastates the communities they come from.⁷

In this Article, I present a theoretical framework aimed at shaking the racist foundations of the criminal justice system by highlighting its racial origins and antidemocratic impact. This framework rejects the current conceptualization of racial bias as an aberrational malfunction, recognizing instead how the system refashions past regimes of racial control to continue to sustain white supremacy. It supports, as a start, abolishing criminal justice institutions with direct lineage to slavery and Jim Crow that are key components of the present regime of racial repression.⁸ I highlight three key institutions—mass incarceration, capital punishment, and police terror—whose origins can be traced to black enslavement and whose modern day survival radically contradicts liberal democratic ideals, placing the United States outside the norm of Western nations. The only explanation for the endurance of these barbaric practices is their racist function and the only moral remedy is their abolition.

Unlike state violence inflicted in the Jim Crow era explicitly to reinstate blacks' slave status, today's criminal codes and procedures operate under the cloak of colorblind due process. The racism of the criminal justice system is therefore invisible to most Americans, and the disproportionate involvement of blacks only reinforces the stereotype that they are naturally prone to crime. The

7. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stanford L. Rev.* 1271 (2004).

8. This framework is only a partial response to racism in the criminal justice system as it leaves intact a number of biased policies and practices, such as disparate charging and noncapital sentencing of violent offenders and racial profiling in nonviolent police stops and arrests that do not result in incarceration. See Tracey Maclin, *Race and the Fourth Amendment*, 50 *Vand. L. Rev.* 333 (1998); Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows and Misdemeanor Marijuana Arrests in New York City, 1989–2000* (Univ. of Chicago, Olin Law & Economics Working Paper No. 317, 2007) reprinted in 6 *Criminology & Public Policy* 165, 165–81 (2007) (noting that misdemeanor marijuana arrests in New York City, which disproportionately targeted African Americans and Hispanics, increased by 2,670 % between 1994 and 2000 and advocating relaxing the legal standard for discrimination claims). Nevertheless, a successful abolitionist movement targeting mass imprisonment, capital punishment, and police terror would weaken other aspects of law enforcement that support the U.S. racial hierarchy, force a broad rethinking of the role of criminal justice in our society, and open space for envisioning more just alternatives.

public believes that this unprecedented level of state brutality is normal and necessary for its protection. A recent study by Princeton sociologists Devah Pager and Bruce Western found that whites just released from prison fared better in the New York City job market than blacks with identical resumes but no criminal record.⁹ Employers' preference for white offenders over law abiding blacks shows not only the inequitable economic conditions that squeeze some blacks into illegal alternatives, but also that blackness itself is seen as a mark of criminality. According to this view, poor blacks are meant to labor in prisons and not in decent jobs.

The current *McCleskey*-type jurisprudence requiring proof of discriminatory motive or impact in individual cases treats racial bias as a system *malfunction*.¹⁰ The question posed by the justices in *McCleskey* was whether there was a discriminatory misuse of the death penalty—an aberrational abuse of discretion or unexplained discrepancy. The problem with this approach is that the massive criminal control of blacks is not a malfunction. It shows that the system is working precisely the way it was designed. Both the majority and dissenting justices in *McCleskey v. Kemp* recognized that racism was so endemic in the U.S. criminal justice that making racial discrimination unconstitutional would threaten the entire system.¹¹ As Justice Brennan wrote in dissent, the reason for *McCleskey*'s holding was “a fear of too much justice.”¹²

9. Devah Pager & Bruce Western, *Race at Work: Realities of Race and Criminal Record in the NYC Job Market*, http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (last visited Sept. 30, 2007).

10. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (finding that Warren McCleskey failed to demonstrate that his race and that of the victim affected or motivated his individual death sentence and that proof that racism was endemic in the criminal system was not sufficient to vacate his personal sentence).

11. *McCleskey*, 481 U.S. at 315–19, 335–42 (Brennan, dissenting); see James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment*, 107 Colum. L. Rev. 1, 83 (2007) (arguing Justice Powell's majority opinion in *McCleskey* meant the Court's ““unceasing efforts’ to eradicate racial prejudice in our criminal justice system” cease when necessary to let the States continue carrying out unavoidably race-based executions”). In announcing he would join Justice Powell's opinion, Justice Scalia conceded with little concern that “the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable . . .” Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987), quoted in Liebman at 83 n. 424.

12. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

How do we rectify a system that so brilliantly serves its intended purpose? Given the function of crime control in most societies, as a key component of social policy aimed at governing marginal groups, we can expect that racial bias is inevitable as long as white supremacy reigns in the United States.¹³

Nonetheless, anti-racist struggles have succeeded in toppling past regimes of racial repression in this country by exposing the inherent contradiction of the caste divisions these regimes reinforced in a formally democratic society.¹⁴ Even a system as universally accepted and profitable as slavery was ended in the British colonies and the United States as a result of slave rebellions and an international abolitionist movement.¹⁵ In *Brown v. Board of Education*,¹⁶ the U.S. Supreme Court reversed the long-accepted order of “separate-but-equal” schooling when black agitation and international scrutiny revealed its immorality.¹⁷ Indeed, the escalation of African-American imprisonment in the last thirty years can be seen as a backlash against the collapse of de jure segregation under pressure from the civil rights movement. There is precedent for the success of a model for contesting racism in the criminal justice system that exposes how the system continues to preserve the U.S. racial hierarchy by denying blacks’ citizenship rights. The United States is an exception among the world’s democracies in its acceptance of mass imprisonment, capital punishment, and police terror.¹⁸ These law enforcement policies have reached a state of such

13. See Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and The Transformation of State Policy*, in *Mass Imprisonment*, *supra* note 4, at 35; see generally David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990); Georg Rusche & Otto Kirchheimer, *Punishment and Social Structure* (1939) (evidence and argument that policy regimes in the United States differ, but all act in some way to exclude marginal groups).

14. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in *Mass Imprisonment*, *supra* note 5, at 82, 86.

15. Eugene D. Genovese, *From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World* (1980); Adam Hochschild, *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire’s Slaves* (2006).

16. *Brown v. Board of Education*, 347 U.S. 483 (1954).

17. Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2002).

18. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (2006); see also Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends 2* (2003), available at <http://www.sentencingproject.org/pdfs/pub9036.pdf> (last visited Sept. 30, 2007).

glaring opposition to democratic ideals that the time is ripe for a new movement to abolish them.

History, social science, and political theory are more useful to this model than current legal doctrine on racial bias developed largely to legitimize racist institutions. Social science research on the community-level disenfranchisement and social damage caused by the concentration of mass imprisonment in black neighborhoods, for example, reveals a profound contradiction between asserted ideals of participatory, liberal democracy and the prison apparatus.¹⁹ The criminal justice system's racial bias functions to deny blacks' citizenship rights in two principal ways. First, criminal justice supervision of a large proportion of black people interferes with their participation in democracy by isolating them in prisons, denying them the right to vote, and damaging broader social and political relationships necessary for collective action.²⁰ Second, the system reinforces the myth of blacks' propensity for criminality, which has been invoked throughout U.S. history as "evidence that blacks were unworthy of assuming the full rights and duties of citizenship."²¹ An interdisciplinary approach can help to inform an alternative legal doctrine that accounts for the repressive function and impact of criminal justice policy.

Part II of this article describes the historical roots of penal policy, capital punishment, and police terror in slavery and Jim Crow; Part III discusses their antidemocratic function; and Part IV concludes by endorsing an abolitionist movement that seeks to eliminate them.

According to Mauer, the United States has the highest incarceration rate in the world, "5-8 times that of the industrialized nations to which we are most similar, Canada and Western Europe."

19. Roberts, *supra* note 7, at 1294-97.

20. See sources discussed in *id.* at 1281-97; see also Sherrilyn A. Ifill, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the 21st Century* (2007) (giving a wide range of evidence showing the marginalization of prisoners and their families, and the effects thereof).

21. Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 41 (2006).