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Dorothy E. Roberts

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

Dorothy E. Roberts*

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

* Kirkland & Ellis Professor, Northwestern University School of Law; faculty fellow, Institute for Policy Research. I am grateful to the Kirkland & Ellis Research Fund for its financial support and to Robert Davis for excellent research assistance. This article is based on my talk at a symposium entitled “Pursuing Racial Fairness in the Administration of Justice: Twenty Years After *McCleskey v. Kemp*,” held by the NAACP Legal Defense and Educational Fund and Columbia Law School on Mar.2–3, 2007.

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).

II. THE SYSTEM'S HISTORICAL ROOTS IN SLAVERY AND JIM CROW

The pillars of the U.S. criminal justice system—mass imprisonment, capital punishment, and police terror—can all be traced to the enslavement of Africans. The criminal justice system functioned as a means of legally restricting the freedoms of black people after their emancipation and preserving whites' superior status. Through these institutions, law enforcement continues to implement the “logic of slavery,” which treats black people as inherently “slaveable.”²² White slaveholders classified Africans as an animal-like race, separate and inferior to whites, who could be legally treated as chattel property. These slaveholders believed blacks demonstrated their proximity to animals by their lack of “intellect, culture, and civilization” and their natural propensity to commit crime.²³ Prisons, state executions, and police brutality have supported white supremacy by effectively reinstating blacks' slave status and by reinforcing the myth of inherent black criminality.

A. Mass Incarceration

Penal institutions have historically been key components of social policy aimed at governing marginal social groups. Sociologist Loïc Wacquant theorizes about prisons as instruments of management of social marginality and examines their particular role in U.S. racial repression.²⁴ He situates contemporary mass incarceration in a historical lineage of “peculiar institutions” that have served to define, confine, and control African Americans—slavery (1619-1865), the Jim Crow system in the South (1865-1965), the urban ghetto in the North (1915-1968), and the “novel organizational compound formed by the vestiges of the ghetto and the expanding carceral system [(1968– present)].”²⁵

Mass imprisonment is not only an institution that acts like prior oppressive regimes. Today's penal policy has a direct lineage to

22. Smith, *supra* note 6, at 67.

23. Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* 100 (2004).

24. Wacquant, *supra* note 14, at 82.

25. *Id.* at 85.

the regimes of slavery and Jim Crow.²⁶ When black people were enslaved in the United States, the state incarcerated white people almost exclusively. Emancipation and the passage of the Thirteenth Amendment, which prohibited involuntary servitude except upon criminal conviction, dramatically changed the demographics of prisons. Incarceration and the convict leasing system became a principal means of preserving blacks' status as the property of whites. "In Alabama, for example, nonwhites made up just two percent of the prison population in 1850, but seventy-four percent by 1870."²⁷ Southern prisons both extracted the labor of formerly enslaved blacks and helped to keep them economically and politically inferior to whites. Some state prisons literally took over plantations, effectively re-enslaving black inmates who were whipped and worked to death in chain gangs.²⁸

Those confined in U.S. prisons today are disproportionately the descendants of slaves. The transformation of prison policy over the last thirty years has produced the mass incarceration of African Americans.²⁹ The sheer scale and acceleration of U.S. prison growth "is an unprecedented event in the history of the U.S. and, more generally, in the history of liberal democracy."³⁰ This extraordinary prison expansion involved incarceration of young black men in grossly disproportionate numbers. The gap between black and white incarceration rates has deepened along with rising inmate numbers.³¹ Most people sentenced to prison today are black.³² On any

26. See Angela Y. Davis, *Are Prisons Obsolete?* 22–39 (2003) (explaining the relationship between "historical expressions of racism" and the structure of current prison systems in the United States).

27. Manza & Uggen, *supra* note 21, at 57.

28. David M. Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* 34–45 (1997).

29. See generally Mark Mauer, *Race to Incarcerate* (1999) (detailing the expansion of the American prison population over three decades, starting in the 1970s, and examining several aspects of prison policy that have specifically affected rates of African-American incarceration); Michael Tonry, *Malign Neglect: Race, Crime, and Punishment* (1995) (describing the rise in the numbers of young minority citizens, especially males, incarcerated during the 1980s and early 1990's and accounting for the causes of this increase).

30. Mass Imprisonment, *supra* note 4, at 1. By the end of 2002, the number of inmates in the nation's jails and prisons exceeded two million.

31. Marc Mauer, *Racial Disparities in Prison Getting Worse in the 1990s*, 8 *Overcrowded Times* 8 (1997).

32. See Human Rights Watch, *Incarcerated America, Backgrounders*, <http://www.hrw.org/backgrounder/usa/incarceration/> (last visited Oct. 10, 2007).

given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole.³³ More than half of black male teenagers in some inner-city high schools are arrested each year.³⁴ As a result, a black male child has a one in three chance of going to prison during his lifetime and the likelihood is even higher in some cities.³⁵

Radical changes in crime control and sentencing policies, rather than increasing crime rates, led to the prison explosion.³⁶ The growth of both the prison population and its racial disparity are significantly attributable to aggressive street-level enforcement of drug laws and harsh sentencing of drug offenders.³⁷ An increasingly large proportion of new admissions for drug offenses combined with longer mandatory sentences kept prison populations at historically high levels during the 1990s, despite declines in crime.³⁸ Although whites have a higher rate of illegal drug use, black offenders are

(describing the disproportionate number of blacks in prison, as of 2003. In 2003, 44 % of all prisoners in the U.S. were African American). *See also* U.S. Dep't of Justice, *Prison Statistics*, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Oct. 10, 2007) (explaining that at the end of 2005, there were more black male sentenced prison inmates than white or Latino male inmates).

33. Marc Mauer et al., *The Sentencing Project: Young Black Americans and the Criminal Justice System: Five Years Later 1* (1995).

34. Paul Hirschfield, *The Hyper-Concentration of Juvenile Justice Contact among Urban African American Males and the Consequences of Collective Labeling* (paper presented at 2007 American Sociological Association Annual Meeting, on file with author).

35. Donald Braman, *Families and Incarceration*, in Marc Mauer & Chesney-Lind, ed., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, *supra* note 4 at 117 (2002).

36. Bruce Western, *Punishment and Inequality in America* (2006); Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in *Mass Imprisonment*, *supra* note 4, at 6; *see also* Harcourt & Ludwig, *supra* note 8 (finding no evidence that New York City's marijuana policing strategy is associated with reductions in violent or property crimes in the city).

37. William Chambliss, *Drug War Politics: Racism, Corruption, and Alienation*, in *Crime Control and Social Justice: The Delicate Balance* 295, 297–99 (Darnell F. Hawkins et al. eds., 2003); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods* (2003), Paper No. 03–54, Columbia Law School Public Law & Legal Theory Working Paper Group, *available at* <http://ssrn.com/abstract=392120> (last visited Oct. 2, 2007), at 5.

38. Western, *supra* note 9; Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 *J. Urb. Health* 434, 434–35 (2002).

much more likely to be sentenced to prison.³⁹ The sentencing rate for drug offenses in 1998 was twelve times greater for black offenders than for white offenders.⁴⁰

The sentencing changes responsible for the prison explosion made punishment less individualized.⁴¹ Sentencing reforms have increased both the certainty and severity of sanctions involving incarceration.⁴² In 2000, sixty-five percent of felons were sentenced to some form of incarceration.⁴³ As Marc Mauer observes in explaining prison growth, “[t]he most significant change within the criminal justice system is the loss of the individual in the sentencing process, as determinate sentencing and other ‘reforms’ have taken us from an offender-based to an offense-based system.”⁴⁴ Although some reformers in the 1970s advocated determinate schemes to reduce judicial bias and unfair disparities in sentencing,⁴⁵ the severity of mandatory sentences combined with the War on Drugs and

39. Chambliss, *supra* note 37, 299 fig.12.5.

40. *Id.* at 301 fig.12.5.

41. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. Chi L. Rev. 1, 12 (2003) (discussing a “new penology in sentencing guidelines and mandatory minimum sentences that allocate punishment wholesale rather than retail”); see also Bernard E. Harcourt, *From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 Law & Contemp. Probs. 99, 101–02 (describing the development and refinement of an actuarial approach to criminal law).

42. Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, in *Crime Control and Social Justice: The Delicate Balance*, *supra* note 37, at 27. In commuting I. Lewis Libby Jr.’s 30-month prison sentence in July 2007, President George Bush acknowledged the excessiveness of federal sentencing. See Adam Liptak, *Bush Rationale on Libby Stirrs Legal Debate*, N.Y. Times, July 4, 2007, at A1. University of Houston law professor David Dow, who represented several death row inmates denied commutation by then-Governor Bush, poignantly highlights the injustice of President Bush’s action: “Because President Bush signed a commutation, a rich and powerful man will spend not a day in prison, while 57 poor and poorly connected human beings died because Governor Bush refused to lift a pen for them.” David R. Dow, *To the Editor*, N.Y. Times, July 4, 2007, at A16.

43. Todd R. Clear & Dina R. Rose, *supra* note 42, at 27.

44. Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in *Mass Imprisonment*, *supra* note 4, at 12.

45. See, e.g., Marvin Frankel, *Criminal Sentencing: Law Without Order* (1973).

discriminatory enforcement of offenses led to unprecedented racial inequity in the prison population.⁴⁶

Moreover, institutional arrangements that reward the fanatical pursuit of convictions encourage prosecutorial “overreaching.”⁴⁷ By routinely indicting defendants on the maximum charges possible, prosecutors place overwhelming pressure on defendants to give up their right to trial.⁴⁸ There is virtual uniformity of plea bargaining in drug cases.⁴⁹ In New York, for example, more than ninety percent of drug cases are decided by guilty pleas, rather than jury trials.⁵⁰ Mandatory minimum sentencing laws pressure defendants to cooperate with prosecutors as the only way to escape draconian prison terms.⁵¹ This “assembly-line justice” created by mandatory sentencing and prosecutorial power funnel black defendants into prison without the individualized judgment of culpability normally contemplated by notions of just desert.⁵² Thus, the mass imprisonment of African Americans should be viewed as a state measure to supervise citizens en masse on the basis of race rather than a race-neutral effort to control crime or mete out offenders’ just deserts.

46. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts* 44 J.L. & Econ. 285 (2001) (finding, after controlling for extensive criminological, demographic, and socioeconomic variables, that blacks, males, and offenders with low levels of education and income receive substantially longer federal sentences).

47. Robert Owen, *Absolute Power, Absolute Corruption, in Prison Nation: The Warehousing of America’s Poor* 23 (Tara Herival & Paul Wright eds. 2003); see also Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (2007) (describing the injustice created by prosecutors’ unbridled charging and plea bargaining decisions).

48. Owen, *supra* note 47, at 17.

49. Angela J. Davis, *Incarceration and Imbalance of Power, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 61, 78 (Marc Mauer & Meda Chesney-Lind eds., 2002).

50. James Fellner, Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders* (1997), available at <http://www.hrw.org/reports/1997/usny>.

51. Owen, *supra* note 47, at 26.

52. Angela J. Davis, *Incarceration and the Imbalance of Power, in Invisible Punishment, supra* note 49, at 78 (“[a]ssembly-line justice facilitated by powerful prosecutors, helpless defense attorneys, and increasingly powerless judges now characterizes the system that determines whether a person will lose his liberty or even his life.”).

The escalation in imprisonment of African Americans at the end of the 20th century is a political reflection of its start a century earlier. Similar to the growth of black incarceration after Emancipation, its contemporary surge is a response to the gains of the civil rights movement. As Alex Lichtenstein points out,

[s]table incarceration rates appear in a period of white racial hegemony and a stable racial order, such as that secured by slavery in the first half of the 19th century or Jim Crow during the first half of the 20th. Correspondingly, sudden rises in incarceration, especially of minorities, tend to appear one generation after this racial hegemony has been cracked, as in the first and second Reconstructions of emancipation and civil rights.⁵³

Thus, the shift in law enforcement policies at the end of the 1970s that started the astronomical U.S. prison expansion can be seen as a backlash against the reforms achieved by civil rights struggles.⁵⁴ It is time for a third Reconstruction ushered in by a movement that cracks the racial order reinforced by the mass imprisonment of African Americans.

B. Capital Punishment

Like mass incarceration, capital punishment in the United States is also intimately tied to the enslavement of black people and the preservation of white supremacy. The death penalty can be traced to the harsh punishment of African slaves, followed by state-sanctioned lynchings after their emancipation from slavery.⁵⁵ Historically, race-based criminal codes imposed the death penalty on slaves for many more crimes than whites. Blacks were commonly hanged for rape, slave revolt, burglary, and arson.⁵⁶ Moreover, slaves

53. Alex Lichtenstein, *The Private and the Public in Penal History: A Commentary on Zimring and Tonry*, in *Mass Imprisonment*, *supra* note 4, at 176.

54. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the "Race Question" in the US*, 13 *New Left Review* 41, 52 (2002) (linking the 1970s return of prisons as a solution to social problems to "the racial and class backlash against the democratic advances won by the social movements of the preceding decade").

55. Randall Kennedy, *Race, Crime And Law* (1997); Stuart Banner, *The Death Penalty: An American History* (2003).

56. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, 96, 98–99 (Charles J. Ogletree, Jr. & Austin Sarat,

were subjected to a fate worse than death, what Stuart Banner calls “super capital punishment”—the execution of a condemned slave was often made especially painful and degrading by burning him alive at the stake, displaying his severed head on a pole in front of the court house, or allowing his corpse to decompose in public view.⁵⁷

After Emancipation, Southerners instituted the ritual kidnapping and killing of blacks in highly publicized ceremonies to re-establish white rule. In the introduction to their book, *From Lynch Mobs to the Killing State*, editors Charles Ogletree, Jr. and Austin Sarat observe that “saying that there is a long and deep connection between this country’s racial politics and its uses of the killings of African Americans through lynchings and the death penalty will come as a surprise to few.”⁵⁸ By leaving disfigured black bodies hanging like “strange fruit” from tree limbs, lynch mobs reinstated the white power structure threatened by blacks’ freedom.

Spectacle lynchings proclaimed the futility of the freedmen’s new civil rights, literally reinstating black bodies as the property of whites that could be chopped to pieces for their entertainment.⁵⁹ The tortured black body displayed for public consumption affirmed the dominance of whites and exclusion of blacks from citizenship, and it served as a warning to anyone who defied this racial order.⁶⁰ As sociologist David Garland points out, the hundreds of “public torture lynchings” celebrated until almost 1940 contradict the scholarly narrative about the civilizing evolution of punishments in modern western nations.⁶¹ Southern whites revived archaic forms of execution involving torture, burning, and mutilation to show that

eds. 2006); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as An Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. Rev. 969 (1992).

57. Banner, *supra* note 55, at 104–05.

58. Charles J. Ogletree, Jr. & Austin Sarat, *Introduction in From Lynch Mobs to the Killing State*, *supra* note 56, at 1.

59. Ifill, *supra* note 20; David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39 Law & Soc’y Rev. 793, 823 (2005); Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching in From Lynch Mobs to the Killing State*, *supra* note 56, at 21–30.

60. Ifill, *supra* note 20; Garland, *supra* note 59, at 815–17; Kaufman-Osborn, *supra* note 59; Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in *Torture: A Collection*, 105, 106 (Sanford Levinson, ed. 2004).

61. Garland, *supra* note 59, at 796–97.

regular justice was too dignified for black offenders.⁶² The public torture of blacks accused of offending the racial order demonstrated whites' unlimited power and blacks' utter worthlessness. This nation's rights, liberties, and justice were meant for white people only; blacks meant nothing before the law.

Lynchings were not exceptions to the law; they were extensions of the inequitable formal administration of justice and part of a broader system of racial control. Garland emphasizes that public torture lynchings were treated like a "legitimate expression of community justice[:]"⁶³ they were staged public penalties imposed in response to allegations of serious crimes; they were conducted by respectable members of the white community, including local law officers; and they were approved by community leaders and state officials.⁶⁴ Lynchings were the terrorist counterpart to state-supported debt peonage, disenfranchisement, and segregation laws that kept blacks subservient to whites.⁶⁵

As lynchings subsided, they were replaced by the imposition of capital punishment disproportionately on blacks. In the twentieth century, public hangings in some Southern states were reserved for black men convicted of raping white women. Kentucky reinstated public hangings for rape in 1920, and in 1938 became the last state to abolish public execution.⁶⁶ Executions of blacks used to mimic lynchings as closely as possible.⁶⁷ Willie McGee was executed on May 8, 1951, based on circumstantial evidence that he had raped a white woman, despite his lawyers' argument to the Mississippi Supreme Court that no white man had ever been put to death for rape in that state.⁶⁸ Five hundred people gathered on the lawn of the Jones County Courthouse, where McGee was electrocuted using a portable electric chair that traveled from community to community. According

62. *Id.* at 814.

63. Garland, *supra* note 59, at 810.

64. Garland, *supra* note 59, at 797–98.

65. *Id.* at 810. Kaufman-Osborn, *supra* note 59, at 33 (stating that lynchings "should be located not in the domain of the illegal or the extralegal but, rather, near the heart of a more comprehensive structure of racial control, one that vested informal police powers in members of the white race and that encouraged vigilantism as a necessary complement to its weak agencies of formally authorized political discipline").

66. Banner, *supra* note 55, at 106.

67. Ifill, *supra* note 20.

68. Kaufman-Osborn, *supra* note 59, at 40.

to one account, “[o]ut on the lawn, when the portable generator stopped humming, indicating that the electrocution had taken place, the crowd burst into cheers, then crushed forward in an effort to glimpse the corpse as it was removed from the building.”⁶⁹

Scholars have noted that as racial inequality became more institutionalized, it was less imperative to enforce white dominance through “more graphic forms of racial violence.”⁷⁰ Jacquelyn Hall notes that lynching receded as legal institutions were developed to deny blacks “the opportunity to own land, the right to vote, access to education, and participation in the administration of justice.”⁷¹ “Once a new system of disenfranchisement, debt peonage, and segregation were firmly in place,” she writes, “mob violence gradually declined.”⁷² Thus, like the shift from enslavement to mass incarceration, the shift from mob infliction of racial violence to capital punishment institutionalized racial repression in a supposedly race-neutral criminal justice system. There was a smooth transition from lynching to state execution because “a culture that carried out so much public unofficial capital punishment could hardly grow squeamish about the official variety.”⁷³ Today, states attempt to sanitize capital punishment by utilizing lethal injection, a method of killing associated less with lynching than electrocution and hanging.⁷⁴ Nevertheless, states continue to impose the death penalty on the basis of race.⁷⁵

69. Philip Dray, *At the Hands of Persons Unknown* 403 (2002), *quoted in* Kaufman-Osborn, *supra* note 59, at 40–41.

70. Kaufman-Osborn, *supra* note 59, at 38.

71. Jacquelyn Dowd Hall, *‘The Mind That Burns in Each Body’: Women, Rape and Racial Violence*, in *Powers of Desire* 331, (Ann Snitow et al., eds., 1983), *quoted in* Kaufman-Osborn, *supra* note 59, at 38.

72. *Id.*

73. Banner, *supra* note 55, at 107.

74. Even this method of killing often inflicts excessive pain on the bodies of the condemned. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *Fordham L. Rev.* 49, 55–56 (2007); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 *Iowa L. Rev.* 319, 379–85 (1997).

75. See generally David C. Baldus et al., *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 *Colum. Hum. Rts. L. Rev.* 139 (2007).

C. Police Terror

The roots of coercive police interrogation techniques, known as the third degree, can also be traced to lynching.⁷⁶ The first stage of lynching was often to extract a confession by whipping or burning the accused. Prior to *Miranda v. Arizona*,⁷⁷ which famously upheld suspects' right to remain silent, police in the segregated South routinely used torture to force blacks to confess to crimes.⁷⁸ Jerome Skolnick shows that public torture lynchings, typically carried out with the participation or sanction of the police, led directly to police whippings of black suspects to obtain a confession.⁷⁹ The 1936 Supreme Court case *Brown v. Mississippi* involved the convictions of three black tenant farmers for murdering a white planter based solely on their confessions.⁸⁰ When one of the defendants, Ellington, denied committing the crime, the deputy sheriff and his posse hanged him from a tree, and when he continued to profess his innocence, tied him to a tree and whipped him. Over the course of several days, Ellington was brutally whipped until he confessed to a statement dictated by the deputy. "The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial," the Supreme Court opinion notes.⁸¹

After coerced confessions were deemed inadmissible in criminal trials, Skolnick argues, police detectives continued to use the third degree and "used [it] against suspects irrespective of race."⁸² In the post-*Miranda* era, according to Skolnick, police rely on deception and trickery, not physical brutality, to obtain evidence for trial. I would argue, however, that race is still implicated in patterns

76. Skolnick, *supra* note 60. See also John H. Blume et al., *Education and Interrogation: Comparing Brown and Miranda*, 90 Cornell L. Rev. 321, 332 (2005) (discussing the relationship between the U.S. Supreme Court's decision in *Miranda v. Arizona* and issues of race; "*Miranda* attacked institutional white supremacy in law enforcement.").

77. *Miranda v. Arizona*, 384 U.S. 436 (1966).

78. Blume et al., *supra* note 76, at 327; Dan T. Carter, *Scottsboro: A Tragedy of the American South* (rev. ed., Louisiana State University Press 1979) (1969).

79. Skolnick, *supra* note 60.

80. *Brown v. Mississippi*, 297 U.S. 278 (1936).

81. *Id.* at 281.

82. Skolnick, *supra* note 60, at 112.

of police terror.⁸³ Police inflict violence, whether the beating, killing, or torture of unarmed suspects, most frequently and most recklessly on blacks.⁸⁴ Nearly all the people in Los Angeles mauled by police dogs are black or Latino.⁸⁵ As one Philadelphia officer put it, the first rule of police abuse is “keep it in the ghetto.”⁸⁶ The publicized street beating of Rodney King, the sodomizing of Abner Louima in a stationhouse bathroom, and the killings of Amadou Diallo (by forty-one police bullets) and Sean Bell (by fifty police bullets) are called aberrational by police spokesmen but, in fact, illustrate more widespread police brutality and harassment in black neighborhoods.

Police torture of suspects continues to be a tolerated means of confirming the presumed criminality of blacks. White police officers in the Area Two Violent Crimes Unit on the South Side of Chicago carried on a reign of torture against black residents for two decades beginning in the early 1970s.⁸⁷ Led by Lieutenant Jon Burge, officers coerced dozens of confessions by punching and kicking suspects, burning them with radiators and cigarettes, putting guns in their mouths, placing plastic bags over their heads, and delivering electric shocks to their ears, nose, fingers, and genitals.⁸⁸

Is Burge the proverbial rotten apple whose excesses do not reflect upon the entire police force? Burge’s torture campaign was well-known and countenanced by other police officers, the state’s attorney’s office, judges, and doctors at Cook County Hospital.⁸⁹

83. The U.S. Supreme Court, however, has failed to recognize the racism in coercive police practices. See Blume et al., *supra* note 76, at 335–40 (arguing that *Miranda* failed to live up to its promise); David Alan Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699, 1730 (2005) (noting that, as the line of coerced confession cases progressed from [Brown v. Mississippi], they had “less and less to do with race and more and more to do with police brutality . . . reflect[ing] . . . a drive toward police ‘professionalism.’”).

84. Paul Chevigny, *The Edge of the Knife: Police Violence in the Americas* (1995); Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* (1998); Tracey Maclin, *Race and the Fourteenth Amendment*, 51 Vand. L. Rev. 333, 390 (1998).

85. Seth Mydans, *Seven Minutes in Los Angeles—A Special Report: Videotaped Beating by Police Officers Puts Full Glare on Brutality Issue*, N.Y. Times, Mar. 18, 1991, at A1.

86. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buff. L. Rev. 1275, 1292 (1999).

87. John Conroy, *Unspeakable Acts, Ordinary People* 66–87 (2000).

88. *Id.*

89. *Id.*; Bandes, *supra* note 86.

Complaints describing similar acts of torture were filed with administrative agencies, the mayor, the state's attorney, and the U.S. Attorney, and alleged by victims at their criminal trials.⁹⁰ Yet all ignored the evidence of torture. The Office of Professional Standards did not investigate the complaints until 1990, following a damning Amnesty International report, and the city suppressed its report finding systematic torture in Area Two until 1992.⁹¹ Burge was eventually fired in 1993, retiring with a pension to Florida, but criminal charges were never brought against him or any other Area Two officer.⁹²

Like lynchings and police whippings, contemporary police brutality is not an exception to the law. Current legal doctrine condones police brutality and makes individual acts of abuse appear isolated, aberrational, and acceptable rather than part of a systematic pattern of official violence.⁹³ Legal rules fragment instances of police brutality so as to obscure its systemic nature, while police supervisors, prosecutors and judges routinely turn a blind eye to its occurrence. Legal scholar Susan Bandes catalogues the innumerable legal hurdles to identifying and documenting patterns of police brutality: "[c]omplaints are discouraged, confessions are not videotaped, record keeping is lax or nonexistent, records are sealed or expunged, patterns are not tracked, and police files are deemed undiscoverable."⁹⁴ The additional barriers that prevent victims from obtaining relief in court are equally onerous. According to Bandes, they include:

[E]videntiary rulings, protective orders, judicial toleration of police perjury or of "the blue wall of silence," assumptions of credibility that favor police officers, the absolute immunity of testifying officers, substantive constitutional doctrine insulating failures to act or demanding an exceptionally high level of proof of wrongdoing, restrictive municipal liability standards coupled with a lack of receptivity to evidence of systemic wrongdoing, and standing doctrines.⁹⁵

90. Bandes, *supra* note 86, at 1288.

91. *Id.* at 1301.

92. *Id.* at 1302.

93. *Id.* at 1288–92.

94. *Id.* at 1279.

95. *Id.* at 1279–80. A pending lawsuit filed by University of Chicago law professor Craig Futterman seeks to overhaul investigations of Chicago police

The chain of racialized terror that spanned slavery, lynching, and police whippings remains unbroken as brutalization of blacks is routinely practiced in today's criminal justice system.

III. THE SYSTEM'S ANTI-DEMOCRATIC FUNCTION

Poor African-American communities have felt the brunt of the staggering build-up of the prison population over the last thirty years. The most obvious way in which mass incarceration bars black democratic participation is the impact of felon disenfranchisement. The United States is exceptional not only because of the astronomical rate of incarceration within its borders, but also because of the antidemocratic impact of incarceration. Jeff Manza and Christopher Uggen definitively demonstrate the tie between incarceration and the disenfranchisement of African Americans.⁹⁶ States passed the first felon disenfranchisement laws during the nineteenth century in response to the extension of suffrage to property-less white men while blacks were still denied the right to vote. After the Civil War, Southern states revised their disenfranchisement laws to prevent African Americans from voting by tying the loss of voting rights to offenses almost exclusively applied to blacks while excluding even more serious crimes of which whites were commonly convicted.⁹⁷ Some states disqualified thieves, burglars, adulterers, and wife beaters, but not those who committed murder. Until the late 1960s, when it barred all felons from voting, Mississippi permitted many violent felons to vote while disenfranchising less serious offenders.⁹⁸ In addition, states that previously had no disenfranchisement laws passed them. The post-Civil War expansion of felon disenfranchisement corresponded to the rapid shift in prison populations from predominantly white to nonwhite prisoners.

Manza and Uggen estimate that on Election Day in November 2004, 5.3 million Americans were prevented from voting because of a criminal conviction.⁹⁹ This massive citizen disenfranchisement has the greatest impact on African American

abuse. Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues*, N.Y. Times, July 20, 2007, at A14.

96. Manza & Uggen, *supra* note 21.

97. *Id.* at 42–43.

98. *Id.* at 42.

99. *Id.* at 76.

men. Manza and Uggen determine that “in fourteen states, more than one in ten African Americans have lost the right to vote by virtue of a felony conviction, and five of these states disqualify over twenty percent of the African American voting age population.”¹⁰⁰

As Manza and Uggen point out, “the United States is the only country in the democratic world that systematically disenfranchises large numbers of non-incarcerated offenders (i.e., those who are either on probation or parole, or have finished their sentence).”¹⁰¹ Barring such a large percentage of citizens from voting “represents a failure to make good on the promise of universal suffrage.”¹⁰² The practice of attaching formal disenfranchisement to a criminal conviction, and thereby denying the vote to large numbers of African Americans, reduces the threat to both the political and economic power of whites.¹⁰³

Mass incarceration excludes African Americans from full citizenship in a less direct but equally devastating way. Studies in several cities reveal that the exit and reentry of inmates is geographically concentrated in the poorest minority neighborhoods.¹⁰⁴ Social science research on prisons’ community-level consequences demonstrates how the concentration of incarceration within inner-city neighborhoods excludes African Americans from social citizenship. A host of empirical studies conducted in the last decade conclude that incarceration has become a systematic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future.¹⁰⁵ As I summarized elsewhere, “[t]hree main theories explain the social mechanisms through which mass incarceration harms the African-American communities where it is concentrated: mass imprisonment damages social networks, distorts social norms, and destroys social citizenship.”¹⁰⁶

100. *Id.* at 79.

101. *Id.* at 38.

102. *Id.* at 8.

103. *Id.* at 61.

104. Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 *Just. Q.* 33 (2003); Fagan et al., *supra* note 37, at 14.

105. Fagan et al., *supra* note 37, at 3–4.

106. Roberts, *supra* note 7, at 1281.

Structural racism systematically maintains racial hierarchies established in prior eras by embedding white privilege and nonwhite disadvantage in policies, institutions, and cultural representation.¹⁰⁷ Mass incarceration is perhaps the most effective institution to inscribe these barriers in contemporary community life and transfer racial disadvantage to the next generation.¹⁰⁸ One of its most pernicious features is its destruction of community-based resources for contesting prison policy and other systemic forms of disenfranchisement by breaking down social networks and norms needed for political solidarity and activism.¹⁰⁹

While prison policy disenfranchises African Americans in direct and concrete ways, capital punishment more symbolically reinforces white rule. A legacy of lynching is reflected in the racially disparate imposition of the death penalty, which sustains white supremacy. The ritualistic torture that accompanied executions was reserved only for black victims of lynching because it constituted a political message about race.¹¹⁰ Torture lynchings punished crimes perceived to violate the most imperative racial codes—murdering a white employer, sheriff, or public official or raping a white woman.¹¹¹ Today, capital punishment is similarly imposed according to the race of the victim: killing a white person dramatically increases the chances of being executed, especially when the defendant is black.¹¹² As the Supreme Court noted, “black defendants, such as McCleskey,

107. See generally, Michael K. Brown et al., *Whitewashing Race: The Myth of a Color-Blind Society* (2003) (demonstrating the continuance of racism as structured within U.S. institutions and the effects of this institutional prejudice).

108. See Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 *Am. Sociological Rev.* 526 (2002) (indicating the detrimental effects of incarceration on the occupational life course of the penal population, including the increase of wage inequality between races due to low minority wage earning post imprisonment).

109. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 *Stan. L. Rev.* 983 (2004) (describing hip hop culture’s critique of mass incarceration as an instrument of racial oppression).

110. Garland, *supra* note 59, at 804; Kaufman-Osborn, *supra* note 59, at 30.

111. Garland, *supra* note 59, at 816.

112. *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (discussing the statistical study by David C. Baldus, Charles Pulaski, and George Woodworth finding that “after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks”).

who kill white victims have the greatest likelihood of receiving the death penalty.”¹¹³

Courts have tolerated an astounding amount of blatant racial prejudice on the part of white prosecutors, judges, jurors, and defense counsel in death penalty cases. In one case, jurors admitted using racial slurs during their deliberations and the defendant's unprepared court-appointed lawyer opined that blacks make good basketball players but not teachers.¹¹⁴ Studies show that jurors are less empathetic toward black defendants, especially if the victim is white.¹¹⁵ Police also investigate these crimes more aggressively and prosecutors are more likely to seek the death penalty in these cases.¹¹⁶ Blacks are excluded from juries and are less likely to be represented among prosecutors and judges who make critical decisions leading to death sentences. Thus, there is ample evidence of conscious and unconscious racial bias at every phase of capital punishment; this bias helps the institution serve its historic function of preserving the racial order.

Police terror also reinforces white rule, as well as the myth that blacks are naturally prone to crime. The sheriff's deputy in *Brown v. Mississippi* saw no need to deny that he had presided over the torture of the black suspects. Rather, he testified that the whipping was “not too much for a Negro.”¹¹⁷ This might explain why the Supreme Court of Mississippi upheld the trial court's admission of the tainted confessions into evidence: whipping was not considered an excessive interrogation technique when imposed on black people. It now seems preposterous that the Mississippi judge believed that the black farmers' words were true confessions. Clearly the whippings they endured had everything to do with enforcing white

113. *Id.*

114. Bill Rankin, *Defense in Capital Case Under Scrutiny*, Atlanta Journal Constitution, Jan. 20, 1996.

115. Sheri L. Johnson, *Black Innocence and the White Jury*, in *Critical Race Theory: The Cutting Edge* 152 (R. Delgado ed., 2000).

116. See Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 Harv. Blackletter L.J. 127, 130–32 (2003) (reviewing empirical evidence of racial bias in prosecutorial discretion in homicide cases); see also Angela J. Davis, *Prosecution and Race: the Power, and Privilege of Discretion*, 67 Fordham L. Rev. 13 (1998) (discussing the subtle and often subconscious racial bias evident in prosecutorial discretion).

117. Skolnick, *supra* note 60, at 108.

power and nothing to do with eliciting information about their alleged crime.

The physical imposition of inferior status makes police terror a particularly effective technology for enforcing the racial order: race is a system of governance that classifies human beings into a political hierarchy based on invented biological demarcations.¹¹⁸ The state-sanctioned torture of both foreign detainees to support U.S. imperialism abroad and black people to preserve white supremacy at home validates the biopolitical logic of race.¹¹⁹ Similarly, the contemporary legal edifice erected by the Bush Administration to shield torture has direct antecedents in the colonial and neocolonial jurisprudence that justified the uncivilized treatment of African and Asian natives under the racialized theory of savage war. The rationale for torture grounded in the victims' savage nature is validated by the act of torture itself. Torture transforms its victims rather than the perpetrators into criminals and terrorists. As Liz Philipose observes, "[d]espite clear evidence of abuse inflicted by whites, 'terror' becomes a racial marker reserved for blacks, dissidents, minorities, and Muslims."¹²⁰ Positioning racialized captives in total subjection makes the torturer appear to be defending civilization, law, and order, while the injured captive becomes the wrongdoer deserving of punishment. The systematic police brutality inflicted on blacks today similarly validates the belief in blacks' dangerous propensities while keeping blacks "in their place."

IV. AN ABOLITIONIST APPROACH

Mass imprisonment, capital punishment, and police terror are not universally associated with racial subjugation. But these barbaric practices can be traced to the enslavement of Africans in the United States and their endurance in modern America serves to sustain the racial order. Racism explains what would otherwise be an

118. Charles Mills, *The Racial Contract* (1999); Ian Haney Lopez, *White By Law* (1997).

119. For an extended discussion of the relationship between torture, white supremacy, and imperialism, see Dorothy Roberts, *Torture and the Biopolitics of Race*, in *Rethinking America: The Imperial Homeland in the 21st Century* (Jeff Maskovsky & Ida Susser, eds., forthcoming 2008).

120. Liz Philipose, *The Politics of Pain and the Uses of Torture*, 32(4) *Signs: Journal of Women in Culture and Society* 1047, 1053 (2007).

intolerable contradiction of their existence in an enlightened democracy. If we see capital punishment, mass incarceration, and police terror as modern extensions of a caste system that originated in slavery and that continues to subjugate black people, eliminating racial bias from the criminal justice system requires their abolition. Conversely, efforts to abolish these institutions should place their racist function at the center of their advocacy.

The goals of an abolitionist movement would be: to drastically reduce the prison population by seeking state and federal moratoriums on new prison constructions, amnesty for most prisoners convicted of nonviolent crimes, and repeal of excessive, mandatory sentences for drug offenses;¹²¹ to abolish capital punishment; and to implement new procedures to identify and punish patterns of police abuse.

I distinguish my abolitionist approach from the one described by Austin Sarat that “argue[s] against the death penalty not by claiming that it is immoral or cruel but by pointing out that it has not been, and cannot be, administered in a manner that is compatible with our legal system’s fundamental commitments to fair and equal treatment.”¹²² According to Sarat, these abolitionists see the linkage of race and capital punishment “through the lens of discrimination.”¹²³ My claim against mass incarceration, capital punishment, and police terror is not that they are imposed in a discriminatory fashion. Rather, I argue that these immoral practices have flourished in the United States in order to impose a racist order. Understanding their racial origins and function helps to explain their endurance and the need to abolish them.¹²⁴

121. See Paul Street, *Color Bind: Prisons and the New American Racism*, in *Prison Nation*, *supra* note 47 at 30, 38; see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System* 105 *Yale L.J.* 677, 715 (1995) (arguing, based on the doctrine of jury nullification, that black jurors should decline to convict black defendants charged with nonviolent drug offenses).

122. Austin Sarat, *The Rhetoric of Race in the “New Abolitionism,”* in *From Lynch Mobs to the Killing State*, *supra* note 56, at 263, 260–84.

123. *Id.* at 264.

124. See generally Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons and Torture* (2005) (discussing U.S. prison regimes and their antidemocratic function). For example, Critical Resistance is a national organization based in Oakland, California, “committed to ending society’s use of prisons and policing as a solution to society’s problems.” Critical Resistance

Abolishing these institutions should be accompanied by a redirection of criminal justice spending to rebuild the neighborhoods that they have devastated. There should be a massive infusion of resources to poor and low-income neighborhoods to help residents build local institutions, support social networks, and create social citizenship.¹²⁵ Abolishing them will also force us to envision a radically different approach to crime disengaged from the racist logic of black enslavement and white supremacy. An abolitionist movement opens the possibility of creating alternatives to prison as the dominant means of punishment, as well as alternatives to criminal punishment as a dominant means of addressing social inequities.¹²⁶ Instead of fearing “too much justice,” we should accept the challenge posed in *McCleskey* to envision a criminal justice system free of racial bias.

Homepage, <http://criticalresist.live.radicaldesigns.org/> (last visited Sept. 30, 2007). Critical Resistance describes its mission as abolitionist, borrowing the concept from “those who called for the abolition of slavery in the 1880s.” Critical Resistance Homepage, <http://criticalresist.live.radicaldesigns.org/article.php?id=51> (last visited Sept. 30, 2007).

125. Susan B. Tucker & Eric Cadora, *Ideas for an Open Society: Justice Reinvestment*, 3 Open Society Institute 3 (Nov. 2003), at 2, available at http://www.soros.org/resources/articles_publications/publications/ideas_20040106/ideas_reinvestment.pdf. (proposing that governments redirect criminal justice spending toward “rebuilding the human resources and physical infrastructure—the schools, healthcare, facilities, and public spaces—of neighborhoods devastated by high levels of incarceration”).

126. Davis, *supra* note 47, at 107 (“[P]ositing decarceration as our overarching strategy, we would try to envision a continuum of alternatives to imprisonment—demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.”).