

***DRAFT\****

**MEETING REPORT**

**RETHINKING CRIME AND PUNISHMENT**

**FOR THE 21<sup>ST</sup> CENTURY:**

**DEVELOPING A PARADIGM THAT**

**ADVANCES RACIAL EQUITY AND SOCIAL JUSTICE**

Meeting organized by the Aspen Roundtable on Community Change  
and sponsored by  
The After-Prison Initiative  
Open Society Institute

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Aspen Meadows  
845 Meadows Road  
Aspen, CO 81611

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\* This is a working draft. It attempts to summarize the proceedings of the meeting, but may include analytical perspectives and observations that do not fully reflect the views of all participants. Please do not cite or circulate without permission

## I. INTRODUCTION

This meeting assembled a diverse group of criminal justice reformers, social scientists, legal scholars, and rights advocates<sup>1</sup> to re-examine the nature and challenges of mass incarceration in the U.S. through the analytical lens of structural racism. Our broad goals were to explore conceptions of crime and punishment more likely to advance social justice and racial equity, and to consider new strategic directions suggested by these alternative frames. The working premise was that current reform efforts would benefit from a deliberate step back to revisit the conventional wisdoms and assumptions guiding current reform initiatives.

Pre-meeting interviews<sup>2</sup> confirmed our sense that the time was ripe for approaching the criminal justice challenge from other analytical perspectives besides criminological ones. Several respondents observed that criminal justice inequities represent a fragment of a larger problem of democracy. Others noted that we were at a point in history where poverty has been criminalized, and criminal justice institutions are expected to step into the breach left by retrenching civil institutions. And everyone agreed that race and racism were central criminal justice issues, even though race and crime were two of the toughest and least sympathy-inspiring areas of American life.

Indeed, although our proposal to ground the *Rethinking* project in a structural racism analysis was strongly supported, it nonetheless elicited a number of important concerns. Might the inter-institutional implications of such an analysis lead us to thinking so broadly that it becomes impossible to act? Indeed, did this clarifying lens point strongly enough to solutions? Would this necessary focus on institutions, history and values leave intentional racism “off the hook?” And almost everyone worried about the practical challenge of making convincing structural arguments about race, crime and punishment in a contemporary context dominated by a supposedly “colorblind,”<sup>3</sup> individualistic social policy narrative, and deeply racialized fears of terrorists and immigrants. “Colorblindness” was considered especially daunting due to its far greater ideological appeal than the racial disparity frame. Besides its glib resonance with our societal ideal, it powerfully appeals to those comfortable with white racial dominance and also committed to civil rights.

As we had hoped, those we invited wanted to leave the meeting with a vision and an agenda. So we asked participants to articulate a new vision of criminal justice – the terms to describe it, its social purpose, its institutional sites, and so on. We hoped for a vision that was accountable to the realities of racialized mass incarceration and the criminalized reconstruction of race in the post civil rights era. This would guide not only criminal justice reform, but also help to seed progressive change in other institutional

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<sup>1</sup> See attached list of meeting participants.

<sup>2</sup> See attached summary

<sup>3</sup> Several participants noted that the Supreme Court’s anti-affirmative action posture, and efforts of like-minded activists and celebrities (e.g., Ward Connerly, Bill Cosby) had made the proposition that race or “color” no longer mattered in America much more resonant. A public rhetoric of colorblindness has emerged to mask continuing white privilege and racial inequality.

areas contributing to racialized mass incarceration. The idea was to sketch out a broader vision of how we as a society might deal differently with social problems currently associated with criminal justice, and to hold that vision in “suspended animation” throughout the meeting as a touchstone for each discussion.

With the assumption that specific ideological and institutional preconditions must be met for there to be a true break with our nation’s history of racial disparity – particularly the racially-skewed mass incarceration of the last 30 years -- we proposed two conversational themes. One related to the “knowledge context” underlying governance and social control; the other, to the intra and inter-institutional linkages and operations that automatically reinforce racial inequities in criminal justice and elsewhere. What Americans “know” about race, crime, punishment and security, and how they acquire and associate these facts and opinions are centrally important structuring elements.

These themes were to serve as building blocks for a strategic discussion about the critical requirements for a transformed social and criminal justice environment. Through this process we hoped to get more clarity about where current criminal justice reform efforts might be reoriented or complemented, and reciprocally, where new opportunities for advancing democracy may exist.

The proceedings met and surpassed our expectations. Our decision to bring together this particular group of thinkers and practitioners yielded rich dividends as we were treated to two and a half days of thoughtful, intense and frank discussion. Many difficult conceptual and practical challenges still lie ahead, but we left the meeting with valuable insights about possible early steps in a new social justice movement.

### **Discussion Themes**

Over the course of the meeting the discussions revolved around two broad themes.

- **The nature and significance of the race-crime relationship:** interrogation of the values favored (or rejected) by our society in its framing of race and crime, and recognition of how the race/crime association perpetuates racial hierarchy despite a supposedly “colorblind” America.
- **Recommendations** for reframing the criminal justice challenge as a broader one of advancing understanding of how civic institutions – public and private -- beyond our courts and prisons operate to complement the racial inequities of mass incarceration, and to reinforce a governance culture that overemphasizes coercion, punishment and surveillance.

Each theme is developed in the following pages with acknowledgement of insights and contributions offered by individual meeting participants.

## II. THE NATURE AND SIGNIFICANCE OF THE RACE-CRIME RELATIONSHIP

There was general agreement that although structural racism is a problem of the American political economy and culture in its entirety, criminal justice inequities are nonetheless a special case of particular contemporary importance, an extreme site of glaring racialized inequality. Besides obvious, massive, black and brown overincarceration and its direct consequences for communities of color, racialized criminal justice norms penetrate a wide spectrum of civic institutions to reinforce racial hierarchy. Racial hierarchy is continuously reconstructed through the racialization of crime and criminalization of race. Hence the consensus was that our nation's larger democracy project could not go forward without special attention to this linkage, particularly because the political logic driving criminal justice policies has extended into many aspects of our public security and opportunity discourse and governance. The foundation of this political logic is profound public fear and insecurity fed by social atomization and persistent racial, cultural and national stereotypes. Political entrepreneurs find it expedient and fruitful to exploit and reinforce a vulnerable, anxious public in their quest for power.

However, although everyone present was unequivocal about the race-crime linkage, some wrestled more than others with the analytical and strategic emphasis most appropriate to the reform task on the ground. **Is mass incarceration essentially a criminological problem sharply characterized by racial disparity? Or is it better conceptualized as a contemporary device for racial stratification based on the projection and inscription of race onto socially inculcated fears about crime and national security?**

The starting point of the discussion and the theme that carried throughout was the co-construction of race, crime and security within an ideological climate of white supremacy, initially, and colorblind white dominance in the contemporary period. An early observation was that although race, crime and security each has received a great deal of scholarly attention, there has been insufficient progress toward understanding and explaining precisely how, for centuries, *race had been criminalized in the law*.<sup>4</sup> Nor have we adequately outlined how the *racialization of crime* continues in the American political and popular culture and psyche, how we might repair the harm this association has caused, and how we might extricate ourselves from a racialized justice system. With this awareness that race, crime and security have been defined, framed and institutionalized in a variety of ways to serve specific political and social purposes, conference participants illuminated many of these dynamics.

### **The Historical Criminalization of Race**

Of the meeting's many useful insights, perhaps the most striking is that America does not have a crime problem that just happens to impact blacks and Latinos disproportionately due to the racial incidence of poverty or social dysfunctionality; rather, America has a race problem in that, historically, it has systematically criminalized "blackness."

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<sup>4</sup> Kimberle Crenshaw

Moreover, this particular aspect of race-making continues today in the electoral, social policymaking, mass media, foreign policy and other public contexts. Thus contemporary efforts to “racialize” (that is, to “darken”) violent crime especially, merely follow a pre-civil rights history in which the justice system initially recognized racial identity to be a valid, legitimate marker of criminality.

Several historical-legal illustrations were offered attesting to the durability of this crime-race linkage. It was noted that a lot of early U.S. law functioned as race control, operating hand in hand with slave law.<sup>5</sup> Race itself was considered a crime, for instance, in the form of miscegenation. Similarly, slaves who ran away were deemed guilty of theft, i.e., stealing themselves. After emancipation, Jim Crow laws were enforced to maintain race control. As recently as the 1950s, race was a factor of legal proof; in an ambiguous situation, racial identity could be submitted to a jury for consideration of guilt or innocence. And although today’s courts require more objective evidence of individual culpability, law enforcement policies and practices in many areas (e.g., immigration, the “war on drugs,” public school security) effectively criminalize entire communities and groups of color by pushing the outer limits of “probable cause” criteria for stopping, frisking and detaining those who inhabit these places.

It was suggested that an overlooked historical-political explanation of this nation’s race-crime nexus is its steadfast denial of black Americans’ human rights.<sup>6</sup> Opposition to universal human rights was an explicit feature of early U.S. post-World War II internationalism, and of the later domestic struggle to define black freedom and equality in ways that would not threaten white supremacy. Universal human rights clashed with mainstream determination to retain blackness as a symbol of exclusion. Conservative and liberal whites justified this on the basis of “civilizational<sub>[s]</sub>,” “cultural” or even “biological” superiority, convictions reinforced by black underachievement in precisely those areas that could confirm their equal human “worth.”

A critical insight also offered here is that the continuous conflation of race, criminality, and incarceration in the popular and political culture may have gradually eroded the sense of equal humanity once shared by earlier generations of African Americans themselves.<sup>7</sup> Significant sectors of black and brown communities no longer envision human rights advocacy as a high priority. Internalization of this message of lesser social worth is now an important contributor to the race-crime common sense, and thus to the maintenance of racial hierarchy.

The discussion generated important insights into the more recent history of institutional reinforcement of the crime-race linkage. We heard how the black civil rights movement created a political watershed in criminal justice. Viewed primarily as a local concern prior to the 1960s, crime and race became explicitly linked in national electoral politics and political protest in that decade, subsequently resulting in national penal policies and incentives structured by race.

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<sup>5</sup> Ian Haney Lopez

<sup>6</sup> Carol Anderson

<sup>7</sup> Carol Anderson

The civil rights struggle led to the nationalization/federalization of (white) security as an issue, and facilitated a bipartisan consensus that was contingent on federal regulation limiting black integration.<sup>8</sup> The looming prospect of full freedom for black Americans simply seemed, to many white politicians, dangerously incompatible with white security. Race conservatives exploited fears that too much black freedom and equality – residential, educational, cultural, economic and other substantive kinds – would unleash innate black/brown criminality. So they wanted the federal government to protect white space with “tough on (black) crime” federal policies. Liberals, on the other hand, felt that the root of the black crime problem was insufficient protection of civil rights – not enough black access to opportunity: if blacks had equal access to jobs, higher education and wealth building institutions, fewer of them would be poor and thus likely to turn to crime. In effect, both perspectives validated opposite sides of the same paradigm linking crime and race,<sup>9</sup> along with the idea that the federal government had a critical role to play in crime control. Conservatives and liberals created an electoral and policymaking dynamic on crime that has remained racially coded to this day, continuously pitting public safety concerns against policies that would expand citizenship rights, social safety-nets, and equal opportunity for black and brown Americans.

This analysis of post-civil rights Congressional politics provides another useful frame for making sense of today’s race-crime-security discourse, making it easier to see that the criminalization of race relies on a bipartisan consensus to protect white space from today’s racial and cultural “outsiders”: immigrants of color, particularly those with national backgrounds and religious profiles unpopular within the U.S. mainstream. At this historical juncture, the dominant political discourse around public security continues to legitimize massive expansion of the state machinery to deter, prosecute and punish broad demographic categories so expansive that they subsume almost all people of color.<sup>10</sup>

### **White Space and the Racialization of Crime**

Simply stated, the idea that powerful structural forces promote and sustain racially-coded beliefs about violent criminal propensities resonated with the group in Aspen. The mass media fuels the public’s fear of victimization by random violence (however rare statistically) with racialized images and narratives, domestic and foreign. Moreover, the old racial order based on white privilege is sustained by presumably colorblind criminalization and punishment of the poor and people of color. Structural racism ensures that this public policy bias leads to the mass incarceration of many nonviolent youth of color, and helps preserve a social dynamic that reinforces a “common knowledge” about black criminality and youthful “super-predators.”

During the discussion of how crime, punishment, and more broadly, social fear/insecurity in general are racialized in the political culture, the important concept of the U.S. as a

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<sup>8</sup> Naomi Murakawa

<sup>9</sup> Susan Tucker

<sup>10</sup> Naomi Murakawa

“white space” emerged as a motif for subsequent discussions.<sup>11</sup> White space might be understood as the physical, cultural, legal, economic and social psychological territories of social group opportunity and individual privilege which are intensively monitored and patrolled to deny or tightly regulate racial opportunity. Fear and insecurity are primary tools in its maintenance: racially-based anxieties about physical victimization, economic deprivation and cultural dominance are projected onto individuals and groups of color. *To conceive of ostensibly diverse 21<sup>st</sup> century America as “white space” is to assert that seemingly neutral mechanisms of law enforcement, deterrence and punishment actually operate to preserve “whiteness” as the defining characteristic of its socio-economic, political and cultural mainstream.* Implicit in the concept is the proposition that although individuals of color may physically inhabit white space, they do so as mostly unassimilable “others,” “perpetual foreigners,” and other sorts of “outsiders” who are suspected, watched, contained and controlled in a variety of ways to maintain the multiple borders between white space and the space of The Other. Some portion of these notions derives from beliefs that people of color possess inherent characteristics that threaten white socio-cultural norms, and which therefore disqualify them from unconditional inclusion within white space. [s8]

A vivid example was shared of how, in our colorblind context, “neutral” spatial rationales are employed to justify anti-crime surveillance and policing priorities when communities of color are adjacent to white communities. The example cited was the recent appearance of unannounced mobile NYPD surveillance towers on streetcorners of East Harlem in New York City. These “watchtowers on stilts with cameras” were manned by police officers who could not be seen from the ground. This panoptical architecture creates the sensation of being in prison, forever under the watchful gaze of the prison guard, the barbed wire absent but hardwired into our imaginations.<sup>12</sup> This example illustrates how colorblind ideology facilitates criminalization of black and brown space by making demonstrable intent the sole criterion for racist misconduct – whether by individuals or the state.

One consequence of this kind of racial/spatial sorting, it was suggested is a decline in the intensity of collective political contestation of white space in post-civil rights decades.<sup>13</sup> Part of the explanation might be a complicated mix of local pragmatism, cynicism and resignation. But another aspect seems to be widespread public absorption of a racially-coded security frame and logic. Marginalized New Yorkers of color have been led to

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<sup>11</sup> john powell

<sup>12</sup> Errol Louis; Kimberley Crenshaw. Errol cited the East Harlem example to make the point that such intrusive and disrespectful law enforcement tactics are unlikely to be prescribed for and accepted by any white community.

<sup>13</sup> Civil rights activism in the U.S. obviously waned for many complicated reasons, which probably include a diminution in the intensity with which African Americans’ once asserted their equal humanity and a basis for rights. Historian Carol Anderson offered this observation, reflecting on African Americans’ impassioned but fruitless efforts in the early 20<sup>th</sup> century to establish human rights, and not just civil rights, as a universal governing principle. She also noted that facing a variety of pressures, black rights activists felt compelled to shelve the notion of a rights regime that covered all races and basic human needs, and accept a much narrower set of “civil” rights.

believe by recent crimefighting city leaders that targeting black and brown residential space for this kind of indiscriminate criminal treatment is warranted by objective, data-driven, public-safety decision-making. So East Harlem residents, already accustomed to a very high level of NYPD presence, may well perceive the prison-like surveillance of their “dangerous” neighborhood not as a dehumanizing intrusion, but rather as just another logical public safety necessity.

The group particularly noted how racially-coded anxieties about immigration and terrorism have come to the fore at the turn of the new century as justifications for the protection of white space -- just as fears of victimization by black street criminals began to subside in the 1990s. Overall crime rates continue to fall and prison populations to rise in most places.<sup>14</sup> Big cities like New York and Chicago feel safer to whites<sup>[s9]</sup>, yet new racial fears are being mobilized, to exclude other disfavored groups like immigrants of color.

Indeed, unlike African Americans, darker-skinned immigrants today appear to be marked for exclusion and not just marginalization. African Americans long bore the stigma of unassimilable “other,” but aside from brief periods in past centuries when their voluntary and involuntary return to Africa attracted fleeting interest, their complete exclusion from all of white space was never seriously attempted. Rather, they have been isolated and contained – often terminally -- within carefully designated areas and aspects of white space, what Loic Wacquant describes as the “ghettoization of prisons and the prisonization of ghettos.” In contrast, foes of contemporary immigration trends frequently use a rhetoric that casts newcomers from Mexico, Latin America and Africa as “invaders” who pose a threat -- to white space itself. Racial fears are mobilized through cultural and nationalistic appeals which suggest that these “outsiders” are poised not to assimilate but to change American values and culture. Part of what they fear is a sociological and political shift that undermines white privilege and the monopoly that Western European customs, practices and traditions have so long enjoyed.

Since “9/11” the political rhetoric and mass media have strongly linked Muslims and terrorism in the public imagination, almost daily stoking new public fears about obscure vulnerabilities such terrorists might exploit. Indeed, President Bush frequently justifies his ongoing military interventions in the Muslim nations of Afghanistan and Iraq in these terms: “We’re fighting them there so we don’t have to fight them here at home.” And, his administration is the first in U.S. history to authorize the construction of a security fence across its southern border with Mexico, and to deploy military personnel on that border to stop the flow of illegal immigrants.

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<sup>14</sup> New York State and New York City are positive exceptions: incarceration and crime are down, both significantly. New York is credited with adopting smarter crime and policing policies, in addition to demographic and other factors.

### III. RECOMMENDATIONS FOR REFRAMING THE CRIMINAL JUSTICE CHALLENGE AND PROMOTING RACIAL EQUITY AND SOCIAL JUSTICE

Crime, public safety, race and justice problem are tightly intertwined, as both the meeting participants' discussion and work clearly showed,<sup>15</sup> in ways that perpetuate a system of racial inequity and social injustice. Civil institutions that structure social and economic opportunities for Americans are failing the poor and disadvantaged communities of color disproportionately. To cope with the social consequences of concentrated poverty, our society has chosen to expand its criminal justice infrastructure dramatically since the 1970s, an expensive priority that has reduced available resources for expanding access to living-wage employment, urban education, health care, homeownership, child care and other areas where access would be likely to reduce inequalities and level the playing the field. Instead, the criminal justice system is the predominant government institution in most poor communities of color.

More troublingly, some of these very sectors are complicit – even major actors -- in the criminalization of black and brown people and places. Education, health care, housing, immigration, employment, social welfare and other “equalizing” sectors have evolved governance models that sort, constrain and punish racial minorities. Institutional failures and deficiencies trap far too many adults and children in a downward spiral that can lead straight into the criminal justice system. In short, America prefers to “govern through crime” because this colorblind paradigm is consistent with an electoral politics that champions punishment over equality.<sup>16</sup>

Looking ahead, the group agreed that social policy and governance has to be reframed to value common humanity's equal right to civic, socioeconomic and cultural space for everyone.<sup>[s10]</sup> Policy and politics need operational principles that reflect these values and aspirations. Without a fundamental paradigm shift in this direction, the vicious cycle of racialized criminalization, incarceration, and socioeconomic marginalization will prevail. Criminal justice reform, in other words, has to be reconceptualized as a larger project to prevent the “terminal marginality” of the masses of people – poor, black and brown -- who end up behind bars in America, and the families and communities they leave behind.

Over the course of the conversation, the importance of two specific areas of reform resonated widely:

- **reframing dominant narratives** of crime, security, race, justice and their interconnections; and
- **targeting for strategic intervention institutions and movements** most connected to people and places victimized by racialized mass incarceration.

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<sup>15</sup> Notably, the writings of Kimberle Crenshaw, Jonathan Simon, John Powell, Ian Haney Lopez, and Naomi Murakawa. See attached bibliography.

<sup>16</sup> Jonathan Simon

## **Reframing Dominant Narratives of Crime, Security, Race, Justice and their Interconnections**

Participants recognized that what Americans believe about crime, security, race and justice has to change and that intentional work is required in this respect. Attention has to be given to all dimensions of the social psychology of these intersecting issues, as well as to the political environment that sustains the public's "common sense" about them. Everyone acknowledged that rates of violent crime are higher in the U.S. than in other advanced western economies and that our response, historically, has always tended more toward the punitive than rehabilitation and restoration, and that this addiction to harsh punishment persists even when rates of crime are down. However the group also noted that this penal bias has dramatically deepened over the past four decades, as stereotypes of nonwhite criminality and a racial ideology of colorblindness have taken even greater hold in the political culture. And, there was deep concern that America's increasing unwillingness and inability to question its attachment to racially inequitable carceral punishment is effectively undoing the civil rights gains of the past four decades, especially for poor people..

Briefly put, the successes of the civil rights struggle intensified many whites' security fears and, since the 1960s, solidified political support for vast expansions in the regulation of the (disproportionately nonwhite) poor through tougher prisons and more severe sentencing. Illegal immigration and terrorism now reinforce this trend. And over the same period, the idea that the U.S. is now a colorblind society – which has been heavily and effectively promoted in some circles -- has thwarted political and legal efforts to expose and reverse gross racial disparities in arrest and imprisonment.

Much of the conversation suggested that at least two societal shifts in this complex dimension of belief and meaning are needed:

- A **changed** public common sense or "**knowledge context**" about "whiteness" and "color" that reverses incentives for a national politics which privilege incarceration and other forms of spatial and cultural confinement and marginalization as devices for creating a sense of security, and managing risk for white people
- Recognition that **social and economic rights** should be fundamental cornerstones of real security in democratic societies that the **state should guarantee**

Three bundles of problems were highlighted here. One relates to the shifting of perceptions of where agency resides in the criminal justice arena. Americans are incurious about the agency of the law itself: that is, about the social purposes laws are intentionally designed to serve. Consequently, the broader public knows and cares little about the lawmaking process and reflexively favors individualized, moralized, biological and genetic explanations of crime that fit their self-perceptions as free agents. Racialized mass incarceration relies significantly on this public knowledge deficit relating to the social construction of law.

We could add to this Americans' deep belief in the supremacy of individual advocacy or free will – a belief that is largely divorced from political and economic structures and realities. Thus the spectacle of a vast black and brown prison population does not cause widespread suspicion about the integrity and purpose of criminal justice norms because those individuals are perceived to have “put themselves there” through bad personal choices.

There is inadequate public awareness, for example, of viable alternatives to carceral punishment, that crime and poverty are linked, and that poorer Americans are much more likely to be convicted in our courts than those who can afford good legal representation. Lawmakers, however, seeking to order society in particular ways, often disregard these truths to engineer other social outcomes.<sup>17</sup>

Another problem area relates to how our society chooses to define security. Security is largely perceived as protection from physical harm and material deprivation by “types” of individuals whose humanity we discount. People [s11]convicted of violent crimes or sex offenses, are viewed through these frames[s12]. However, we tend also to impute violent and deviant tendencies to racial and ethnic groups who stand outside the parameters of whiteness. Arresting and prosecuting members of suspect racial/ethnic groups reconfirm their unalterable “deficiencies” in the public mind and legitimize both our fears and the penal systems' containment policies and practices.

Security, then, needs to be re-imagined, rearticulated and redirected. Instead of laying the blame for our fears on individuals or groups cast as undeserving of full social inclusion, against whom we need to be protected via their surveillance, isolation and disadvantage, another understanding needs to be advanced. A more plausible and ethical policy premise is that true security comes only from guaranteeing substantive equality predicated on universal human rights. Security also has to be de-linked conceptually from white space: that is, from notions that privilege personal and neighborhood safety in white spaces over “dangerous” and “threatening” non-white spaces and proximity to people and places of color.

Thirdly, there is the problem of countering the ideology of colorblindness, which claims that race and racism exist today only when we *speak* these words, and that we have in fact evolved post-racialized social institutions and systems with bias-free, neutral mechanisms. The argument is that the civil rights struggle dismantled the worst of white supremacy and recent socioeconomic and demographic trends invalidate and complicate the old racial hierarchy, producing a growing public consensus that race-centered explanations of and solutions to inequality are now irrelevant and even harmful. Yet, relevant social indicia clearly show that whites continue to dominate and that color still reliably predicts social status. The knowledge challenge here boils down to the need to develop and deploy effective counter-narratives to colorblindness.

With these challenges in mind, a number of specific ideas were proposed for reframing the public's criminal justice knowledge and rights discourse.

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<sup>17</sup> Alice O'Connor

***Ideas for creating a new knowledge and rights context for racial equity and social justice***

- (a) Identify opportunities for de-linking race and crime in the public understanding

Since crime and race are so linked in the public imagination, we were advised to recognize and exploit opportunities to undermine this insidious, four-decade connection. 9/11 was offered as an example of an opportunity to change the dominant crime frame at a time of plummeting crime rates. It provided an alternative language for mobilizing a fearful electorate. 9/11 changed the perception of a law-abiding (read white)/law-breaking (read black) societal cleavage, to one of “Americans versus (Muslim, non-citizen) Others.” Needless to say, this observation does not celebrate the displacement of discrimination. Racial equity and social justice would not be served by replacing one group stereotyped as inherently threatening with another. Rather, this is an example of an unexpected shift in the cultural psyche that might provide a learning opportunity that could help break down the idea of an inevitable, natural, black/white schism.<sup>18</sup>

- (b) Raise the profile of “white collar” crimes that actually affect more people’s lives than localized “street” crime.

Equal prosecutorial and media attention to tax fraud, insider trading, corporate corruption and the like, and more public transparency in the disposition of such cases, would go a long way toward changing beliefs about who are “criminally inclined,” and more importantly, about the social costs of white collar crime.<sup>19</sup> The public is largely unaware of the far-reaching harm caused by corporate crime and greed, and of how privileged corporate criminals exploit the judicial and legislative systems (through plea bargaining and immunity deals, for instance) for their own benefit.

- (c) Decriminalize social problems that afflict poor communities of color disproportionately.

Minor drug possession, for example, brings vast numbers of black and Latino youth into contact with law enforcement and the prison system. The criminalization of dependency on drugs and alcohol and mental illness effectively penalizes entire families and communities and make the criminal justice and prison systems the dominant public program affecting them. Ironically, a perhaps unintended consequence of growing attention to domestic violence and child abuse and neglect has been the disproportionate arrest and imprisonment of minority men and women.

- (d) Publicize the widespread disaffection with mass incarceration within law enforcement, corrections departments and the courts

Hardly anyone working within the criminal justice system has faith in it or believes that harsh punishment and prison make people better or society safer. We should remind the

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<sup>18</sup> Ian Haney Lopez

<sup>19</sup> Jonathan Simon

public that though the carceral response may seem natural, cops feel that it is ineffectual and that their work is underappreciated, judges feel hobbled by mandatory sentencing guidelines, and corrections departments feel overburdened and under-resourced. We might be able to tap into this widespread discontent with a compelling new vision.<sup>20</sup>

- (e) Highlight ways in which our nation's laws, penal system and other institutional areas that shape opportunity are structured by racism

The colorblindness frame could be countered effectively only by another equally appealing frame more congruent with reality. Structural racism is the still unrefined version of that alternative frame; it needs to be better defined, developed, applied and communicated in lay terms to which people can relate. Criminal justice advocates need this application urgently. It is vital to filter what the public knows or thinks it knows about crime and punishment through an alternative frame that recognizes the overlapping historical, institutional and cultural dimensions of race.

For instance, well-known sentencing disparities associated with the races of defendants and victims (e.g., blacks convicted of killing whites are 22 times more likely to receive the death penalty) are unlikely to be persuasive unless criminal justice reform advocates use such facts to tell a structural racism story.<sup>21</sup> In fact, the immorality of race-based justice has, for the most part, not been a winning argument with the courts. Even when judges acknowledge racial disparities and concede a likelihood of racial bias, they are loathe to identify racism as a cause or explanation, and tend to elaborate a conception of racism more consistent with colorblindness in which actors are either purely, intentionally racist, or purely innocent. Unconscious bias of individuals or structurally racist institutional actors have not been recognized.

In this legal and legislative environment, we need a popular discourse of structural racism for every sector that affects individual and group progress, including education, housing, health care, military service, labor organizing, and many more. For criminal justice, for example, we were advised to develop explanations of how structural racism is

- *Continuing* – racialized policies and practices of the past are the foundation of the current criminal justice system;
- *Cumulative* –the effects of race accumulate across institutional areas at critical decision-points within those institutions; thus we see how arrest disparities, charging decisions, jury selection, judges' responses, legislative decisions, etc., interact with those in the penal, educational, public health and other sectors to the disadvantage of minorities;
- *Cultural* –ideas of racial differences legitimize ongoing criminal justice disparities, and so perpetuate the way we punish and function as a society;
- *Concrete* –the knowledge context for crime and punishment is not simply ideational in nature, but is also concretely represented in the cement, bars,

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<sup>20</sup> Marc Mauer

<sup>21</sup> Ian Haney Lopez cited *McCleskey v. Kemp* U.S. 279, 327 (1986).

practices, jails, ghettos, and other entrenched machinery of mass incarceration;

- *Functional* –this racialized knowledge has become part of the common sense people used reflexively and unconsciously to function in a complicated political and sociological environment.<sup>22</sup>

- (f) Advance human rights and other values consistent with notions of justice not structured by race.

Rejection of human rights as a collective and governmental responsibility, and the internalized inferiority that has followed, have progressively weakened the sense of equal rights to political, economic and social space – i.e., to white space -- among many Americans of color. The denial of economic rights as human rights, and with that, denial of an economic vision that does not normalize the stratification that pits groups against each other, has been particularly damaging. Altogether, these denials have made grassroots mobilization for social transformation within communities of color themselves so much more difficult.

Along with human rights, it was suggested that we advance several narrower justice principles and ideas. These include principles such as community restoration, decriminalization, “truth and reconciliation,” justice reinvestment, rehabilitation and community reintegration of those convicted of criminal offenses.. Additional ideas included the elimination of youth incarceration; work geared toward articulation a broader, more inclusive concept of citizenship; and a new nonzero-sum conception of how some version of a regulated market economy could operate more equitably for everyone’s benefit.

- (g) Focus on effective communication about the meaning of black and brown mass incarceration

“Facts alone won’t bring change.” “Information about disparities of groups that are disfavored actually hardens disfavor against them.” “We need to recognize that we’ve already won the disparities debate and that now we must focus on communicating its meaning.” “We need to remember that the structural racism analysis is not a program or communications strategy.”<sup>23</sup> These quotes capture the overall sentiment that priority needs to be given to effective communication of what is now a complicated argument: that *racism continues to order American society despite civil rights progress, and despite a mainstream political rhetoric of equal opportunity, meritocracy, diversity and colorblindness*. So development of narratives to counter dominant images of people of color, white space and white privilege, criminals and criminality, and colorblindness is a critical need.

In particular, language has to be tailored for the limited audiences most likely to “get it,” and to do justice to it. This would be accomplished through engagement with groups

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<sup>22</sup> Ian Haney Lopez

<sup>23</sup> john powell

with the capacity to develop appropriate messages and disseminate them effectively to different audiences. Among those mentioned were journalists, artists, youth, the civil rights community, environmentalists, urban planners, architects, filmmakers, women's organizations, labor unions, advocates and activists who were formerly incarcerated, immigrant coalitions, and death penalty activists.

### **Targeting Institutions and Movements for Strategic Intervention**

Some participants felt that the entire institutional backbone of our criminalized racial order, and not only the justice system, has to be given equal strategic priority by racial equity and social justice reformers. Racialized mass incarceration depends not only on law enforcement departments, courts and prisons. These form only its inner core. Its outer components are formations in the civic, cultural, political and business realms that sustain and operationalize dominant beliefs about white space and its security management through institutional practices and policies. Institutions in the education, social welfare, employment, media, health care, housing and other sectors have evolved operational cultures that regulate the underserved and punish the nonwhite poor in ways that increase their exposure to criminal justice institutions. So understanding these cultures and identifying linkages across these "peripheral" sectors are critical.

Equally necessary is integration of the efforts of oppositional, progressive academics, practitioners, policymakers and other formations and actors within civil society who are well-positioned to contribute to structural transformation of penal and civil society institutions.

A number of specific recommendations were put forth relating to

- The **identification of strategic institutional sites** within the criminalized racial order in which we might root transformational ideas about race and justice;
- The creation of a **new infrastructure for advancing racial equity and social justice**;
- **Substantive collaborations with movements and organizations** already actively working with constituencies severely impacted by mass incarceration and its community consequences.

#### **A. Strategic institutional sites to be targeted for reform**

- (a) Legal institutions (including the Supreme Court itself) must be encouraged to broaden the frame of anti-discrimination law

Legal observers and scholars suggested that civil rights and criminal justice reformers need to work together on broadening the current frame governing anti-discrimination law,

and specifically on a collective strategy for overturning the “intent” doctrine.<sup>24</sup> Anti-discrimination law has been so stifled, they argued, that we need to broaden the definition of discrimination through application of a profound racial analysis. But we also need to be clear about whether we want structural racism to be explanatory or evaluative.<sup>25</sup> They noted that to bring about this shift we have to recapture the race discourse, particularly because of the increasingly robust consensus that race is no longer a problem, and the strong movement to ban collection of racial outcomes data.<sup>26</sup> Importantly, this refashioned race discourse cannot and should not be just about nonwhites: it has to clarify how structural racism affects everyone and not simply situate whites as perpetrators of racism. Also, it should eliminate the false distinction between race and class, particularly because Americans are so much more comfortable with a superficial understanding of the latter.<sup>27</sup>

- (b) Media institutions have to be encouraged to take responsibility for racial equity internally, and to promote racial equity and social justice in the society

Everyone present agreed that if “new knowledge” about race, crime, punishment and justice was important, then media institutions have to be principal targets for reform. Racial niches are starkly outlined in media space, despite the careful attention many media now give to colorblindness and diversity. News media are most culpable in perpetuating racial stereotypes relating to crime and security, and entertainment media steadily reinforce the idea of prison as a social control norm by featuring it as a staple of dramatic and “reality” programming. Work had to be done to influence all popular media to accept greater responsibility for representations and frames that help to normalize current racial inequities.

- (c) Other site-based work designed to test new racial equity and social justice ideas

Besides media institutions and the courts, it was felt that efforts should be made to “seed” the structural racism analysis and transformative justice ideas (listed earlier) in as many important institutional venues as possible. Local and state government planning departments, regional governance organizations, school boards, business coalitions, community colleges, and large universities were some examples cited.

Interestingly, one of the criminologists present warned against targeting the criminal justice system itself in this way, since in his view that system is poised only to reproduce itself. Talk about racism as a structural issue, he believed, would have little resonance within that context. He suggested that we propose comprehensive alternatives to replace rather than reform criminal legal solutions, and that these be attractive fiscally, grounded in experience, and capable of inspiring the trust and confidence of a public that will always demand safety.<sup>28</sup>

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<sup>24</sup> Alvin Starks, Kimberle Crenshaw, Ian Haney Lopez

<sup>25</sup> Tommie Shelby

<sup>26</sup> Ian Haney Lopez

<sup>27</sup> John Powell

<sup>28</sup> Todd Clear

## **B. New infrastructure for advancing racial equity and social justice**

Here the call was for the vertical and horizontal integration of institutions, organizations, coalitions and individuals capable of generating research, messaging, communications, and advocacy required to counter conservative narratives and policy initiatives relating to racial equity and social justice. Inclusion of “non-traditional” stakeholder groups, such as families of the incarcerated, black environmentalist organizations, unions, and immigrant rights organizations, was emphasized.

Support for a progressive social science research network deliberately integrated into the effort to define and develop a penal system not structured by race is important. Many of the scholars present suggested that facilitating more dialogue among a wider array of social theorists and social justice activists than is now typical is key. Such a network might give more attention to the quality and use of a broad spectrum of racial outcomes data, and to the framing of an accessible 21<sup>st</sup> century race paradigm to counter the insidious colorblind formulation.

It would also be beneficial to develop and train a critical mass of leaders and youth who share a structural understanding of race and justice, and strengthen their capacity to engage local governance with that analysis. Training in this area could target civil rights, social policy, labor unions, and other willing leaders in business, local government and philanthropy, as well as grassroots activists. It might also cover policy analysis and other skills required to participate in local governance. Youth development, for instance, might focus on the construction and implementation of high school and university curricula on structural racism and the justice and related systems.

## **C. Substantive collaborations with movements and organizations**

Several participants felt strongly that a new politics that exploits emerging democratic spaces now being created by the debates around climate change, economic globalization, immigration and national security could be crafted to break pernicious links between race, space and social position. This has to be guided by an awareness of how “whiteness” and “color” are reconstructed and revalidated by our politics -- for instance, how fear and devaluation of the humanity of some facilitates crime/race-oriented governance and racial sorting.

Some participants believed that because security issues around which the public is easily mobilized are often framed in racial terms in the electoral and policy contexts, we have to give politics and governance high priority. We heard a strong plea that practical politics and governance<sup>29</sup> not be delayed while proceeding with the more philosophical and conceptual enterprise of deconstructing race and crime and revisioning crime and punishment. Both efforts should proceed in parallel fashion and inform each other.

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<sup>29</sup> Specifically, attention to the “race-laden electoral connection” relating to security policies (i.e. immigration, terrorism, prison construction, reentry, school security, the war on drugs, etc.) at the federal and local levels. (Murakawa)

Besides attention to electoral and legislative institutions and processes, there was call for much more attention to grassroots movement-building around a structural racism framework. Unions<sup>30</sup> and environmental organizations<sup>31</sup> were offered as ripe opportunities for new multiracial alliances around 21<sup>st</sup> century urban and suburban renewal and a rethinking of public spaces. As an example, inevitable future demand for blue-collar labor to retrofit our built environment for energy conservation was posited as an opportunity for engaging a variety of stakeholders around the workforce effects of mass incarceration. Federal, state and local investments in “green” technologies, conservation and training promise to dwarf the New Deal in job creating potential, and thus might create huge new opportunities for democratic movement-building and downsizing prisons if these opportunities can be effectively exploited.

An overriding sentiment was that focus on political, civic and other institutions with real or potential links to poor communities of color, but that seemed tangential to racialized mass incarceration, actually make good political and strategic sense. We heard that many grassroots movements represent excellent examples of areas where community, race, working-class opportunity and over-incarceration converge, but where those linkages are too frequently overlooked. America’s historical union narrative, especially, needs a major reframing informed by structural race analysis.<sup>32</sup> Indeed, we were advised to find and engage other progressive movements that evince a “radical ambivalence” about race around this analysis, to help them see that progress is unlikely unless they deal with internal racial fissures they themselves have contributed to over time.

In sum, the sentiment appeared to be that criminal justice dynamics – particularly the imminent return of over 650,000 formerly incarcerated individuals annually to their home communities -- presents immediate movement building opportunities. Properly contextualized, the reentry phenomenon produced by mass incarceration could provide a unifying thread and common entry point for usually fragmented labor, immigration, jobs, health, housing and other campaigns, all seeking to improve the political and economic clout of the same communities. Moreover, grassroots engagement around this issue would facilitate the bottom-up flow of knowledge essential for reframing current social and criminal justice values.

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<sup>30</sup> Phil Thompson

<sup>31</sup> Van Jones

<sup>32</sup> Here, Phil Thompson gave a concise overview of how U.S. labor unions marginalized minority workers and ignored employment rights issues throughout the 20<sup>th</sup> century.

#### IV. NEXT STEPS

In summary, three broad areas of work have been proposed for the *Rethinking Crime and Punishment for the 21<sup>st</sup> Century* project by its advisors:

- work that promotes new concepts, language and definitions of race, crime, punishment and security for the public discourse and imagination relating to the intersection of these issues with mass incarceration
- work that integrates currently fragmented efforts and capacities for advancing racial equity and social justice, and that embeds and tests transformational ideas in criminal justice and other institutions
- work aimed at leveraging, linking and mobilizing movement opportunities for advancing racial and social justice presented by contemporary global and environmental trends

Each area covers a vast terrain, so we have to consider specific goals we might seek within this project. Change assumptions embedded in those goals must also be recognized as we set out to define our next steps. Some very preliminary thinking along these lines began in Aspen, and now we need to explore and develop each of these areas more fully to outline a roadmap for the work of extricating the U.S. criminal justice and related systems from operational logics structured by race.