

## **Draft Working Paper**

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### **Rethinking Crime and Punishment for the 21<sup>st</sup> Century:** *Can we develop a criminal justice paradigm that advances racial equity and democracy?*

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#### **Race as entry point for a fundamental reexamination of our criminal justice paradigm**

As our national story goes, the U.S. criminal justice system ensures fairness and equality to all under the law. Throughout American history, generations of policymakers, analysts, practitioners, advocates and ordinary citizens have recognized the failure of the criminal justice system to deliver on this democratic ideal and have worked to “fix” it and correct its most egregious injustices. However, these fixes—even when successful—have left largely intact a criminal justice system that continues to reflect, sustain and even perpetuate structural inequities that underlie and indeed define all our social institutions, civil as well as criminal. Even those who have been successful in catalyzing criminal justice reforms continue to lament our inability, as a nation, to re-examine why and how this critical institution consistently produces negative outcomes for so many, and—since 62% of the male prison population is black or Latino—such inequitable outcomes for people of color. Those committed to changing the justice system recognize the need for a fundamental reconsideration of values and assumptions that underlie the structure, functioning and maintenance of the criminal justice system.

This expansive and ambitious reform outlook that seems more consistent with the scope of our criminal justice problem. Our initial challenge appears to be identification of a framework that will allow us to interrogate assumptions underlying our choices relating to who, what, and how we punish. We also need to understand how these choices affect and are affected by other social institutions and systems such as education, housing, healthcare and work. To paraphrase Albert Einstein, we cannot solve the problems of the criminal justice system with the same thinking that created them – we need to approach the issue from a new perspective.

This paper posits race as a powerful and revealing lens through which to reconsider the relationship between mass incarceration and democracy. This may seem counterintuitive, knowing how difficult it has been for this nation to confront and resolve its racial reality. To try to make headway on a difficult issue (criminal justice reform) by invoking another seemingly intractable one (race) as an entry point, may seem a fool’s errand. Also, this approach might also seem narrow since there are structural injustices grounded not only

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in race, but class, gender, sexual orientation and their intersectionality as well.<sup>1</sup> Mindful of these concerns, this paper offers a detailed rationale for the structural racism approach.

Two justifications appear to be fairly obvious. First, the overwhelming racial disproportionality in the criminal justice system makes a race-focused discussion more than reasonable. In confronting the racialized nature of the problem head-on, we're much more likely to ask new and different questions that might, in turn, open up new and different avenues for reform. We might ask, for example, "If we were not such a racially stratified society, would we have a criminal justice system that operates the way that it does?"

Second, it bears noting that race has often compelled America to confront inconsistencies between its liberal democratic ideals and its social outcomes. As the authors of the landmark book *The Miner's Canary* point out, race has provided a consistent and important litmus test in the course of this nation's struggles over the scope of democracy and the quality of justice.<sup>2</sup> Political demands for racial inclusion and equality continually force Americans to construct new political and social processes, institutions, and standards of right and wrong. In U.S. history, old paradigms have, on occasion, evolved to accommodate oppositional movements that have destabilized moral consensus on race once deemed entirely rational and justifiable. Perhaps a racial lens—this time applied to criminal justice and its relationship to other systems—can once again challenge what has been considered rational and justifiable.

### **Can we re-imagine the criminal justice system?**

Race-based slavery in the United States lasted well over two centuries until its dissonance with democratic ideals helped spark the Civil War: a conflict that was as much over the proposition of universal human personhood, as over secession and union. Granted, it took the full force of federal arms to dismantle the "peculiar institution" of slavery. And full African American citizenship had to wait another century after Appomattox because reactionary Southern politicians—with no little Northern complicity—effectively reimposed much of the old racial order during Reconstruction. Virulent anti-black terrorism in the Jim Crow years signaled that slavery had not lost all respectability in 1865.

It took the Warren Court's embrace of equalitarian ideas in 1954 and federal legislation in the 1960's to dismantle finally the public architecture of the Jim Crow racial regime. Jim Crow's foundations of black segregation, intimidation, economic exploitation, and political and social exclusion were eroded by dogged civil rights activism and resistance.

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<sup>1</sup> Crenshaw, Kimberle, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" and "Mapping the Margins: Intersectionality, Identity Politics, and Violence; Against Women of Color," in *Critical Race Theory: The Key Writings that Formed the Movement*,: Crenshaw, Kimberle, Neil Gotanda, Garry Peller and Kendall Thomas, eds. (New Press, 1995)

<sup>2</sup> Lani Guinier and Gerald Torres. *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*. Cambridge, MA: Harvard University Press. 2002.

Only through these continued movement struggles did centuries of overt legal race construction finally end in the 1960s.

However, the inadequacies of this post-civil rights racial formation—which acknowledges the full legal personhood of Americans of color, but not necessarily their equal social worth and humanity — are also quite evident. Formal equality has not dismantled *de facto* white privilege, removed the stigma of “blackness,” or stripped race of its huge material significance as a social resource. Considering where American democracy stood 100 years ago, civil rights gains have been a great leap forward. But as we begin the 21<sup>st</sup> century, criminal justice and other social outcomes starkly illustrate the endurance of racial stratification.

The reason is that racism in the U.S. is and always has been structural rather than epiphenomenal. American society’s origins and subsequent arrangements have been forged in a crucible of racial hierarchy. “Structural racism” refers to a system in which public policies, institutional practices, cultural representations and other norms work in mutually reinforcing ways to perpetuate racial group inequity. It identifies dimensions of this nation’s history and culture that have allowed privileges associated with “whiteness” and disadvantages associated with “color” to endure and adapt over time.<sup>3</sup> Racial hierarchy has become integral to the accepted understanding of fair and appropriate outcomes in every consequential societal realm. White advantage in politics, the economy and the national culture has been internalized as a norm by most everyone regardless of race, as has nonwhite overrepresentation on the lower rungs of the socioeconomic ladder. A durable public “common sense” about race that now might be described as “colorblindness”<sup>4</sup> biases institutions and standards of equity and justice in ways that are today harder to perceive, describe, and thus contest within traditional political frameworks.

Disparities and discontents arising from this modern mutation of structural racism raise questions about the legitimacy of values and rationales guiding many contemporary social policies. Decades of failed public and private remedies for chronic disparities and disadvantages in communities of color invite us to reexamine systems and institutions that provide and restrict opportunity in new ways. Prevailing educational and wealth building arrangements, and mechanisms that frame and communicate cultural narratives, all deserve scrutiny. Systems and institutions of coercive social control warrant the highest priority in this regard, since these directly determine the incidence of individual and group liberty. Moreover, it is vital that we reconsider not just public policies and institutional practices, but also underlying philosophies and logics from which these derive.

Functional remedies for failures in education, social welfare, prison and other flawed opportunity-shaping systems are clearly necessary. But it would be short-sighted to stop

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<sup>3</sup> Aspen Institute Roundtable on Community Change. *Structural Racism and Community Building*. Washington, DC: The Aspen Institute. 2004.

<sup>4</sup> See Eduardo Bonilla-Silva. *Racism Without Racists: Color-Blind Racism and the Persistence of Inequality in the United States*. New York: Rowan & Littlefield, Inc. 2003

there. Tenacious racial inequalities are rooted in institutional governance cultures that hold selected society-level beliefs of fact and rectitude at their cores. And, those beliefs unavoidably draw on dominant racial perceptions. Thus the social outcomes we see—mass incarceration, educational achievement gaps, residential segregation, workforce stratification, and the like—inescapably reflect racist values that, though publicly disavowed, remain deeply embedded in systems of thought and practice. Indeed, our tendency to concentrate our critical gaze and reform efforts on narrow, “tangible” aspects of institutions and systems is often a way of avoiding uncomfortable reconsiderations of those submerged core values.<sup>5</sup>

No area of chronic racial disparity invites us more urgently to reconsider guiding beliefs, assumptions, and knowledge context than the domain of criminal justice. Only a small fraction of the overwhelming empirical evidence supporting this proposition is presented below. Given the salience of racial inequality in the American social narrative, it seems appropriate to ask philosophical and structural questions as we grapple with concrete challenges of sentencing, rehabilitation, community re-integration, and the like. Questions might include: Why do we punish the social conduct that we do, in the manner that we do, and in the social strata that we do? Indeed, why in the 21<sup>st</sup> century do we still rely so heavily on “punishment” as the appropriate response to so many categories of behavior deemed inimical to community interests? What social control goals does our contemporary criminal justice paradigm serve? What social control values might better serve our aspirations for multiracial democracy? How can we repair the harm caused (to individuals, communities, the nation) by a racially structured criminal justice system and how can we extricate ourselves from it? What would a criminal justice system not structured by racism—one consistent with a more expansive view of equity and justice—look like? And, how can we make such criminal justice values and ideals operational? What do these questions and the answers say about the role of the criminal justice system *vis a vis* other civil society institutions?

### **The dominant frame: What do we “know” about race and criminal justice?**

It might be helpful to speculate, first, about how the public makes sense of the association of race and crime and punishment. Outlines of a dominant popular “frame” for processing this are discernible from the familiar political discourse about crime, and in the law enforcement and punishment practices that seem acceptable to a majority of Americans. While there are nuances to this popular perspective, three of its features loom largest: mass incarceration, fear of personal victimization, and of course, racism.

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<sup>5</sup> Institutions and their embedded core values are, of course, mutually constructed over the long term. However, it is unlikely that such values shift significantly in the short-term in response to the kinds of limited technical or programmatic adjustments that we typically see in so many high-stakes areas (e.g., school achievement, workforce development, affordable housing, child welfare, juvenile justice).

### *Mass incarceration*

First, it is jarringly obvious that in a nation that incarcerates lawbreakers on an industrial scale, disproportionate numbers come from communities of color. More than 2.2 million individuals are currently either in jail, prison, or under some other form of direct criminal justice supervision. Currently, African Americans are about 46 percent of the prison population while just 12 percent of the U.S. population. Latinos are 19 percent of those behind bars, while also about 12 percent of the population. Black-white differences in incarceration rates are most dramatic: In 2006, for example, 4,789 black males were locked up for every 100,000 black males in the free population, compared to 736 per 100,000 white males. A stunning 11.7 percent of black men in their late 20s were incarcerated.<sup>6</sup> Black men of all ages are five-to-seven times more likely to be incarcerated than white males of the same age.<sup>7</sup>

Most Americans probably won't be surprised by these racial patterns, but still may not realize that they hold up across gender, criminal offence and regional categories. Americans are also unlikely to be aware of the devastating consequences of mass incarceration for entire communities of color. Residents of such places are collectively victimized in several ways. On the front end, mass incarceration steadily drains away breadwinners, fathers, and heads of households. Spouses, partners and children of inmates themselves become captives to prison system routines as they try to maintain family relationships with loved ones behind bars. To cite just one hardship, urban offenders are often incarcerated in distant rural communities that welcome the jobs prisons bring. The physical distances alone can take a huge toll on families of the incarcerated as they make visitation costly, difficult and ultimately, infrequent.

Collective victimization also comes on the back end, when hundreds of thousands of individuals return annually from prison with meager prospects for productive lives outside prison. Not only is their "re-entry" into the mainstream of stable employment, family formation, responsible parenting, civic participation and criminal desistance difficult in itself, their already depleted communities are typically targeted for intense police surveillance and criminal justice supervision.<sup>8</sup> Individuals of color already marked as criminal offenders thus typically have much smaller margins for error in the conduct of their lives than similar whites.

### *Fear of Victimization*

Two related areas of belief seem to be at the core of the social psychology driving criminal justice politics and governance: fear of personal victimization and racism.

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<sup>6</sup> See <http://www.prisonsucks.com/> a project of the Prison Policy Initiative in Northampton, MA. For a comprehensive recent treatment of the racial features of mass incarceration, see Bruce Western. 2006. *Punishment and Inequality in America*. New York: Russell Sage Foundation.

<sup>7</sup> Bureau of Justice Statistics, June 5, 2006 <http://www.ojp.gov/bjs/pub/pdf/pjim05.pdf>

<sup>8</sup> See Timothy Lynch's essay, "We Own the Night: Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit". *Cato Institute Briefing Paper No.56*. March 31, 2000.

Although difficult to disentangle, each has some distinct features that contribute to the dominant criminal justice frame.

If we accept the premise that popular media fare merely reflects public demand, Americans are deeply preoccupied with security from random, violent victimization. A good deal of this apparent demand must be attributed to politicians who foster the misimpression that citizens can and should be insulated from such dangers. Nowadays, personal security concerns extend to fear of attacks by foreign terrorists. But home-grown fears of violent crime have long been a core public anxiety, as Americans have always worried a great deal about robbers, murderers, rapists, and more recently, pedophiles.<sup>9</sup> Belief in the imminence of danger from these quarters combines with convictions about personal responsibility and retributive justice to generate unwavering political demands for “tough-on-crime” policies.

People who commit crimes are taken to be independent, autonomous actors who, through publicly-elected prosecutors, can be held personally accountable to victims and society at large. Violent criminals, especially, are considered willful deviants who choose to prey upon the rest of us. Popular narratives and political rhetoric feed a conventional wisdom about a “class” of predatory, anti-social individuals driven by bad genes or upbringing to make criminal lifestyle choices. Such people, many believe, simply lack the self-restraints required for following social rules. Most law-abiding citizens therefore see nothing wrong with punishing violent offenders in a manner -- removal and incarceration -- that prevents them from victimizing others for as long as possible. These just seem to be logical and rational solutions.

Perhaps not surprisingly, there has been a durable political consensus around removal and incarceration. Actual and potential victims believe the certainty of incarceration—and in some cases, execution—to be much more likely to deter victimizers than rehabilitation and other positive community incentives for desistance.

Finally, public policies and institutional practices seem to reject most social factors that likely shape individual tendencies toward criminal conduct. Our criminal justice regime is firmly anchored in a personal responsibility paradigm that largely ignores abstractions like “inequality” and “disadvantage” but emphasizes the harsh punishment of those who should “know right from wrong.” As evidenced by the popularity of capital punishment, most Americans strenuously resist contextual, sociological and other impersonal explanations of criminal behavior – particularly violence. The focus almost always has been exclusively on the “wrong-doer” and his or her “dysfunctional” family, although in recent decades this scope has widened somewhat to include the “cultural” characteristics

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<sup>9</sup> Whites’ well-documented fears of victimization go back to slavery and its demographic imbalances, especially in the South.

In his 2006 book, *Governing through Crime: The War on Crime and the Transformation of America, 1960-2000*, Jonathan Simon explains how even rural and small town Americans feared random assaults by the notorious criminals of the Prohibition and later periods prior to the declaration of the ‘war on crime’ in the 1970s. Today, suburban residents in white enclaves nevertheless manifest heightened fear of young black men.

of inner-city neighborhoods. But generally, when Americans talk about crime and punishment, fundamental structural arrangements – public policies, institutions, social norms and values, and so on -- are rarely interrogated and seldom challenged.

### *Racism*

It is impossible to ignore the contribution of racism to the construction of any of these individualistic attitudes. Although social science and criminology research have long concluded that criminal and violent behavior appear randomly distributed across classes and groups,<sup>10</sup> violent crime is most personified by the darker-skinned male in this nation's imagination. Opinion surveys and research studies continually reconfirm a widespread psychological association between "color" and violent crime.<sup>11</sup> Not surprisingly, therefore, conceptions of "serious crime" and "fitting punishment" tend to reflect, in substantial measure, negative stereotypes linked to color. The strong political consensus against parole, and for mandatory sentencing, capital punishment, prison construction and other tough-on-crime measures, is powerfully assisted—despite a steady decline in crime over the last decade—by Americans' fear of victimization by nonwhite "superpredators."<sup>12</sup> Indeed, this is not irrational in the strictest sense, since the preference of major media for the imagery of street crime reinforces such "knowledge" almost daily. Moreover, these are the crimes of poor people and places, and in America, poor people and places are disproportionately black and brown.

While the stereotype of the dangerous racialized predator has had a long historical pedigree affecting various immigrant groups, the drug trade—especially crack—that played out violently in America's inner cities in the 1970s and 1980s solidified the racial stereotyping of crime that persists today. The government responded with the "War on Drugs" sweeping into the criminal justice net vast numbers of young men of color and guaranteeing daily media images of black and brown "suspects" and "perpetrators." The lucrative urban drug industry generated a great deal of violence as suppliers and dealers fought to protect and expand their markets. Viewed from afar, this seemingly

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<sup>10</sup> For a brief discussion of this see the Summer 2000 Intelligence Report of the Southern Poverty Law Center, "Coloring Crime," at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=255>.

<sup>11</sup> Recall the notorious editorial decision to darken O.J Simpson's image on the cover of the June 27, 1994 edition of *Time* magazine. UCLA researchers Frank Gilliam and Shanto Iyengar have conducted several experiments that show how a negative "script" about blackness forms part of the frame of crime news reporting. E.g., see Gilliam, F.D., Jr. & Iyengar, S. (2000). Prime suspects: the impact of local television news on attitudes about crime and race. *American Journal of Political Science*, 44(3), 560-573.

<sup>12</sup> Princeton University political science professor John J. DiIulio, introduced the word "superpredators" in a 1996 report to warn of the coming of a "new breed" of juvenile delinquents—more "cold-blooded" and "remorseless" than previously seen—as America's youth population soared. This assertion does not overlook our current and growing hysteria over sex offenders, where the popular image is that of a white male. There is a much longer history, however – particularly in the former slaveholding states—of white perceptions that free black males posed an existential threat. Accounts of the violent white backlashes of Reconstruction period reveal that white terrorists justified their actions as necessary preemptive measures aimed at preventing the wholesale slaughter and rape being plotted by newly freed blacks. See Nicholas Lemann, 2006. *Redemption: The Last Battle of the Civil War*. New York: Farrar, Strauss and Giroux.

senseless violence continuously re-legitimized assumptions that young men of color everywhere were potential threats to the social fabric.<sup>13</sup> In this atmosphere, simple logic seemed to dictate that (a) since violent crimes demanded harsh deterrent responses, and (b) since African American and Latino males “made the choice” to commit such offences at higher rates than whites, more of them should be behind bars and on death row.

Needless to say, none of this denies that black and brown males commit violent crimes or absolves them of responsibility for their actions. Nor does it minimize the safety concerns of the communities of color that mostly bear the brunt of their actions. Rather the intent is to draw attention to two structural issues that receive little mainstream attention. First, despite the confinement of black and brown crime largely to those very communities, these males have been stigmatized as dangers to society as a whole, while white male criminality remains individualized. Due to their perceived dangerousness, even black and Latino males who have never had contact with the criminal justice system must continually prove their “harmlessness” and worthiness of full social inclusion – often more so than whites who do have criminal records.<sup>14</sup>

A second structural factor is the disproportionate exposure and confinement of black and brown males to criminogenic environments. No other groups have been as systematically denied educational and wealth-building opportunities while being told that these are keys to upward mobility and social recognition. It is obvious, for instance, that the illegal drug industry with its attendant violence has taken such firm root in black and brown inner city America simply because it offers unskilled individuals rare opportunity to “get paid” more than subsistence wages.

Structural racism sorts whites and nonwhites along every important societal dimension, not least of which are class and space. But young black and Latino males have great difficulty accepting fates of permanent socioeconomic marginality within broader contexts of wealth and opportunity in which they were born, or to which they have migrated. Their determination to acquire social resources and prestige – often through the illegal avenues that represent the only opportunities available – perversely deepens their social demonization, and reinforces structural racism itself. The almost inevitable over-involvement of young men of color in gangs and street crime, combined with the decontextualized media coverage of these often disturbing events, intensify a kind of “representational apartheid” in public knowledge. At a very fundamental level, much of the public comes to discount black and brown humanity, and thus, cannot imagine their full inclusion in every dimension of the white mainstream. This complicated interconnection between race, space, crime and social inclusion deserves a bit more discussion.

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<sup>13</sup> Interestingly, in sharp contrast, law enforcement relating to marijuana use weakened over the same period when it became the drug of choice for middle-class whites. See David Cole, *No Equal Justice*. pp.152-153.

<sup>14</sup> Reference to employment data showing whites with criminal records getting jobs before blacks without

## *White Space and the Racialization of Crime*

Perhaps the most dramatic evidence of how race plays into whites' victimization fears is residential. Metropolitan residential patterns since the 1970s have been characterized mostly by white middle-class mobility driven by a combination of racialized fears: fears of falling property values as blacks took advantage of new fair-housing laws, fears the integrated public schools that followed desegregation, and fears of black criminals. Collectively, these intensified fears boosted white flight to suburban communities throughout the 1970s and 80s. As the drug epidemic ebbed in the early 1990s, this outflow subsided. But studies continue to show that all of our large metropolitan regions remain hyper-segregated by race, particularly with respect to African Americans.

It should be noted here that although the metropolitan population dynamic has been mostly centrifugal for the past two to three decades, we are now seeing a complex new pattern of demographic transition in the urban core. One aspect is the 600,000 men and women who return home from state and federal prisons annually. Criminologists tell us that this translates into 1,600 individuals a day—four times the number who returned home from prison twenty years ago.<sup>15</sup> And researchers who map these patterns note that people leaving prison generally return to a small handful of urban zip codes.<sup>16</sup> Indications are that there is a significant degree of churning of this re-entering population. Crime is falling, but continuing political demand for mass incarceration has meant that urban residents of color still cycle in and out of prison at high rates. Thus high re-entry levels are being offset by continuing high re-arrest rates for drug and street crimes and for “technical violations” of parole.<sup>17</sup>

At the same time, a modest reverse movement of whites has even been evident in recent years as the gentrification of many inner-city communities has accelerated. It remains to be seen how the unabated incarceration trend combined with the apparent “rediscovery” of urban cores by whites will impact their racial balance, civic capacity, and economic viability in the coming years.<sup>18</sup>

Persistent metropolitan hypersegregation by race is propelled, in the deepest sense, by the imprinting of whiteness on every meaningful dimension of American society. Some social scientists find it analytically useful to conceive of America as a “white space.”<sup>19</sup>

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<sup>15</sup> See “But They All Come Back: Rethinking Prisoner Reentry” by Jeremy Travis. U.S. Department of Justice Office of Justice Programs, National Institute of Justice. *Sentencing & Corrections: Papers From the Executive Sessions on Sentencing and Corrections*. No. 7. May 2000.

<sup>16</sup> See the work of Eric Cadora, Director of the Justice Mapping Center, at [www.justicemapping.org](http://www.justicemapping.org)

<sup>17</sup> Basically, these are non-criminal violations of the conditions of parole as spelled out in a prisoner's release plan. Of the 423,000 men and women whose terms of parole were concluded in 1998, 42 percent were sent back to prison. See Kelly Virella, “Trapped by the System: Parole in America,” in *Prison Nation: the warehousing of America's Poor*, Tara Herivel and Paul Wright, eds. New York: Routledge. 2003. pp.101-105.

<sup>18</sup> We know that those newly released from prisons already face enormous reintegration challenges. Should gentrification trends continue, these might become even more complicated.

<sup>19</sup> See especially John A. Powell, “Dreaming of a Self Beyond Whiteness and Isolation,” 18. *Washington University Journal of Law and Policy* 45, 29. (2005).

Their proposition is that the society's physical, cultural, legal, economic and political "territories" are all constructed to regulate social group opportunity and individual privilege in ways that preserve white dominance. Each critical domain is intensively surveilled and patrolled to deny or tightly regulate racial opportunity. White space is a realm of fear and insecurity, factors that have remained constant despite centuries of unambiguous white supremacy in every consequential area. Specific illustrations of this are enduring racially-based white anxieties about physical victimization, economic deprivation and cultural dominance by individuals and groups of color.

To conceive of ostensibly diverse 21<sup>st</sup> century America as white space is to imply that seemingly neutral mechanisms of law enforcement, deterrence and punishment actually operate with biases that reinforce the association between "whiteness" and America's idealized socio-economic, political and cultural mainstream. It is an acknowledgement that although individuals of color may inhabit the physical dimensions of white space, they do so as mostly unassimilable "others," "perpetual foreigners," and "suspects" of one kind or another to be watched, contained and controlled in a variety of ways.

Prior to the civil rights era, white privilege extended to almost every corner of public life; today, however, the race-space relationship is more complicated. Southern Jim Crow laws and anti-black terrorism unambiguously inscribed whiteness into public institutions and norms. Institutional policies and social norms made white privilege a palpable reality in Northern states too,<sup>20</sup> but there its protection relied more on residential, social and economic shunning than blunt legal tools and open, organized violence. By the end of the 1960s civil rights campaigners had managed to enlist the courts in prying open swathes of white public space by dismantling racist laws and curtailing anti-black violence. But they were unable to change the generative logic of racism, which structures the private realm even more insidiously.

At its root, racism in the U.S. derives from whites' private convictions that individuals of color (blacks especially) are incompatible with their conception of community (that is, social intimacy, proximity and mutual responsibility based on a sense of shared humanity). Historical accounts of American racism tend to gloss over the depth of white apprehensiveness over the prospect of black social integration, especially in non-slaveholding states. However a lot of the animus related to blacks' perceived unfitness, on many levels, for civilized society. Blacks were seen as morally lax and likely to draw whites into savage, unrestrained behavior; to have criminal tendencies; to be mentally inferior and thus unfit for civic participation; to be incapable of self-improvement; and most of all, to threaten the "purity" of whiteness itself through miscegenation. Since much of this intangible, private feature of racism stood beyond the reach of the law, it ensured the adaptive, exclusionary mutation of those parts of white space – schools,

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<sup>20</sup> Alexis de Tocqueville, renowned for his insights on 19<sup>th</sup> century American society, noted that anti-black racism was greatest in states where slavery had never been known. In *Democracy in America*, he wrote: "In the North the white man no longer clearly sees the barrier that separates him from the degraded race, and he keeps the Negro as a distance all the more carefully because he fears lest one day they may be confounded together." (J.P. Mayer (ed.), *Democracy in America*, New York: Doubleday & Co., Inc. 1969. p.343).

workplaces, housing, and the like -- legally compelled to accommodate blacks, rather than the genuine liberalization of white space in its entirety.

Indeed, the end of Jim Crow actually led to nationalization of subtler Northern “techniques” for transforming and preserving white space. Prominent among these has been the spatial strategy of white abandonment, devaluation and containment of “darkening” (mostly urban) residential enclaves, and creation of new (mostly suburban) homeownership opportunities for whites. A critical component of this strategy has been the enlistment of federal, state and local government in the virtual privatization of these ostensibly public suburbs. White dominance of homeownership, transportation, income tax, education, zoning and law enforcement policymaking at all levels has made possible the simultaneous extension of white residential space and limitation of universal racial access to these new communities.<sup>21</sup> Of course, formal equality today ensures that we have many racially diverse workplaces, legislatures, playing fields, entertainment media, and so on. But these public contexts still remain subtly stratified in ways that devalue roles and spaces occupied by people of color, and that make it difficult for them to transcend assigned niches in white space.

Racial group “transcendence” and mobility are hard because, as noted earlier, all of white space is policed to preserve white privilege. Spatial policing, for instance, is accomplished through privately secured gated communities, the unwalled imprisonment of the most stigmatized and vulnerable populations in ghettoized neighborhoods, and the prison warehousing of huge segments of the black and brown population. Less obvious is the self-policing that results from internalized racial inferiority and superiority, and from political individualism – the dominant belief that collective, social obligations should be subordinate to personal and family interests. American individualism also promotes a kind of social atomization that fosters a pervasive sense of personal risk, danger and fear – territory that politicians eagerly mine to shape social policy preferences and governance in a range of institutional areas, particularly those bearing heavily on racial equity. We see this most vividly in the (white) public safety domain, where apprehensiveness toward those who do not fit default racial, cultural, religious, behavioral and other criteria of white space is reinforced by media frames and political rhetoric.

Racialized public security logic and discourse extend well beyond crime governance itself to how we produce and allocate education, healthcare, welfare, voting access, public housing, immigration, and other social and democratic “goods.” Most of the public, including groups of color, take for granted conventional policies and practices steeped in this logic, such as the increasingly penal approach to urban public school management, the intrusive monitoring of welfare and public housing recipients, hyper-vigilance against (black) voter fraud, and uncompromising, militaristic (Mexican) immigration management.

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<sup>21</sup> For more on this spatial perspective of race, see John A. Powell, “Dreaming of a Self Beyond Whiteness and Isolation,” 18. *Washington University Journal of Law and Policy* 45, 29. (2005)

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 street crime have begun to subside. New racial fears are being mobilized to exclude rather than merely marginalize Mexican immigrants and Muslim foreigners. Although African Americans long bore the stigma of unassimilable “other,” their complete exclusion from all of white space was never seriously attempted (aside from brief periods in past centuries when their voluntary and involuntary return to Africa attracted fleeting interest). Instead, they have been marginalized and contained – often terminally -- within carefully designated areas and aspects of white space. But in contrast, Mexicans and foreign-born Muslims are today cast as existential threats to white space itself. Racial-cultural fears are being mobilized to ensure their exclusion, not just their marginalization. Cultural conservatives openly worry that these “outsiders” are poised to corrupt Judeo-Christian values and culture, and to push whites into the numerical minority. Since the terrorist attacks on New York City and Washington, D.C. on September 11, 2001 by young men from the Middle East, the U.S. has basically declared war on Muslims,<sup>22</sup> framing the conflict as a civilizational struggle for Western values. Since “9/11” Islam and terrorism have been firmly linked in the public imagination. For six years now, political and media institutions have continually stoked public fears about every conceivable vulnerability that terrorists might exploit. And so the ordinary wisdom about the “war on terror” has become “we’re fighting them over there so we don’t have to fight them here at home.”

We cannot overlook how communities of color themselves inadvertently help to preserve white space. Many Americans of color take for granted their social group positions and “places” in relation to the idealized white mainstream, and so do not mount sustained challenges their subordinate status. Here, internalized racial inferiority is reinforced by their strong psychological attachment as Americans to an individualistic frame of reference. Individualism has also taught communities of color to be as fearful of progressive, collective solutions to inequality as whites. As a result, although awareness of disparities and disadvantages might remain high among racial minorities, their collective contestation of white space has waned significantly in post-civil rights decades.<sup>23</sup>

### **Structural Racism as a Reframing Lens**

We cannot make sense of our contemporary criminal justice paradigm without an appreciation of how mass incarceration and spatial regulation of the most racially disfavored Americans serve the nation’s racial hierarchy. When all we see is personal victimization we miss the fact that criminal justice institutions serve, intentionally or not,

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<sup>22</sup> The Bush administration insistently describes this as a “war on terrorism,” but the illogic, transparency and expediency of this branding is obvious. Iraq, now described as the central front in the “war,” has never been linked to the Sept. 11 attack, or to any other terrorist attack on U.S. allies or interests.

<sup>23</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.

as active instruments of racial subordination. Whether or not this is a considered goal is beside the point. The reality is that mass incarceration steadily undermines and may have already rolled back hard-won racial equality gains -- however minimal or inadequate those may have been -- for generations to come (see Simon, 2006). Criminal justice institutions today permanently bar vast numbers of African Americans and Latinos from equal opportunity, despite an apparent public civil rights consensus around racial accommodation and integration.

A structural racism analysis allows us to understand how and why extreme racial disproportionality has become a defining characteristic of the criminal justice system. Structural racism describes how apparently neutral, objective social and institutional policies, practices, principles, and traditions can produce racially inequitable outcomes. For criminal justice, there are two main avenues through which it operates. First, it focuses on the interaction effects across key sectors and highlights how failures in each arena accumulate at the individual and community levels to result in rotten social and economic outcomes for whole groups of people. And second, it points out the normalization of racially essentialist beliefs in the public mind, and by extension, in the way we understand, interpret, and explain cause and effect in social outcomes. So, although it is universally and historically true that ghettoized, disadvantaged populations commit higher levels of crime than privileged ones, and that individual criminality generally diminishes with upward mobility, we still stubbornly choose to equate blackness and criminality here in the U.S. This equation is preserved because of its power as a tool of racial subordination.

*What are the most important insights of a structural racism analysis?*

As we consider its application to criminal justice, two broad insights of a structural racism frame are important. *The first is the importance of inter-institutional dynamics.* A structural perspective encourages recognition not only of the internal workings of a single institution, but of the complementary effects of interdependent opportunity structures that are racialized. Some scholars propose a birdcage metaphor to illustrate this, in which institutions crucial to opportunity are likened to the individual bars.<sup>24</sup> No single bar is solely responsible for detaining the birds; they all tightly interconnect to create an imprisoning structure stronger than the sum of its parts. This useful image helps us perceive, for example, how an inequitable public school system that pushes kids out of school, inadequate local job markets that push people into the informal (sometimes illicit) economy, and a lack of affordable housing that denies families shelter and stability can interact to reinforce criminal justice inequities.

A second and probably more important insight is that racial hierarchies today depend less on the *overt acts of bias or deliberate government policies, than on invisible structures of the mind.* Over the history of racial inequality, our society has successively replaced one means of maintaining racial hierarchy with another, each of which has relied less on direct institutional authority and more on a popular racial attitudinal consensus. Prisons,

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<sup>24</sup> Andrew Grant-Thomas and John A. Powell, "Toward a Structural Racism Framework." *Poverty and Race*. November/December 2006. Vol.15, No.6. pp.3-6.

however, might represent an important contradiction of this trend. Considering its historical use as a tool for black subordination and labor exploitation, the continuing racial skew within America's penal system indicates that some aspects of the older social order of overt, coerced racial control still remain.<sup>25</sup> Yet on balance, institutions, organizations, and rules created to maintain slavery, enforce Jim Crow laws, carry out anti-black terrorism, exclude non-whites from opportunity arenas, and so on, have now been largely replaced by a shared conviction about "racial essentialism." We (the body politic) believe that we "know" where people of different races belong, live, what they're worth, how they're brought up, and therefore what they're capable of. The majority of Americans largely acquiesce in this racial sorting by actively and passively legitimizing types of governance (e.g., the War on Drugs, the War on Terror) that maintain and exploit racial disparities, and by permitting the expansion of coercive control for certain segments of the population.

This racial common sense is almost universally shared. Sufficient numbers of whites and people of color internalize it, thereby providing political legitimacy for the institutional policies and practices, and the cultural representations that sustain racial hierarchy/white supremacy/black marginalization. In other words, ideology (software) has largely replaced the coercive institutional infrastructure (hardware) of laws, rules, and traditions that historically kept nonwhites "in their places." In a way, this ideology is much more effective and tougher to deal with because (a) it is practically invisible to most (unlike Jim Crow, overt acts of bigotry, etc.) and (b) it is so well marketed (via diversity, colorblindness, multiculturalism, etc.) that it is shared even by many of those oppressed by it. Whites find it easier to deny their privilege because all signals suggest that they have "earned" their status, and oppressed groups are enticed into conscious and unconscious complicity with white privilege and supremacy because they find it impossible not to view themselves through the dominant national ideological lens of individualism, meritocracy, and equal opportunity. When it comes to people of color committing criminal acts, then, this racialized ideology prevents most people from understanding the historically over-determined contexts in which so many incarcerated people of color have been trapped.

Popular awareness of racial hierarchy is clouded by what philosopher Antonio Gramsci described as "hegemony"—the socialization and legitimization of ideas and beliefs that reinforce prevailing power arrangements in the public common sense. In our society, yardsticks used by the dominant culture to evaluate the "morality" and "worth" of racial minorities are so taken for granted that they appear to represent a natural order. And crucially, the hegemony works because the oppressed themselves often internalize and act to reinforce it. Some of the starkest evidence of this is low and declining rates of minority civic participation and social activism at a time when economic inequalities continue to widen. If people are willing to accept that individual merit alone is what determines success in life, exemplified by the highly touted success of some in spite of

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<sup>25</sup> As Foucault reminds us in *Discipline and Punish*, while most of the punishment spectacles of the sovereign state have been transformed into internalized self-policing mechanisms, for those living in poor neighborhoods under constant police surveillance, the criminal justice and prison systems continue to operate as institutions of coercive control.

the odds, they are less likely to mobilize around inequities in the structure of opportunities.

*Implications of the structural racism lens for rethinking crime and punishment in 21<sup>st</sup> century America*

As we look closely at this cognitive psychological aspect of structure, values move to the foreground. Beyond connectedness among institutions, structural racism bespeaks of an ideological consensus on race that translates into a particular sense of community. This sense of who is or isn't "just like us" regulates the level of emotional interdependence that, in turn, influences ethical judgments about the allocation of society's benefits and burdens. The implication here is that in the structurally racist society in which we currently live, we must consistently interrogate the value assumptions behind public policy choices, since these may not derive from a shared sense of community that is based on a single standard of personhood or humanity across social markers.

The challenge facing those who want to interrogate and change the underlying values, principles and operations of the criminal justice system (as well as other societal structures and institutions) is to open up the ideological criminal justice "black box" that continually re-legitimizes outcomes that are replete with racial inequalities and injustices. Not only are these outcomes inconsistent with democratic principles, they appear to fit a disturbing global pattern of permanent marginalization for those on the lower rungs of the economic and racial hierarchies. There is much work to do and many possible starting points.

To extricate ourselves from a justice system structured by racism, an important first step is to develop a common language for discussing the ideological underpinnings of the criminal legal system—the criminal justice "knowledge context." A second step is to create a strategy for operationalizing our new understanding. Tackling and challenging pragmatically the daily injustices of the current system—prison conditions, zero tolerance policies, barriers to jobs or housing after prison—are necessary and important efforts, but they are not sufficient. Research and historical analysis of the political, economic and social realities we currently face point to the probability that the dominant ideology currently driving the country's excessive reliance on incarceration and harsh punishment will not fade away on its own. It is actively reinforced by our politics, popular culture and mass media, and it perversely serves the institutional arrangements (and dominant groups) that benefit from a society structured by racial inequality. If we believe another, more democratic way is possible, it is also necessary to challenge the dominant ideology. Despite its obvious challenges, this broader and more ambitious entry point is worth exploring.