# GRIM REALITIES: TOWARD A CRITICAL THEORY OF PUNISHMENT

By

WENDY LANGUM WRIGHT

A Dissertation submitted to the

Graduate School-New Brunswick

Rutgers, The State University of New Jersey

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

Graduate Program in Political Science

written under the direction of

Stephen Eric Bronner

and approved by

_____

_____

_____

_____

New Brunswick, New Jersey

*May 2013*

ABSTRACT OF THE DISSERTATION

Grim Realities:

Toward a Critical Theory of Punishment

By WENDY LANGUM WRIGHT

Dissertation Director:

Dr. Stephen Eric Bronner

My dissertation is a careful treatment of penal ideology that reveals the legacy of slavery and Jim Crow in the development of the contemporary penal system by mapping the complex interaction of institutional, intellectual, and cultural attitudes towards punishment. I argue that instead rather than the traditional justifications of retribution, deterrence, or utility, American punishment is best understood through Albert Memmi's model of the relationship between "the colonizer and the colonized." My examination contends that that criminality itself has become divorced from the abstract offending body and has been re-mapped onto already defined bodies, centrally those of poor black men. In addition to contributing to the emergence of mass incarceration, this research maintains that the displacement of criminality from act to body creates a scenario in which harm itself is ever more difficult to recognize or remediate. The dissertation concludes with an exploration of possibilities for resisting hegemonic ideologies of punishment through an immanent critique of their reifying effects.

## Acknowledgments and Dedication

While I continue to love the image of the wise and wizened scholar, working alone in a drafty turret with candles and books stacked hither and yon in an erudite fire hazard, the lesson I have learned best and most frequently through my (many) years in graduate school is that scholarship is a collaborative process. Work gets better through deadlines, comments, reviews, check-ins, debriefings, more comments, feedback, and repeat—and I have been fortunate to have a wonderful community at Rutgers and beyond who are willing to both help and include me in this process. In addition to the immediate work of producing scholarship is the equally important matter of staying sane, healthy, and happy. In these acknowledgments, I'd like to express my thanks to and regard for a small percentage of the many people who contributed to either or both sides of this equation throughout this surprisingly long process.

My first thanks goes to my dissertation committee. My thanks go to Cristina Beltran, for joining this project so readily and with such enthusiasm. Her specific comments have enriched this work and she, as a writer and a mentor, is a model of the kind of political theorist I hope to be. As for my internal committee, I feel profoundly fortunate to have such a wonderful group of scholars and human beings guiding me and keeping me accountable throughout this process. Lisa Miller's gently incisive feedback, as well as her generosity of spirit, have made this lengthy, and at times existentially challenging process, much more bearable. I hope merely to hold onto the tails of her rising star, continuing to learn from her example. Milton Heumann has been a friend, an ally, and a reality check from almost my first moments in the graduate program.

Consistently cheerleading and prodding, I look forward to years of future conversations —not beginning with the question: “are you done with your dissertation?” He is a true mensch. I owe my greatest intellectual debt to my great friend and the chair of my committee, Stephen Eric Bronner. When working out difficult passages, or trying to explain my work, it is his voice in my head, pushing me to think dialectically, to own my own voice, and most importantly to make the case why any of this work matters. I recently remarked to a colleague, what a frequent occurrence it was, that upon editing a section with which I was particularly pleased, that I had discovered “Steve's fingerprints all over it.”

In addition to my committee, I owe many debts to a number of other members of the Rutgers community. First, the faculty both in the Political Science Department and beyond have been munificent with their time, resources, and selves. I cannot thank Mia Bay or Ann Fabian enough for giving me the opportunity to spend the past two years—the years in which the vast majority of this dissertation was written—as a Graduate Fellow at the Center for Race and Ethnicity. Both their individual support and feedback, and what I have gained as a member of the CRE community have proven invaluable in my development as a scholar of race and power. I am also thankful to Drucilla Cornell, Dennis Bathory, Andy Murphy, Nikol Alexander-Floyd, Shatema Threadcraft, Roy Licklider, Sue Carroll, Rick Lau, Brittney Cooper, and Beth Leech, without whose brilliance, generosity and care in the classroom, the hallway, and sometimes even in their own homes, I would have been rather more lost and much less successful.

I also wish to recognize and thank my fellow graduate students. Grad school

makes odd tribes, which are my favorite kind of tribes. From my original cohort, including Kelly Dittmar, Erin Heidt-Forsyth, Amy Buzby-Troia, Tim Knievel, and Ben Pauli, to the other wonderful friends and colleagues from within the Political Science Department and beyond, including (but certainly not limited to) Janna Ferguson, Susan Billmaer, Kelly Clancy, Albert Castle, Josh Easie, Doug Pierce, Tessa DiTonto, Dave Anderson, Mark Major and my co-GAs at the Center for Race and Ethnicity, especially my 2-year buddy, Jahaira Arias. I owe special thanks to writing partners Ashley Falzetti and Audrey Devine-Eller, who have read more of my work than I think anyone else, especially in its worst and clunkiest forms. To those of you who are still slogging through, my only bit of advice is to do the work. When you do the work, the work gets done.

I have also been fortunate (nosy) enough to meet and have the aid, support, and friendship of a number of the people who really make Rutgers run, including Mia Kissil, Sheila Friedlander, and Jan Murphy. My Rutgers experience would be markedly different were it not for the TA Project, which along with the PLDI, is where I truly learned how a university works, as such, I thank Barbara Bender, Jay Rimmer, Alex Bachmann, my fellow TAPpers, and the rest of the GSNB crew.

Friends and family have kept me sane, happy, and continually reminded me that there is life outside of graduate school; I deeply appreciate the generosity, care, and patience that Kristen Schroeder, Sage and Tyler Schroeder-Wright, Casey and Rachael Wright, Helen Wilcox, Pamela Koczan, Suze, Andy, Walker, and Emmett Wright, and of course the inimitable Florence Peterson have shown me. Samantha Wright, in particular,

has kept me company on the long and frequent commutes to New Brunswick and back, and I look forward to finding new daily rituals. I am particularly indebted to my local friends, Anna Sathe, Andrew Shohen, Lauren Rush Shohen, and Jaime Traba, with whom I have shared many meals, and who have been proud of me even when it has seemed to me that I haven't had much to show. I also must recognize my little dog Dio, who is a better companion than I might deserve.

I cannot sufficiently acknowledge my mother, Cate Wright's, role in producing this document, from quite literally putting a roof over my head for far more years than is likely fair or reasonable, to her inexhaustible and unqualified support and love.

JJ, thank you. Thank you for loving me and for placing such a high value on loving me. Thank you for growing up with me. Thank you for teaching me how to think about writing. Thank you for being my family. Thank you for your shockingly high estimation of my virtues and for realistic assessments when they are needed. This work is dedicated to you.

Along with many others, the people mentioned above deserve much of the credit for any insight this dissertation might offer. And of course, any and all errors, narrow-sightedness and shortcomings are mine and mine alone.

## TABLE OF CONTENTS

# Chapter 1

## Introduction: Punishment in Form, Fact, and Concept

*"Men simply copied the realities of their hearts when they built prisons."*

-Richard Wright, *The Outsider*

I began this project with a fundamental question: "what is the relationship between the normative justifications for punishment and the ways we actually punish?" My experiences with the criminal justice system, first as a practitioner,[1] then as a student of policy,[2] and in my early work as a student of political theory, led me to believe that there was something important and complex in this question. The philosophical legitimacy of certain justifications for punishment—in other words, explanations for how and why the state has the right to harm its own citizens—served to legitimate many practices that seemed on their face illegitimate. Indeed, the persistence of the primary justifications (deterrence, retribution, utilitarianism) of punishment by a state actor in the face of practices that seemed utterly divorced from their stated goals brought this question to the fore. This question placed into a coherent framework the phrase that had frequently come to mind in during my time as a probation officer, "Why are we doing this? It makes no sense." Worse, though I signed up for the job hoping to 'help,' I quickly became concerned that despite my best efforts, the requirements of the job simply made me part of the problem.

One, not uncommon, day stands out as an illustration of the puzzle. A fellow officer had heard that one of her juvenile probationers, who had a warrant for his arrest,

1 I was a juvenile probation officer from the State of New Jersey from October 2003-October 2006.
2 My first graduate degree in Public Policy and International Affairs was completed in May 2006.

was spending time at his grandmother's house. We assembled a small team, of about five probation officers, and went to see if we could arrest him. As probation officers in the State of New Jersey, we did not carry guns, but we did wear bullet-proof vests and carry police radios and pepper spray. The goal was to locate this fifteen year old boy, place him in handcuffs, and transport him to the juvenile detention facility where he would await a new court date (his failure to appear in court was the reason he had a warrant in the first place).

We arrived at the house, the boy's grandmother and a few neighbors were sitting on the front porch, and there were several children of various ages on the porch and coming in and out of the multi-family house. One officer went around the back of the house to make sure no one ran away, one officer stayed out front to keep an eye on the street, and with the permission of the grandmother, three of us entered the home to look for our 'missing' probationer. It was quickly discovered that the boy was in the kitchen, and was trying to “escape” through the back door—but he saw the officer in the back of the house and froze. We quickly moved to place him under arrest and he began to fight.

He was not a large boy, at fifteen he was still short and wiry, but he fought hard enough that we were quickly—three probation officers and this teenager—lying on the ground struggling. The boy's assigned officer was yelling at him to stop fighting (while trying to get a cuff on one wrist); another officer was yelling at the family to stay back (while trying to hold the boy still on the ground); I spat out the occasional “hold still!” as I tried to wrestle his other arm into a position where it could also be cuffed. The odds won out quickly—in seconds really—and once the boy was in handcuffs, he stopped

fighting, went from yelling to muttering, and leaned against the sink while his officer spoke to his grandmother about what was going to happen to him. I stood there, holding his arm, and looked around the house. Several of the neighbors were peering in from the front door, and there were several children, from about 4 years old on standing and watching us, poking their heads in from the dining and living rooms.

I knew all the officers in that house well, and I believed deeply that every single one of them was there for the "right" reasons. We wanted to make the community safer, we thought we could help the kids, we were good at our jobs, and still, standing in that kitchen, I couldn't figure out whose life we were making better. Instead it just felt like we had upset a decent afternoon, and probably traumatized a pre-schooler. We were doing what we were supposed to be doing, and none of it seemed to have anything to do with the goals that we has as individuals or professionals. This sense of disorientation has stayed with me in the years since, and it resulted in the question I started this section with: What do our stated goals have to do with what we are actually doing?

Thus, I threw myself into both understanding the philosophical justifications for punishment, and understanding what is happening on the ground in prisons, courts, and elsewhere in the "penal landscape."[3] Over the course of my research process, I found that the extant literature tended to be either lost in the details of practice and policy or was problematically divorced from the material realities in its quest for conceptual clarity and elegance. Further, as I dug into the history and theory of American punishment, I found that while every moment of major transition (for example, the emergence of the prison as

---

3 James, Joy. *Warfare in the American Homeland : Policing and Prison in a Penal Democracy.* Durham: Duke University Press, 2007. "Introduction."

the dominant penal structure) in the criminal justice system was intimately connected with ideological structures of racial domination, there was strikingly little investigation from the perspective of political theory into the constitutive force that these structures have.[4] This project attempts to produce a critical account of American punishment that takes seriously the materialist conditions of punishment and the ideological structures that are both reflective and constructive of these conditions. I argue that the tension between these positions reveals the centrality of punishment in legitimating state action, constructing and maintaining a white supremacist order—while appearing to have been moving ever forward on civil rights issues—and in the making of the "nation" itself. Punishment, itself then, provides a “case” of sorts, to investigate the relationship of freedom and unfreedom in the modern world.

**I. American Punishment as a Colonial Project?**

There are significant gaps in how race is treated in accounts of punishment—often race is reduced to a social fact, a variable, if a damning one. Racial groups are treated as static and homogenous, even where race is acknowledged to be socially constructed. It seems clear, however, that visions of race have, across time, been a cornerstone of the dominant ideology that was instrumental in producing normative values, institutions, and practices of American penality, but also that in this American history, race is the central, but not unique oppressive structure. Instead, when taken in its full complexity, the social relations that characterize this history are best understood as part of a colonial relationship wherein the punished—predominantly poor, powerless people of color—are

4 Work by Angela Davis and Joy James presents an exception, and I found that this was the task that this dissertation needed to take up.

constructed in the position of colonized, and the judging dominant culture—predominantly white, monied, and powerful—assume the role the colonizers. Building a critical theory of American punishment that is grounded in both critical race theory and post-colonial theory provides a theoretical richness that makes a materialist, critical assessment possible. In this dissertation, I am interested in understanding the work that Othering, racial ideology, and racial identification do (and has done) in creating and recreating the American system of punishment, and how this in turn has functioned to re-create oppressive hierarchies across society.

In *The Colonizer and the Colonized*, Albert Memmi describes a colonial relationship wherein the colonizer, buttressed by and buttressing the power of the state, creates a political reality (encompassing ideology, institutions, and political practice) that functions to uphold the asserted legitimacy of this reality, which permits it to continue functioning. In examining the character of the colonial relation, Memmi argues that it is the unjust oppression that creates the society that the oppressor wishes to uphold (politically and economically, especially), but the reality of this creates an untenable position for the oppressor, who wishes not only to see his status as justified, but also wishes to be absolved of responsibility for the violence he is enacting against the colonized population. Memmi describes one of the possible responses to this conundrum in his portrait of "the colonizer who accepts. This character is haunted by the "Nero complex," wherein the colonizer knows deeply that he is a "usurper," but desires his triumph so deeply that he must re-narrate the world to tell a story where his usurpation disappears,

> "One attempt can be made by demonstrating the usurper's eminent merits, so eminent that they deserve such compensation. Another is to harp on the usurped's demerits, so deep that they cannot help leading to misfortune. His disquiet and resulting thirst for justification require the usurper to extol himself to the skies and to drive the usurped below the ground at the same time. In effect, these two attempts at legitimacy are actually inseparable.
> Moreover, the more the usurped is downtrodden, the more the usurper triumphs and, thereafter, confirms his guilt and established his self-condemnation. Thus, the momentum of this mechanism for defense propels itself and worsens as it continues to move. This self-defeating process pushes the usurper to go one step further; to wish the disappearance of the usurped, whose very existence causes him to take the role of usurper, and whose heavier and heavier oppression makes him more and more an oppressor himself.... "[5]

In the modern American context, the categories of colonizer and colonized are amorphous, but traceable—and are transposed into the relationship of the innocent to the criminal. The image of criminal replaces the image of the person; criminality is treated as endemic rather than incidental thereby creating a class of individuals for whom punishment is reserved. This can also be mapped onto the ways the race and punishment have been mutually constructive as a key element in supporting the dominant American political structure. This colonizer/colonized relationship is also always marked by racism, in that the colonized group are marked as incapable of equality and thus not requiring it, "Racism sums up and symbolizes the fundamental relation which unites colonialist and colonized."[6] The position of the colonized—here, the punished—makes treatment that is inimical to justice natural and even virtuous. To harm the criminal is to treat him as he deserves, to remove the criminal from the civic sphere is proper because he can only corrupt the political process, to reduce the criminal to an utter object is necessary to salvage meaningful subjectivity. Giving an example of the differential

5 Memmi, Albert. *The Colonizer and the Colonized*. 1st American ed. New York,: Orion Press, 1965. 52.
6 Memmi. *The Colonizer and the Colonized.* 70.

justice of the colonized, Memmi relates an anecdote, "An author was recently humorously telling us how rebelling natives were driven like game toward huge cages. The fact that someone had conceived and then dared build those cages, and even more, that reporters had been allowed to photograph the fighting, certainly proves that the spectacle had contained nothing human."[7] The punished are stripped of their humanity, and in the stripping the punishers forfeit theirs.

In this analysis, the racial character of the American system of punishment can be interpreted through Memmi's colonizer/colonized framework, but this still requires a complex analysis of how race is mobilized in this framework. The use of the framework of the colonial relation rather than strictly a race framework, despite the fact that Blackness has been the central focus of American penality,[8] makes more evident the structural plasticity of penal oppression. The boundaries of the criminal are fluid, constructed against an imaginary and shifting ideal—where convenience and utility for the colonizer is the only reliable measure. Though my analysis is structured centrally around an analysis of racism (as Memmi himself argues is crucial for any colonial analysis), the colonialist framework, particularly when deployed in an analysis in the US, obviates a multi-dimensionality that otherwise might be somewhat subsumed. The colonialist framework captures the intersectionality of the penal designation. Criminality is described by blackness, but also by certain understandings of poverty, masculinity, and deviance. The contours of this criminality are only understandable when parsed from the logic of the colony—that certain people exist for the use of others, and that this logic

7 Memmi, *The Colonizer and the Colonized.* 87.

8 By penality, I mean the focus of the state power to punish. Though there are multiple genealogies from which punishment might be derived, I argue that the dominant strain *must* be understood from the construction of blackness itself. I take up this argument more fully in the next chapter.

requires defending. The colonialist framework also speaks to the emergence of "post-racial" constructions of criminality, that construct the criminal outside of the structures from which s/he emerged.

**II. Making Race, Making Punishment**

"Race and racism are centrally about seeking, or contesting, power," argues Ian Haney Lopez in his revised investigation into the legal construction of race,[9] and it is this wielding of power in which I am most interested. Racism does not emerge from mere human impression (the sensory experience that people with different phenotypes are fundamentally different). Rather, the idea of difference is constructed around economic, social, and political agendas. These differences have become reified, where symbolic differences (i.e. skin tone, eye shape, parenthood) have become essentialized objects in themselves,[10] and that naturalization obscures the power relations—as the relative positions seem to be a matter of course. Through the domination of this binary, other races as well as ethnicities have been subsumed under the White/Not-white paradigm. Under white supremacy, Non-whiteness is identified as problematic, deviant, criminal, dangerous, and unruly; whiteness is identified as valuable, virtuous, orderly, and normal. Blackness takes on a unique position in this relationship as it is posited as the apotheosis of whiteness, all other racial and ethnic identities are subsumed along the spectrum. However, this spectrum is not fixed. Racial groups are "unstable categories,"[11] the boundaries shift, social meanings shift, and the institutions and practices grounded in racial hierarchy shift. Further, outside of all but the truly totalitarian society, racial

9 Haney-Lopez, Ian. 2006. *White By Law* New York: New York University Press.
10 See Garner, Steve. 2007. *Whiteness: An Introduction.* New York: Routledge. Particularly pp 1-10.
11 Haney-Lopez, xxii.

categorization is contested—by diverse external interests, competing power hierarchies, and by those who push back against dominant culture. Therefore it is a constant political, economic, and social process to produce and reproduce categories of control—but it is important to note that this is not an even playing field. The characteristics of these relations come into sharp relief when dealing with punishment because it is a site where the naked power of the state becomes apparent.

The power to punish in many ways defines the state itself. Criminal punishment, in particular perhaps, even refines Weber's argument that the state is that entity that holds a "monopoly on the legitimate use of physical force."[12] There are two main ways this is so. First, the state is often conceptualized as both legitimated and necessary through criminal justice functions. We are protected from criminality by the state. Second, when this kind of use of physical violence is used against a state's "own people," and it is accepted as legitimate, it further supports the power of the state itself. In this way, criminal punishment becomes a central organizing principle. In America, this boundary has always been racialized. Despite the whitewashing of the American founding, people of color-- Natives and people of African descent were an integral part of the story from the beginning. When the first African slaves were brought to Jamestown in 1619, it was far from certain that the colony would persist;[13] in describing the legal treatment of Native peoples, Rennard Strickland describes Georgia's passing of a law legalizing the killing of Indians by colonists, "by declaring Indians to be outlaws, beyond the protection of the law."[14] The political emergence of the new state was marked by the development

12 Weber, Max. "Political as a vocation."

13 Appelbaum, Robert, and John Wood Sweet. *Envisioning an English Empire: Jamestown and the Making of the North Atlantic World*. University of Pennsylvania Press, 2005.

14 Strickland, Rennard J. "Genocide-at-Law: An Historic and Contemporary View of the Native American

of penal apparati in service to white supremacist ambitions. The colonized and the colonizer emerged in the act of colonizing, and in the process also became American.

The necessity of the slave economy to the burgeoning American state required a number of creative legal constructions that were designed to effectively use state power to control the enslaved population while at the same time denying their personhood. Saidiyah Hartman documents the paradoxical position of the slave as a

> "subject who is socially dead and legally recognized as human only to the degree that he is criminally culpable. […] the notable features of this [...slavery] are: the slave cannot be a witness against a white person, either in a civil or criminal cause; the slave cannot be party to a civil suit; the benefits of education are withheld from the slave; the means for moral or religious education are not granted to the enslaved; submission is required of the enslaved, not to the will of his master only but to that of all other white persons; the penal codes of the slave-holding states bear much more severely on slaves than upon white persons; and slaves are prosecuted and tried upon criminal accusations in a manner inconsistent with the rights of humanity."*(emphasis mine)*[15]

The enslaved person, and by extension most people of African descent, for the first three-quarters of a century, are literally only considered by the law to be people to the extent of their criminality. The state only recognized these people as penal subjects—not civil subjects, or entities who are identified as citizen-subjects.

Further, race is not an exclusive category, separable from other systems of power and domination. Instead, I follow Adolph Reed in arguing that race and class are "equivalent and overlapping elements within a singular system of social power and stratification."[16] Though race is the primary category through which penal ideology in the United States is constructed, this cannot be separated from interconnected structures

---

Experience." *University of Kansas Law Review* 34, no. 4 (1986): 713-56. pp. 720.

15 Hartman, Saidiya V. *Scenes of Subjection : Terror, Slavery, and Self-Making in Nineteenth-Century America*. Race and American Culture. New York: Oxford University Press, 1997.

16 Reed, Adolph. "Unraveling the Relation of Race and Class in American Politics." *Political Power and Social Theory* 15 (2002): 265-74. . pp. 266.

of power, including class and gender. The confluence of these fluctuating classifications makes up the category of colonizer, and the structural difference from that imagined ideal identifies the qualities of the colonized. Throughout this dissertation, I will be discussing these intersections as they are materially important. For example, the division of the poor along color-lines has been an obstacle of organizing, but also as a means for poor whites to retain or gain access to relative power and privilege. In her landmark article, "Whiteness as Property," Cheryl Harris outlines the distinction of Black human beings being legally defined as property-objects, while whiteness itself ought to be regarded as a type of property that is possessed and wielded—this distinction has material consequences for the creation of the penal binary—one who is rightfully a punisher, or one who is rightfully punished.[17] In a more contradictory form, there is also particular importance in constructions of masculinity. At the intersection of race and gender, black masculinity is stereotyped as uniquely dangerous, grounded in an aggressive sexuality that threatens to destroy the sane white world through rape.[18] This is posited against a 'safe,' but also dominant white masculinity that is the legitimate patriarch, this archetypal Man in fact cannot be a criminal because he has sanctioned rights to all land, properties, and bodies. This binary gives particular insight into the ways that identical acts can be categorized as criminal or lawful, depending on the concurrent category of the actor—think for example of the accounts of "looting" or "foraging for survival" in the wake of Hurricane Katrina. These points of intersection will be discussed throughout this dissertation, but will be taken up in a systematic way in chapter five.

---

17 Harris, Cheryl I. "Whiteness as property." Harv. L. Rev. 106 (1992): 1707.

18 Muhammad, Khalil Gibran. The *Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America.* Harvard University Press, 2010.

This construction of the penal subject as a colonized subject is where I begin with my analysis of how race and punishment have been mutually constitutive in American history in chapter 2 of this dissertation. I argue that the American state derived its legitimacy—and thus actually becomes the state—through this colonial-esque complex of discourses, institution building, and ideological domination. Throughout the subsequent chapters of this project, I continue to develop and articulate this theory of race, as I look at how the penal subject is developed, how the liberal-republican citizen is developed, and the ways in which the human-subject has been posited within this context.

**III. Methodological Approach**

This frame is then employed in an analysis of dominating conceptions of punishment as well as ways that those conceptions have manifested in various realms across society, including the legal system, popular culture, and in various historical 'moments.' There are a number of past and present historians producing crucial accounts of the role of punishment in race-making and state-making.[19] It is important to note here that I am relying on this work, but that my claims are critical and interpretive. Similarly, there are a number of sociologists who have also investigated the world of punishment (though much of this work has tended to resist the centrality of race in the American system of punishment) to great effect, but this work too has resisted materialist theorizing.[20]

Instead, the contributions I seek to make, and that I believe can best be made from

---

19 Oshinsky, David M. *Worse Than Slavery*. Free Press, 2008.; Perkinson, Robert. *Texas Tough: The Rise of America's Prison Empire*. Metropolitan Books, 2010.

20 Garland, David. *Mass Imprisonment: Social Causes and Consequences*. Sage Publications Limited, 2001.; Wacquant, Loïc. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Duke University Press Books, 2009.

a theoretical perspective are these: One, I offer an account of punishment as constituted through institutions, ideology, and culture, and power; this account is understood through the category of a colonial style racial domination that is at the heart of every material instant of American penality. Two, I develop an account of American citizenship that is constructed through and against race-affiliation and criminality. Three, I situate this racialized, law-and-order citizenship in the context of dehumanization, objectification, and reification, with the results of contributing to the discussion of how politics produces and reproduces human relations. Four, I then build a critique that focuses on identifying locations of resistance to this reification, building towards a practical politics of liberation.

**IV. Breakdown of Chapters**

The structure of this dissertation reflects the tension that is present in the competing developmental narratives. Each chapter has two threads, but in the telling they become one; I am using the visual symbol of a double helix that ultimately converges into one strand. The first thread of each chapter is one of the dominant justifications for punishment: retribution, deterrence, and utilitarian motives (chapters two, three, and four, successively). The second thread of each chapter examines the work that punishment is doing in an ideological sense. In the second chapter, I build an account of race in American punishment that focuses on the political functions of blackness. In the third chapter, I build on that account to discuss the role of punishment and race in the construction of citizenship. In the fourth chapter, I ground this account of a racialized penal citizenship in a more fundamental context of the subject-object divide

as developed in the tradition of critical theory. In the fifth chapter, I integrate these multiple threads into a critical theory of American punishment that argues for the centrality of race in punishment, and the centrality of punishment to both the American political and psychological being.

To be more expansive, in Chapter 2, I reconstruct American white supremacy as a project of retribution. Retribution is about the act of giving to a guilty actor what s/he[21] deserves. The ideology of slavery, Jim Crow, and even contemporary punishment, which together are best understood as a continuing colonial project, is that the one who suffers is getting what s/he deserves. To be a slave is to be punished already, to be punished is to have done something that deserved it. Thereby, the colonized position itself is pre-politically constructed as a crime. In this chapter, I examine ways that desert and the act of retribution have been mobilized across history, philosphy, and in contemporary culture. Early American conceptions of retribution are deeply religious in nature, in this chapter I look at the relationship between the theological structures of retribution and how these ideas were imported and transformed as American political practice was secularized. I analyze the history of lynch law as a phenomenon that was dominated by the rhetoric of retribution. I also examine sites where retributive language has been used in American legal contexts, particularly in capital jurisprudence in both recent and non-recent history. I then turn to contemporary cultural artifacts (in this chapter, films and television) to examine the ways that retributive sentiments manifest in the present imagination.

Through all this, I push against the grain to draw out the racialized history here. I

21 These forms of punishment are explicitly gendered constructions, with a black masculinity becoming the focus in some locations of analysis. Therefore, when I am indicating a gendered construction, I will use "he" as the generic pronoun. When I am simply using a pronoun to indicate an imagined person of either gender, I will use s/he.

locate the ways that retributive themes have had constructive influence on the ideological and institutional forms of punishment, but also on the American conception of race itself, and the construction of an irredeemable colonized Other. Retribution has its deepest roots in the fact of sin. The imagined sin must be grave in order to require such awesome recompense as slavery, lynching and the convict lease system; indeed, the imagining itself must be profound. I conclude this chapter by arguing for the inextricability of conceptions of race from retributive ideology in the American dominant order and a further exploration of the utility of the frame of colonial theory. Also here, I begin to complicate the notion of race by beginning to specify the roles that constructions of blackness and whiteness, the colonized and the colonizer, have played in the origins of concepts of desert and connect these constructions to identifiable policy areas. In the discussion of this chapter, I also return to complicate my assertions in how they might be understood beyond the American context.

In chapter three, I turn to deterrence and the role of deterrent punishment in the making of a colonial liberal citizenship, primarily structured through white supremacy. Deterrence, as a justification for punishment, is conceptually linked to liberal political theory. In Locke's theory of politics, one of the primary reasons for the creation of the political union is so that punishment might be depersonalized and thereby more likely to secure the rights of the citizenry.[22] However, also fundamental to this theory is that there is a distinct line between those deserving of rights and those who are fit for use in the securing of others' rights. Locke defines this line as humanity itself, but as I demonstrate,

22 Locke, John. *The Second Treatise of Government and a Letter Concerning Toleration.* Dover Publications, 2002.

both in Locke's work and in American ideological history, this line has always been contingent—and one of those contingencies has always been the racial status of s/he who is subject to the scrutiny of the power. In this chapter, I examine the other "twin infamy,"[23] convict-leasing practices, both as a case that illustrates the slippery status of citizen-as-rights-bearer in the context of criminal justice, and as a transitional penal structure. I focus on the tenuousness of the rule of law, and the mechanisms by which criminal punishment is validated. I then turn to the contemporary case of Three-Strikes Laws that emerged in the 1990s, with a special focus on the California law, which has spawned some of the most remarkable and well-known results.[24] One of the central contributions of this chapter is to propose a model of how race-biased practices have been transformed to appear race-neutral on their face—while retaining the internal logic and external effect of reinforcing the race-based domination of people of color. I also push further here on the construction of whiteness as against non-whiteness that has complicated this scenario beyond a black/white story. I conclude by re-articulating American citizenship as a structure bounded by race and the construction of criminality.

In the fourth chapter, I turn to utilitarianist justifications for punishment. Here I argue that through a utilitarian framework, it is most easy to see the absence of a coherent logic for the contemporary penal system---other than one set on reproducing the extant social order. Indeed, the utilitarian frame has created the conditions for the reduction of

---

23 Frederick Douglass famously called lynch law and the convict lease system "twin infamies" of the post-Reconstruction era.

24 See the case of Jerry DeWayne Williams, the "pizza thief," who was sentenced to twenty five years in prison after stealing a slice of pizza at a picnic. Williams was ultimately released after approximately five years, though could face a life sentence if he stole another slice. Leonard, Jack. *"Pizza thief" walks the line.* Los Angeles Times. February 10, 2010, available at http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10

punishment to a set of practices that are in many ways divorced from any material consideration of public welfare, the traditional normative goal of state policing powers. The utilitarian vision, probably the most visibly recognizable in its structures, with Bentham's panopticon, replaces external goals for punishment—safety, social harmony, behavioral correction—with an internal logic that reconfigures the object of punishment as the ultimate Object. This chapter centers on an analysis of the move towards incapacitation, or the idea that prisons have the central goal of keeping criminals from committing crimes,[25] as the primary goal of incarceration, with particular attention to the mundane use of solitary confinement. From here, I discuss the obscuring consequences of a penal utilitarianism grounded in racist ideology. This builds towards a discussion of the way that American penality legitimates an ever more dehumanizing set of practices and logics—without being recognized as such. Under this logic, criminals can be used to whatever end, but also under this framework, the ends themselves have justifiable purpose. Instead, the purpose becomes circular: prisoners can be treated in any such way because they are prisoners who are deserving of being treated in this way. I use a critical theory framework to expand on the mechanisms of dehumanization, objectification, and reification, tying the material reality of contemporary punishment to the processes of ideological reproduction of the state.

In the fifth chapter, I tether together these arguments to build a critical theory of American punishment. A critical theory attempts to a.) produce an account of a phenomenon that is sensitive to the relevant and multiple constitutive elements, such as

25 This attitude also has the effect of reinforcing criminals as not worthy of protection, as prisons are understood to be locations of violence—criminals are not incapacitated from committing crimes, they are incapacitated from committing crimes against people who matter.

ideology, economics, social structures, power relations, and institutions, and b.) also seeks to criticize that structure. This critique is grounded in a material interest in human self-determination radically construed. Therefore, in this chapter, I unite the different parts of the story of American punishment that I have developed in the second, third, and fourth chapters, and weave this narrative into the broader political context—discussing the ways in which this dynamic is also about gender and class, and identifying specific mechanisms by which it is currently being reproduced. I explore the relationship between what Foucault refers to as "legality" and "illegality" in this world where these forms have a material existence grounded penal logic, but not reducible to it. I also subject this narrative to a critique that seeks to both reveal the dominating logics, and also how those logics work to reinforce themselves and undermine movements towards "thick" democracy, social liberation, and personal self-determination. I conclude this chapter by identifying specific spaces, large and small, where resistance might be both possible and effective.

In a short conclusion chapter, I review my conclusions and contributions, and identify areas for practice and for further research. Also in this conclusion, I reflect on the epigraph that prefaced this dissertation, "Men simply copied the realities of their hearts when they built prisons."[26] I return to Wright's novel, reflecting on the brilliant rage that answers American penality, recognizing the human suffering that is, at its core, the subject matter of this project.

**V. Conclusion**

The American political tradition has been characterized by what Angela Davis

26 Wright, Richard. *The Outsider*.

refers to as an "enduring philosophical emphasis on the idea of freedom alongside an equally pervasive failure to acknowledge the denial of freedom to entire categories of real, social human beings."[27] Nowhere is this more true than in the case of American punishment. Indeed, when one looks at the historical and present condition of the American criminal justice system, the paradox is even more profound than the one Davis suggests. Rather than existing in parallel, the freedom offered through justice in the United States is itself posited in such a way that it does not reside *alongside* the denial of freedom to certain categories of people, but is conceptually, politically, and existentially *contingent* on that denial. The organization of this denial of freedom begins with the structure of the American social order—or more specifically, a historical ordering of domination and exploitation—and is repeated and continuous across social and political relations, primarily in constructions of a racial hierarchy, but also in class, ethnicity, and gender.[28] This was true at the founding of the modern state, in the balancing of Constitutional freedom on the three-fifths margin, and it continues to be true, though in different forms, as the reliance on "mass imprisonment"[29] (of African-American men) has come to characterize American justice.

In this dissertation, I develop an account of American punishment that holds constant both the idealized, normative vision of the state's penal power and those categories of "real, social human beings" whose lives are structured by it. This account

---

27 Davis, Angela Yvonne, and Joy James. "Unfinished Lecture on Liberation." *The Angela Y. Davis Reader.* Blackwell Publishers, *1998.*

28 In Chapter Two of this dissertation, I argue that race and punishment must be understood as mutually constituted, an extensive review of the literature is employed in this argument.

29 "Mass imprisonment" is defined by sociologist, David Garland, as the systematic imprisonment of whole groups of the population." "Introduction." *Mass Imprisonment: Social Causes and Consequences* ed. by David Garland pg. 2

of punishment argues that the conceptual structures of American punishment itself are identified through an order that resembles the colonial relationship, particularly as described in Memmi's typology *The Colonizer and the Colonized.* Further, that punishment and a racialized criminality define the boundaries of citizenship, and that the existential struggle for self-determination is legitimated or denied through the structures of the racialized colonial order and punishment. Understanding punishment in this way reveals the criminal justice system to be fundamentally inimical to any modern vision of justice—including the one proffered by the dominant order in the first place. In *Discipline and Punish*, Foucault argued that the construction of the modern system of discipline posits an image of conformity that is fundamentally impossible—thereby defining all actual individuals as deviant—and thus potential and legitimate objects of the penal apparatus.[30] However, casting us all as penal objects obscures the fact that some of "us" are actually in prison and some of "us" are not, and further, that these material conditions are heavily determined by deeply embedded ideological, institutional, and practical structures.

The current American criminal justice system and its primary means of punishment, incarceration, is at a profound crisis point. With more than 2.4 million people incarcerated on any given day, the United States currently incarcerates more people than any other nation has at any time in human history.[31] It is even easier to marshall disturbing statistics on racial disparities in this system: an African American

30 Noting of course, that one of the most incisive critiques of *Discipline and Punish* is that Foucault failed to appropriately recognize that deviance is still a relative construction—thus the penal apparatus is more actually dangerous to some than others. We may all be imprisoned by our circumstances, but some people are actually imprisoned. For an important discussion of this, see Joy James *Warfare in the American Homeland.*

31 Mauer, Marc. *Race to Incarcerate*. The New Press, 2006.

man has a one in four chance of being incarcerated at some point in his life;[32] the US incarcerates African Americans at nearly six times the rate that black South Africans were incarcerated under Apartheid;[33] in many urban neighborhoods, one in three young black men is, at any give moment, under the supervision of a criminal justice organization (probation, parole, or incarceration).[34] These snapshots offer a glimpse into the phenomenon dubbed "mass imprisonment,"[35] which is defined by sociologist, David Garland, as the systematic imprisonment of whole groups of the population, "specifically, African American and other minority groups."[36] Indeed, the effects of the current levels of criminal justice supervision have penetrated every facet of life in many African-American communities: education, healthcare, housing, and employment—and indeed the quality of communities in their entirety.[37] There are just a few of the spheres that have been shown to have assumed penal characteristics.

Over the past decade, there have been a number of important investigations into the system of mass incarceration and the emergence of a total system of policing. However, critiques of this system have not effectively situated a materially understood American punishment in a context that fully captures the nature and consequences of punishment as a political process that is characterized by the interplay between institutions and ideology. While other works have effectively documented the role of

---

32 Ibid.
33 Ibid.
34 Ibid.
35 Pager, Devah. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. University of Chicago Press, 2007.
36 Garland, David. *Mass Imprisonment: Social Causes and Consequences*. Sage Publications Limited, 2001. pg. 2
37 Clear, Todd R. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. Oxford University Press, USA, 2007.

race in the criminal justice system[38] and the role of punishment in the late modern state,[39] this dissertation seeks to provide a critical account of American punishment that captures the dialectical relationship between ideology, institutions, and practice. By placing these relations within a coherent account of American democracy, American citizenship, and the fraught history of racial domination that has characterized much of American history, I provide grounds for a critique that captures both immediate conditional effects and the deep political consequences of the system, as well as a means for understanding how the ideological vision interacts with the material conditions. This investigation into the American case also creates a location for further analysis and critique of the meanings of punishment in modern society, the exercise of power on the body, and how race is mobilized to justify oppression. The conclusions that can be draw from these investigations begin to call into question the project of the American nation-state as a political organ, in other words, if through governing, people become less free, then how can that governing defend its own existence.

Specifically, I argue that the American system of punishment is best understood as a material consequence of a system of sociopolitical oppression that is grounded in social relations much like those theorized by Albert Memmi in his "portraits" of the colonizer and the colonized. Social relations in a colonial-style order, as Memmi argued, must be articulated through a complex account of the work that the American racial order has done in constituting the American conception and practice of punishment. At their core, these logics of this hierarchical order serve to legitimate state and social oppression and

38 Alexander, Michelle. *The New Jim Crow.* New Press, 2012.
39 Garland, David. The *Culture of Control: Crime and Social Order in Contemporary Society.* University of Chicago Press, 2002.

undermine the possibilities for human freedom. By understanding punishment as it has developed, in its historical, economic, social, and ideological structures, points of incongruity, oppression, and harm can be identified and indicted.

Through the combination of this theoretical framework and the further insight drawn from each of the cases, a renewed perspective on the underlying structures of the American system of punishment is constructed thus providing a stronger foundation for political and policy-oriented critique. As noted criminologist Franklin Zimring has claimed, the contemporary practice of incapacitative incarceration in the United States is "a practice in search of a theory."[40] This dissertation argues that there is a coherent theoretical explanation underlying contemporary punishment, but that it is an underpinning that is intolerable to a just society and is indeed self-contradictory—and thus in dire need of reconsideration, re-theorizing, and renovation.

40 Zimring, Franklin, and Gordon Hawkins. *Incapacitation: Penal Confinement and the Restraint of Crime.* Oxford University Press, USA, 1997.

## Chapter 2

## What Justice Demands: Retribution, Rationality and the Colony

Retributivism, the idea that punishment is justified and/or purposed as recompense for illicit deeds, is one of the most persistent and dominant conceptions of just punishment. Whether we deserve to be left alone, to be supported, to be harmed, or to be praised, figuring out what is deserved and how to transform that normative ideal into practical politics is a core concern of normative constructions of justice. In an actual political community, the doling out of punishments and rewards has a variety of functions, from creating/maintaining social order(s), to legitimating the power structure itself.[1] Throughout this dissertation, I argue that across American history, punishment has been used to create and maintain an internal, colonial-style order, instead of promoting any modern vision of a just democratic society. I also argue that the dominant and persistent normative accounts of punishment, retribution, deterrence, and utilitarian approaches, function not as utopian goalposts or foils against which we can measure our success,[2] but rather provide political legitimacy for oppressive hegemonic structures that run counter to the narrative by which the US legitimates itself—most notably creating a narrative that naturalizes and thus justifies the colonial-style hierarchy that orders the world along race, class, gender, and ethnic lines.

In this chapter, I argue that retribution, perhaps the oldest justification for punishment, functions as a key element in creating this ideological, historical, and institutional order. Specifically, I use retribution as a frame for investigating how

---

1 Mcbride, Keally. *Punishment and Political Order.* 2007. University of Michigan Press.

2 See Shklar's discussion of the political uses of utopia in *Men and Citizens.* Shklar, Judith N. *Men and citizens: A study of Rousseau's social theory.* Cambridge University Press, 1985.

punishment and political legitimacy (and illegitimacy) are mutually constitutive, and how that relationship has functioned across ideology, institutions, and practice. The central contribution of this chapter is to build toward a critique of punishment itself—not simply how we punish, or who we punish—but how punishment itself has been constructed in the United States of America. I claim that an imagined and posited whiteness absolves, and an equally fictive suspect identity, centered on blackness, condemns. These divisions are ordered along the structural line of what I identify as a colonial-style order wherein the poor, young, black, male, the "superpredator,"[3] is constructed as both utterly deserving of punishment, as well as being fundamentally incompatible with lawful society. In this order, the extent to which one's identity is aligned or opposed to the ideal model determines the extent of one's deservingness for punishment or reward. This ordering is not a simple linear function, working on a spectrum of black to white, but works multidimensionally, across a number of intersecting and interacting political categorizations including race, class, gender, geography, and personal expression. Despite the complexity of the framework, it does, however, persist in functioning to maintain the extant political order that has been long characterized by white, male, capitalist supremacy. Punishment, thereby, is conceptualized, articulated, and employed within this colonial framework—it is divorced from material measures of harm, and instead has been used to legitimate and maintain anti-democratic impulses across American history and into the present. Further, this construction of state punishment resists critique; unlike the most obvious examples white

[3] Templeton, Robyn. "Superscapegoating: Teen 'superpredators' hype set stage for draconian legislation." http://www.fair.org/index.php?page=1414

supremacy (for example, explicitly racist language, race-based violence), which on its face has been condemned in dominant culture, lawful punishment for criminality retains legitimacy to the extent that it can be shown to accord with even the most superficial trappings of the rule of law.

Punishment is seen as a central operator in the functioning of a just order, and the necessity of this function is all but universally accepted.[4] By couching this system of oppression in the discourse of a reasonably legitimate social order, the oppressive nature of the prison system is made to seem natural, appropriate, and even just. By obscuring this colonial order, the US is able to defend its actions as in defense of the democratic common good, and even of justice itself. The colonizer has made the colony disappear.[5]

In building this critique, this chapter follows in this structure: first, I discuss the background of retribution as a justification for punishment in politics and philosophy. I then construct a theoretical framework that juxtaposes the normative vision of retribution with a theory of colonial ideology in punishment. This colonial framework begins with race, but extends to class and other categories as well.[6] The colonial framework is necessary because it is under this broad conception that ideology can be most effectively

---

[4] The widespread acceptance of the state's right to punish in the way it does is evidenced by the aggression faced by prison abolition groups.

[5] In *The Colonizer and the Colonized,* Memmi argues that the colonizer harbors a deep desire for the colonized to disappear, thus expiating his sins—but this cannot happen because the colonizer requires the labor/resources of the colonized to continue his existence. In this case, the colonizer has succeeded in obscuring the colonized through positioning the colonized as justifiably in his position.

[6] In the section itself, I will discuss the understanding of race, however for brevity's sake, at this point, I am following Martinot's assertion that ""Race" is something that one group of people does to others. In the hierarchy of "race," one group racializes another by thrusting them down to subordinate levels in a dehumanization process. In the "materiality of history" (as Kincheloe and Steinberg [1998, 5] put it), "race" is something that Europeans, in the course of the colonization of other people, have done to those people. "To racialize" and "to humanize" stand opposite each other, in contradiction (Fanon 1967)." Martinot, Steve. *The Machinery of Whiteness: Studies in the Structure of Racialization*. Temple University Press, 2010. *Philadelphia*: Temple University Press. pp. 10

interrogated. I then use this framework to analyze a pair of cases wherein retribution is mobilized. The two cases both focus on forms of collective killing: the historical phenomenon of lynch law, and the legal case of the limits of capital punishment. I argue that in these cases, the retribution offered is a pre-modern vengeance, not a penal justification coherent under modern democractic values defended as central to the American ethos. At the same time, however, the operation of vengeance in contemporary punishment resists critique as it is clothed in the discourse of retribution. The reasoning for each of these cases is discussed at the start of each section. Following the case analysis, I complicate my argument by re-contextualizing retribution within the instant system of criminal justice and the broader context of the American political order. I conclude this chapter by re-emphasizing the necessary critical moments upon which I will continue to build the dissertation.

**I. Background of Retributivism as a Penal Justification**

*Lex talionis,* or the law of retribution, is perhaps both the simplest and most complex justification for punishment. Having a legitimating ideology is necessary for state punishment to persist in a democratic state; these ideologies construct locking people in cages and sometimes even killing them as not only possible, but necessary to the success of the just community. Retribution, as one of these ideological constructions, is often seen as both comprehensible and necessary. "An eye for an eye," the classic construction of retribution, is considered by some to be enough of a justificatory narrative on its own, not requiring any further philosophical formulation. Retribution offers a sense of finality or integrity that renders the retributive act impervious to examination

and indeed requiring of no further intellectual frame—there is intuitive and emotional satisfaction in the concept. However, through examining how retribution and retributive themes have been mobilized in actual penal policy, historical events, and culture, it becomes clear that instead, retribution is profoundly complex. Retribution, despite the seemingly mathematical approach of proportionality,[7] is revealed to be inseparable from the hegemonic ideologies of the local ethos.

When looking at retribution as it has been mobilized as a justification for punishment, I argue that the American state uses retributive narratives to justify the production and reproduction of a colonizing political hierarchy, rather than the protection of democratically defensible political goals such as equality of opportunity, due process, or public safety. Penal policies have, across American history, tended to re-inscribe the racial order, functioning to develop, institutionalize, legitimate, and essentialize white supremacist articulations of a racial binary wherein the mark of the colonized, with blackness as its most essential characteristic, is identified with criminality.[8] This has meant that as penal institutions and practices have developed, they have tended to reproduce the racist, classist, and sexist political contexts from which they emerged. However, through constructing deservingness as inextricable from the colonialized category, a politically defensible discourse masks the reproduction of systemic inequality.

The dichotomy between justifying language and unjustifiable act, present throughout American history (one must only look to the stark contrast between the

---

[7] Proportionality, or the idea that the punishment should "fit" the crime, is one of the core tenets of modern retributive theories of punishment. The idea that the right amount of punishment should and can be discovered is one of the base elements of retributive theory.

[8] Please refer back to the introduction of this dissertation for a more complete discussion of this colonial-style category

language of the Declaration of Independence and the quickly following Three-Fifths Compromise to get a sense of this tension), became less possible to discern as the criminal justice system turned in the post-Civil Rights Act era towards *prima facie* race-neutral policies. One of the central consequences of this is that transgressions against the racial and colonial order displace acts that would be identifiable as transgressions against the rights of individuals or the state under a coherent retributive discourse. However, this shift is obscured by the deployment of a logic of retribution. However, as I argue in this chapter, the retribution deployed is not defensible under democratic ideals, but rather is an reconstructed collective vengeance aimed at legitimating the use of force to maintain the colonial order. This is because the way that punishment is administered is not a matter of failing to actualize legitimate regulatory ideals, but rather the retribution proferred is qualitatively different than any defensible ideal.

The paradox, wherein American dominant culture imagines itself to be oriented toward (if not emblematic of) democratic values enshrined in the US Constitution: freedom of conscience, speech, self-determination, the rule of law, democratic equality, while at the same time reproducing and defending this colonial order—is rendered unrecognizable because retribution is a matter of desert.[9] That is, under retributive theory, the state has the right to harm a person because they deserve it.[10] Further, the punishment that is deserved, once carried out, will bring about an objective benefit, most

---

[9] Though an unusual form of the word, "desert" refers to the singular idea of what is deserved.

[10] Developing from Kant's conception of punishment as payment for a debt incurred, contemporary philosophers of retribution have suggested that the state may or must retribute because certain offenses are in fact "incompensible" through other means (such as tort law). The idea of retribution has been hotly debated among legal philosophers since H.L.A. Hart sidestepped it in 1968's *Punishment and Responsibility (*Hart, H. LA. *Punishment and responsibility.* Wadsworth Publ. Co., 1985*.)*. For more recent work, see Murphy, Jeffrie. *Retribution Reconsidered: More Essays in the Philosophy of Law.* Springer. 1992.

commonly imagined as a just community.[11] By constructing punishment through retributive discourse, legitimacy is conferred discursively where it would not be possible materially.

In their ideal construction, retributive philosophies hinge on the idea that the punishment that is deserved is objectively knowable, that there is a clear, calculable way to ensure that the punishment fits the crime. In "an eye for an eye, a tooth for a tooth," retributive philosophy describes a rational sense of order; it gives us the sense that justice is possible in this world and that it emerges from our intuitive understanding of it. But even in the Book of Exodus, this code is quickly complicated. An unequal balance of power between the parties changes the weight on either side of the exchange, value itself is revealed to be a subjective quality. For example, the biblical "eye for an eye" declaration is made in at least three different books of the Old Testament: Exodus, Leviticus, and Deuteronomy. In Exodus, the "eye for an eye" instruction is followed by the instruction that if a slave master puts out a slave's eye, then the slave must be freed in exchange for the harm. Here, we see that the value of an eye for a slave is different than for a free man—either in that the harm that the master comes to is the loss of his slave and not his eye, or in that the slave receives justice through his manumission rather than his satisfaction in his attacker's harm. This complication is subsumed and reflected in both the regulatory ideals and praxis of retributive punishment. Though the religious grounding of retribution has been largely replaced by a framework structured by rationality and logic in proportionality, the complications that existed persists, and indeed

[11] Merely as an example, the benefit might be to create a response to the "incompensable" offenses mentioned above—think, for example, the murder of a child—it is easily understandable there is no material compensation that can effectively 'make up' for this sort of offense.

proliferate as society itself is increasingly complex.

In the American context, purported goals of the policing powers of the state (a functioning criminal justice system can be said to contribute to the establishment of several Constitutional objectives such as the establishment of justice, insuring domestic tranquility, and promoting the general welfare), have been formed within conflicting ideologies. The result, I argue, is a repressive penal system that operates within the liberal state, and indeed is justified by the liberal state. By this, I mean that retributive rhetoric and regulations based on retributive ideals are accepted as legitimate to the extent that they are instantiated in positive law. Failures to live up to these ideals are framed as the inevitable failures of human fallibilty—the tragic, but acceptable challenge of living as imperfect beings.

However, I argue that rather than this simple failure to live up to an ideal there are more complex political mechanisms at play. The tension between social control and Enlightenment values that is at the core of the American political project is structured creates a multi-dimensional challenge in understanding how retribution is moving through political practice. On the one hand, indeed, there is an at least somewhat morally defensible vision of retribution (though it is certainly under-theorized and shoddily configured in political practice) that is an acceptable regulatory ideal, but that—like the all regulatory ideals—is difficult to live up to. On the other hand, and what I argue is more important because it indicates a set of political institutions that structurally reproduce a system of punishment wherein retribution is qualitatively indistinguishable from vengeance—and thus can make no claims to a defensible democratic ethics.

Articulating this second set of retributive logic, or rather the logic that erases the line between retribution as a philosophically coherent ideal and a process of power that works to reproduce a colonial order, creates an opportunity for meaningful critique.

**II. History of Retribution and the State**

Retribution as a means of achieving justice has historically been associated with positive law, and has tended to arise historically when positive law systems are instituted.[12] Retributive visions of justice emerge in concert with specific prohibitions on certain acts. In the Pentateuch (generally accepted to have been standardized somewhere between 539-334 BCE),[13] explicit calls for a retributive response to broken laws appear in at least thee places: Leviticus 24, Exodus 21, and Deuteronomy 19. Also, the Code of Ur-Nammu (ca. 2100-2050 BCE), and later the Code of Hammurabi (ca. 1790 BCE), some of the earliest extant formal codes, used strongly retributive elements in articulating both commandments for behavior and the consequences for such behaviors. These ancient and revered legal codes are often referenced, relied upon, and asserted to be foundational to human society, but they are only philosophically coherent within their classical socio-political constructions, becoming substantively less defensible when they are cited as a basis for punishment in a modern democratic state. In many cases, the Biblical dictates are unclear as to who is supposed to be doing the punishment—the

---

[12] Alternative constructions of justice, both contemporary and historical have conceptualized justice as a matter of unity and harmony---this is a proactive vision of justice. Justice is a positive state that is often allied with truth, goodness, harmony, and/or virtue. This is true both in philosophical and in religious traditions before the emergence of the modern and even pre-modern state. Plato's work conceives justice and punishment as part of the grander process of the good life; religious traditions such as Druidism, and traditional practices in some First Nation people of North America also stress justice as a constant process concerned with the health of the community.

[13] Collins, John Joseph. *The Bible after Babel: Historical criticism in a postmodern age*. Wm. B. Eerdmans Publishing, 2005. Pg 33.

authority comes from God but the agent of justice is often a murky matter; there is no explicit grant of power to any terrestrial source. Under the Code of Hammurabi, the agent is much more specific. Hammurabi is indeed talking about the maintenance of justice within and by the state, however, this state is specifically created by the gods, Anu and Bel, and Hammurabi is called "by name" to bring law and justice into the land. Here the justification for punishment is the maintenance of the holy state, *lex talionis* is the promise of 'how' this will be done.

**III. Retribution approaching modernity**

The shift to a modern vision of retribution is defined by a move towards retribution as justified not by metaphysical claims, but rather through appeals to human vision of ethics and justice. These reformations are expressed in the political philosophies of Immanuel Kant and George Hegel, as well as in contemporary analytic work. In this section, I discuss the philosophical framings of retribution not to suggest that when laws, sentences, and practices are developed, that they are responding directly to these philosophically coherent structures, but rather these theories stand as normative iterations, rational grounds that can be mobilized to defend practical choices and outcomes. Though political development is rarely built directly on philosophical dictates (and in this case, as these theories emerged in the late 18$^{th}$ and 19$^{th}$ century, that would be a temporally problematic claim), the goal of legitimacy is a central feature in political practice—these philosophies represent ways that retribution has been theorized to be a legitimate justification for punishment. In the United States, as a republican democracy, these claims to legitimacy are even more important. Though the separation of church and

state has never been so much a fortress—perhaps it has been more like a farmer's stone wall—the right for the state to punish has not, since the founding of the modern state at least, directly appealed to an explicit godhead, instead appealing to ideals of justice, natural law, and an amorphous and shifting morality. And indeed, these appeals are what is taken up in the philosophical argumentation—which of these ideals might function coherently and how. Kant's vision of retribution as a regulatory ideal constructs punishment as an essential iteration of the categorical imperative— indiviual will for punishment that is an equal response to the harm committed is required for the production (and re-production) of the ethical (and thereby meaningful) community. This regulatory ideal is grounded not exclusively in political institutions, but rather hinges on the ethical willing subject.

Hegel is equally committed to a retributive vision, but constructs punishment as an act that negates the negation of the rightful order, or in other words: through punishment, the state is able to re-enact its commitment to the unification of justice in the abstract and real world. Kantian, Hegelian, and analytic articulations emphasize proportionality as a necessary condition in justifying punishment, as well as the importance of the criminal *deserving* his/her punishment. Further, in these retributive accounts, punishment has a restorative effect; the act of punishing accomplishes the important political and social function of restoring the criminal to a non-criminal political status; S/he has a debt, and through retributive punishment it is paid. Though obviously there are points of distinction across different philosophical visions, these ideas are at the core of a modern theory of retribution. The modern liberal order constructs the subject as

a rights bearing entity who has entered into a restrictive compact in order to delimit the possibility of arbitrary violence. Through this distinction between arbitrary and non-arbitrary violence, the state right to punish is established. That is, when asubject commits a criminal act, s/he has created a world in which arbitrary violence is possible. Retributive theory identifies this action as the original mover in creating the punishment to which the criminal s/he is subjected.

**IV. Retribution in the Colony**

In contrast to the normative constructions of retribution, I argue that there are very different impulses in play when retribution is mobilized in American criminal justice. In this section I develop an alternative narrative of the ideological and normative drives for retributive punishment in the United States. Theoretical defenses of retribution prize human agency, rationality, and equality before the law. However, in the American context, both quantitative and qualitative assessments[14] depict a social reality of profound inequality across jurisdictions in criminal justice. Despite this, the criminal justice system as well as the American government of which it is part are still broadly viewed as legitimate democratic institutions. I argue in this section that the reason that the US can promulgate a justice system that produces profound injustices while simultaneously being perceived as legitimate is because of the dominance of a colonial logic that follows the ideological track ofwhat Max Horkheimer called instrumental rationality. This logic has its own ends—to reproduce conditions of oppression and domination—but is formally able to claim the legitimacy of a rationality grounded in the materialism of the

[14] Thompson, Heather Ann. "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History." *The Journal of American History* 97, no. 3 (2010): 703-734; Weaver, Vesla M., and Amy E. Lerman. "Political consequences of the carceral state." *American Political Science Review* 104, no. 4 (2010): 817-833.

Enlightenment, which is constructed as necessary to the success of the Western democratic project. Retribution is at the center of this perverted logic in the idea that the colonized subject is colonized because he deserves to be so, and further, that he has actively brought this retribution on himself—thus necessitating his punishment for the maintenance of the just and good order.

In this section, I break down this argument into its constituent parts and then hook it back concretely into a theory of retribution in the colony. First, I further articulate (building on the introduction) the conception of the colony itself, expanding on the added value of using a colonial discourse rather than a more narrow category of analysis. Second, I discuss the political consequences of the permeation of a colonial ideology. Finally, I re-establish the role that this colonial order plays in the outcomes of retribution discourse in contemporary society. In this section, I am articulating an extreme vision that illustrates the operation of power in a system of domination, but that, for the purposes of clarity ignores a great deal of the complexity involved in the real world.

<u>What is the colony?</u> The colony is the set of political structures, most importantly ideology, institutions, and practices wherein values determined by the powerful become the universal principles that organize social life. The imagined ideal citizen of the colony is a somewhat-Christian, Enlightenment figure: He is perhaps George Washington. However, encoded in this ideal is the primary value of white supremacy, along with class position, and intersecting additional values.[15] White supremacy is at the center of this structure in the American setting, and the logic that is at

[15] By this, I mean that there are certain characteristics when combined with others have differing social valances. For example, an aggressive masculinity might be prized in a wealthy white man, would be deplored in a poor black man.

the core of racism is remade and replayed in all corners of the colony. It is also important to note that this ideal is plastic, shifting, elusive, and fundamentally unreal; this ideal is posited by the powerful to shame and justify all those who fail to meet this ideal—but the ideal is both arbitrary and shifting. The standards will shift when it is useful for the powerful that they do.

The American colonial order is grounded most concretely in race, meaning that understanding the role of race in political life is the cornerstone of my claims about the colonial order. Race itself is a means to legitimate the control and exercise of power across symbolic groups of real, material human beings. Lucius Outlaw (following W.E.B. Du Bois) articulates race "as a cluster concept which draws together under a single word references to biological, cultural, and geographical factors thought characteristic of a population."[16] But it is also crucial to not understate the importance of power in the deployment of these thoughts. The construction and persistence of American race is in service to white supremacy. It has its history in the legitimation of slavery, and has since continually been used to defend a socio-economic-political order wherein the use and abuse of black-identified persons is considered legitimate and often sound legal policy.

Race only emerges as a materially significant category as a result of political practice. Grounded in the shifting identities of Europeans in the New World and enslaved Africans, the utility of identifying those who could be legitimately enslaved fell to the symbolism of phenotype. Racial categorization is structured by institutional strength;

---

[16] Outlaw is quoted in Liss, Julia E. "Diasporic identities: The science and politics of race in the work of Franz Boas and WEB Du Bois, 1894–1919." *Cultural Anthropology* 13, no. 2 (1998): 127-166.

Ian Haney Lopez argues that law was a key element in the creation of race, "race is legally constructed principally indirectly by legal institutions that produce and bolster deleterious racial ideologies without forthrightly engaging the categorical debates that so preoccupied race law through the early twentieth century."[17] Haney Lopez further argues that not only are the classifications of race created in law, through such provisions as the one-drop rule, but through marriage restrictions and preferential health provisions, the phenotypes of race have themselves been produced through law.[18] These claims stand in specific opposition to essentialist views of race which elevate external phenotypes to moral, intellectual, and civic heights.

In addition to stratifying society, racial ideology also creates the conditions for the reproduction of that stratification. Oppression requires complicity from a broad swath of society, not just from those who directly benefit materially from it, but also from those who are at the margins or occupy ambivalent positions (both benefiting and being harmed). Wahneema Lubiano points to the broader functioning of racial categorization as a process by which not only are certain groups elevated above others, but also through which the system is legitimated, and creates the means by which these relations are reproduced across the political sphere:

> The idea of race and the operation of racism are the best friends that the economic and political elite have in the United States. They are the means by which a state and a political economy largely inimical to most of the U.S. citizenry achieve the consent of the governed. They act as a distorting prism that allows the citizenry to imagine itself functioning as a moral and just people while ignoring the widespread devastation directed at black Americans particularly, but at a much larger number of people generally.[19]

---

[17] Lopez, Ian Haney. 2006. *White By Law* New York: New York University Press. p. xv.

[18] The relationship between legality and race (in the US?) is explored more fully in chapter 3 of this dissertation, as I argue that citizenship is a racial and penal category.

[19] Lubiano, Wahneema, ed. *The House That Race Built: Original Essays by Toni Morrison, Angela Y.*

Here, we see the complexity of racial ideology—which in this era of so-called "color-blindness" becomes all the more important to recognize. This “distorting prism” transforms oppressive and destructive structures into a just and rational response to the immediate condition.

However, I argue that even a complicated notion of race does not effectively capture the complexity of the ideological system governing American punishment. Instead, I turn to the language of colonization. This language is more appropriate for several reasons. One, relying on race obscures the complexity of the intersections of oppression. For example, the empirical relationship between race and class having been long established, Adolph Reed argues, in the US, race and class are fundamentally indistinguishable as distinct systems of power, instead they function as "equivalent and overlapping elements within a singular system of social power and stratification rooted in capitalist labor relations."[20] Similarly, punishment is also constructed through the lens of race and gender. The central example here is the construction of black masculinity as a focal point for political disorder. Discussing the way visual culture was deployed in maintaining the racial order, Herman Gray describes this intersectional position and its consequences, "Discursively located outside of the "normative conceptions," mainstream moral and class structure, media representations of poor black males (e.g., Rodney King and Willie Horton) served as the symbolic basis for fueling and sustaining panics about crime, the nuclear family, and middle-class security while they displaced attention from

---

*Davis, Cornel West, and Others on Bl ack Americans and Politics in America Today.* Vintage, 1998.

[20] Reed, Adolph. 2002. “Unraveling the Relation of Race and Class in American Politics.” *Political Power and Social Theory.* ed. Diane Davis. Elsevier Science. 266. – For an empirical view, look to Wilson, William Julius. "The declining significance of race." *Society* 15, no. 5 (1978): 11-11.

the economy, racism, sexism, and homophobia."[21]

A second important conceptual reason for framing my argument in colonial discourse include the centrality of political necessity when discussing punishment. The legitimacy of the state hinges on its ability to punish righteously. Though the core of political domination is the desire to retain that which was produced through the exploitation of others, because of the simultaneous American commitment to democratic ideals, it is not sufficient to simply maintain an oppressive political order; rather this order must also be able to be understood as expanding the realm of justice sufficiently that illegitimate violence disappears. The language of colonialism and anti-colonialism has always been directly bound up with the aims of the state, themes of citizenship and belonging, and the various dimensions of political power.

In the American system, this rationality is shaped through the second fork of the American founding vision of bourgeois Christian, colonial, patriarchal, white supremacy. The tension between Enlightenment-informed normative visions derived from materialist rationality and political realities structured by bourgeois instrumental reason is the location where commitment to universal liberty collapses into a system where instrumental reason focused on the perpetuation of existing systems of privilege seamlessly displaces commitments to equality, justice, and democracy. The collapse of these systems into one another creates a complex system where equality, justice, and democracy come to be defined within the logic of the system of socio-political domination. Thus reason comes to be defined not against material conditions, but rather through structural demands of maintenance of hierarchical order. Democracy becomes

[21] Gray, Herman. "Black masculinity and visual culture." *Callaloo* 18, no. 2 (1995): 401-405. p. 402.

democracy for the right kinds of people. Liberation becomes liberation for some, through the domination of others. In the case of punishment, it becomes the creation of a safe community, free from the arbitrary exercise of power, not through the eradication of threat and violence, but rather through the construction of discrete realms of society, membership in which creates the right or the lack of a right to these Enlightenment values.

Punishment comes to be defined as a mechanism through which demands for a safe society that creates the conditions for potential self-liberation can be realized. As a means to achieve Enlightened ends, the means themselves must be constructed rationally. However, because of the coinciding logic of the colony, that rationality extends only to the limits of the colony. Punishment must be conceived, organized, and practiced according to the demands of reason, but it is a reason that functions under the the assumption of the validity of the colony. Retribution retains its traditional commitment to punishing those who deserve to be punished for the sake of the continuity of the political community, but the meanings of both what it means to deserve something and the continuity of the political community are both constructed under the logic of the colony. In the colonial-style order, retribution cannot create an opportunity for a criminal to be re-initiated into the political community; indeed the colonized criminal was never a member of the community in the first place. The very construction of the colonial identity is contingent on the colonizer as the rightful member of the community and the colonized as the aberrant, ex-political anti-citizen. I argue that in the American setting, retribution has been and continues to be mobilized to legitimately maintain an illegitimate sociopolitical

order. That is, in the dominant ideology of the United States, the idea of desert itself is inseparable from the construction of the colonial society. In such a context,, retribution is an indefensible justification for punishment because in this iteration it can only serve to legitimate that which it purports to reject.

**V. Creating the Colony through Punishment**

In that the logic of the colony stands directly at odds with Enlightenment values, there is a constant tension in maintaining legitimacy in punishment practices. In the second half of this chapter, I analyze a pair of cases in American culture that explore retribution as it has been mobilized at specific moments in history, law, and culture. Through these cases, I argue that the criminal is constructed as synonymous with "one who deserves to be punished," side-stepping questions about the humanity of the criminal or the purpose of punishment.

A Century of Infamy: Lynch Law 1865-1950. Retribution (as a justification) legitimates the violence of the state. It does so by offering a grounded, rational argument that the retributive violence is a key element in re-creating justice after an injustice has been committed. When an act is seen as retributive, it also assumes a certain amount of legitimacy. In this section, I explore lynch law, as it was practiced in the late 19th and early 20th centuries in the United States, as a retributive practice. Lynch law was articulated and defended as necessary for proportionality and clarity in the maintenance of a secure public order. It has, of course, been roundly condemned in this post-Civil Rights Era era, but I argue that there are important lessons to be learned through analyzing this phenomenon—and the discourse surrounding it—as a case study through

which retributive philosophy as a regulative ideal can be examined. A core concern for this section is whether lynch law is best understood as a failure of social practice in living up to coherent ideals, or whether it ought to be interpreted instead as something qualitatively different. I argue the latter, and that this difference is grounded in the underlying reality that there are competing normative frameworks in play. This recalls the tension that Angela Davis has said of the American project, that it is characterized by an "enduring philosophical emphasis on the idea of freedom alongside an equally pervasive failure to acknowledge the denial of freedom to entire categories of real, social human beings."[22] In addition to a failure of adherence to the ideals of the rule of law, lynch law represents the manifestation of a dominant culture ideology wherein the black anti-citizen must be governed by a separate law. Under this separate law, appeals to retribution are framed in identical ways as they are under the liberal regime, but the colonized body is posited outside the just community, and his crime—the injustice that must be redeemed through retribution—is primarily the crime of existing—of reminding the colonizer of his offenses. In this section I give a brief sketch of lynch law as a case, focusing on the relationship between the actual violence and the political and discursive context, I re-contextualize it as a set piece for examining the logics in play, concluding with a discussion of the ways in which this both backgrounds and informs contemporary praxis.

This case study has been chosen not because it is representative of retribution across the later 19th and early 20th centuries in the US, but rather because lynch law was

[22] Davis, Angela. "Unfinished Lecture on Liberation II."

articulated in its execution as retributive—a necessary response to the "brutish"[23] behavior of black men. Lynch law, in narrative, if not in the facts of individual lynchings, was governed by broadly-known, if fuzzy social norms, and whites found in these codes a confirmation of the "honorable,""redemptive' nature of lynching."[24] This section will look at the period of lynching, approximately 1865-1950 as a structural framework through which retributivism as it is narrated to be a valid justification and goal for punishment. Note, this is not intended to be a historical narration of retributive themes in lynching practices, but rather reconstructs lynch law in this period as a phenomenon to be analyzed for how people participating, defending, and supporting lynch mobs mobilized retribution to legitimate their actions. I choose to focus on lynch law because of how frequently lynch law was defended in the discourse of the time as a matter of necessity in the creation and maintenance of justice in a society with a freed slave population. [d]

Though great advances in documenting the history of lynching have been made, there is still evidence that it is difficult to define the full extent and content of lynch law, "Source materials on lynchings are scarce because there were no jury records ...the local law enforcement system, meanwhile, would render innocuous and vapid accounts to local and state officials...it is doubtful if a team of scholars working with scraps of information from innumerable small towns could piece together a creditable history of the phenomenon."[25][26] However, since the 1980s, a number of specific histories have been

---

[23] Jean, Susan. "'Warranted'Lynchings: Narratives of Mob Violence in White Southern Newspapers, 1880–1940." *American Nineteenth Century History* 6, no. 3 (2005): 351-372.

[24] Jean, S. quoting Brundage. Brundage, W. Fitzhugh. "Lynching in the New South." *Urbana: University of Illinois Press* (1993).

[25] McGovern. 1982.*Anatomy of a Lynching.*

[26] It is interesting though that the details of these lynchings were not recorded, these acts were simultaneously defended as rightful acts. This tension between the knowledge that lynching was extra-legal while also insisting on its legitimacy highlights the immanent contradictions in the practice.

completed, usually based on specific regional categorization, such as Julius E. Thompson's *Lynching in Mississippi:1865-1965.* A brief sketch of the era of lynch law includes the following: There were at least "3,753 lynchings between 1889 and 1932"[27] with that number revised to nearly 5000 between 1890-1960 according to more recent work by Sherrilyn Ifill.[28] Contemporary scholars have coalesced around the idea that lynch law ought to be understood as a "systematic feature of race relations after 1865,"[29] and further, as contingent not on the criminality of black Americans and but rather on "expressed need to control the black community."[30]

As background, the following must be considered when looking at lynching as a case: Lynch law existed, to various extents, across the United States, most particularly and predominantly in the former Confederacy. Lynch law was definitely extra-legal, but often occurred under the auspices of a condoning public and and an acceding criminal justice system. Despite rhetoric at the time that described lynch law as a practice of the unwashed masses, McGovern states "lynchings seldom met disapproval from local townsfolk regardless of class or education.[31] There are also numerous examples in which law enforcement is documented as having participated in, facilitated, or merely been unable to stop a lynch mob, such as this example given by Chadborn: "After having been returned to Waco, from Dallas on the agreement that the officials would protect him from 'lynch law,'" one suspect was lynched with the near express sanction of the law and court:

After a hurried trial, the jury deliberated three minutes and returned a verdict of guilty.

---

[27] Chadborn, James Harmon. 1933.*Lynching and the Law.* University of North Carolina Press. Pg. 3

[28] Ifill, Sherrilyn. 2007. *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-first Century.* Beacon Press. Boston, MA.

[29] McGovern. 2.

[30] Thompson, Julius Eric. *Lynchings in Mississippi: a history, 1865-1965.* McFarland & Co Inc Pub, 2007.

[31] McGovern. 7.

> The defendant was sentenced to hang in a few hours. There was a pause of a full minute while the judge made the entry: "Jury verdict of guilty." Meanwhile the court stenographer, according to his later statement, slipped back of the sheriff and out of the room. The sheriff followed him. The silence was broken as a tall Waco citizen, driver of a brewery truck, yelled to the crowd, "Get the N*****!" A gruesome burning at the stake followed.[32]

In another case documented by McGovern: "One sheriff conceded that he had to give up his intentions to defend a black about to be lynched because 'the first half-a-dozen men standing there were leading citizens--businessmen, leaders of their church and the community--I just couldn't do it.'"[33] In the same vein, "trials" of a sort were often held, particularly in cases where black men were accused of raping white women. The accused was dragged by the mob to the home of the white woman, whereupon the alleged victim was called on to pronounce the accused guilty prior to the actual lynching.[34]

Despite this seeming lawlessness, lynch law was consistently defended as a necessary tool of justice. Across accounts, across the expansive time period, lynching was defended loudly and proudly—in newspapers, pamphlets, and other outlets—on the basis that it was necessary to maintain lynch law in order that justice be done. Defenders claimed that traditional brick-and-mortar justice was incapable of delivering the immediate, severe punishment required to maintain civil order, indeed that the institutions of justice were faulty and ineffective, and that the crimes committed by black Americans were so egregious they required lynch response. As Grant reports, this attitude was not amorphous, but rather asserted across levels of society.

> Justice Walter Clark of the North Carolina Supreme Court said in a decision,'"Lynch law, evil that it is, is a protest of society against the utter inefficiency of the courts.' United States Supreme Court Associate Justice David J. Brewer shared the opinion. In

---

[32] Ibid. 8
[33] Ibid. 10.
[34] Ibid. 11.

> an address to the Yale Law School, he remarked, "It is not to be wondered at that some communities have arisen in their wrath and have inflicted summary punishment that the machinery of the law has delayed. Many whites came to believe that Blacks charged with heinous crimes were able to escape punishment in the court system by hiring clever attorneys who would prolong the jury selection process or cause the judge to make some trivial error which would result in a new trial.[35]

Neither were these attitudes local. Grant also documents Presidents Teddy Roosevelt's and William H. Taft's descriptions of lynching as the result of lenient or ineffective judicial action.[36]

Lynch law has a long history in the United States, though its origins were not specifically race-motivated. Instead, early American judicial history was characterized by informal practice, and lynch law was employed widely across the North and the South. At times when courts literally did not exist, the lynch mob was looked upon as a legitimate means of responding to crime. However, this was frontier justice, and its use as a common instrument of criminal justice (that was applied to any violator of formal or informal criminal codes) was limited to spaces in which the institutions of justice were functionally insufficient.

Lynch law as it appears after Emancipation takes on a very different character. Here lynching acts not as a stand-in, but as a parallel to institutional forms of governing, stepping in not when the system failed to provide justice, but rather when the system was perceived to be failing to provide a sufficient justice. This is illustrated in the case from Waco cited above. There, the accused man was convicted and would have been put to death in a few short hours, but the mob response determined that the justice born by the state, even when it was to be execution, could not provide the level of harm required for

---

[35] Grant, Donald L. *The Anti-Lynching Movement, 1883-1932*. San Francisco: R and E Research Associates, 1975.

[36] Ibid.

equal retribution. This is also seen in another case cited by Chadborn, "The case of General Boyd […] He was sentenced to two years for entering a white man's home and seizing a woman's foot. […] A month after completing his time, he was lynched for the same offense for which he had served two sentences."[37] However, it would be a mistake to think that there was always a formal relationship between lynching and codified law as in the example from Waco; more often than not there was no trial, nor hard evidence, and perhaps most devastatingly for the black population, lynching offenses were varied and unpredictable—sometimes not even a crime at all.

Grant documents a number of cases in which the dominating theme was that: "after Reconstruction, any Black who moved against any aspect of the caste system could be lynched if it was believed by whites that the other sanctions were inadequate."[38] Indeed, "Blacks were lynched for being successful farmers, owning their own land, and marketing their crops. They were also lynched for acquiring education and rising into the middle class as merchants or professional men." A specific example of this is the case of Sewell Smith:

> Sewell Smith in 1903 was typical of hundreds of similar cases. Smith was a barber in Rayville, Louisiana, who had invested the profits from his barbershop in land. Later, a railroad company purchased land from him, making him relatively rich. On a business trip to Shreveport, a white boy, wanting to earn a tip, asked to carry his satchel. They walked in front of a saloon where loitering whites attacked Smith for presuming to have a white as a servant. Smith defended himself and was killed. That was the end of it. No one was indicted or even arrested for killing an "insolent" Black who had not kept his place.[39]

Even early studies of lynch law, which often, even while condemning the extent of lynch law, saw it in certain cases or in its origins as legitimate, acknowledged that the violations

---

[37] Chadbourn, James H. "Lynching and the Law." *ABAJ* 20 (1934): 71:7.
[38] Grant. 12
[39] Ibid. 7.

that provoked lynchings were often not actually criminal, but rather were violations of social order. McGovern quotes a 1941 study: "The Negro victim then becomes both a scapegoat and an object lesson for his group. He suffers for all the minor caste violations which have aroused the whites, and he becomes a warning against future violations."[40] In speaking of the terrorizing effect that lynch law had on the black population, McGovern continues: "Lynch violence was made more frightening because whites seemingly administered it capriciously."[41]

Despite the range of lynching offenses, the retributive rhetoric around lynch law (as well as most of the defensive—and some of the critical—discourse) was organized around the image of the black male rapist as against the innocent white woman. Lynch was posited as necessary for the protection of white women. While the range of lynching offenses was larged, the one presumed offense that almost certainly resulted in a lynching was any claim of an attack on a white woman, most specifically the rape of a white woman. This sort of violation was considered so heinous, and the potential re-injury to the woman were she required to testify in open court, made the defense of lynching identical to a defense of women, a defense of propriety, and indeed a defense of civilization itself. The black man deserved his punishment so fundamentally that the standard trial and execution (even though those counties that had the greatest number of lynchings also had the greatest record of severe *legal* punishment for blacks as well[42]) was *too* civilized for him. This can be seen in the language used in describing one such accused rapist, Claude Neal, "He had seemingly forfeited his right to life by his bestial

---

[40] McGovern 7.
[41] Ibid.
[42] Chadborn. 11.

behavior and so they subjected him to great cruelty and finally lynched him."[43] As the case from Waco discussed above indicates, even when execution was imminent (three hours in that case), and indeed no further harm to the white woman could come even if she were alive (though there were murmurings from the black community that the accused was innocent and that a white man had indeed been the murderer), the mob saw it necessary to forcibly remove the condemned from the realm of legal justice and lynch him on their own. His desert was so great that that orderly practice of legal process, even when producing the same outcome imminently, was not sufficient for the community to feel that justice would be satisfied. The internal consistency of these claims, however, was suspect; thesupposed intent to spare women from the harrowing experience of a trial was belied by the fact that "The mob would frequently take the accused to the accused woman's home with great fanfare and publicity."[44] Upon arriving at her home, the woman would be required to affirm that this was the man who attacked her, and facing a mob, rarely provided anything but confirmation.

Despite this "mythology," as Donald Grant refers to the constructed narrative around rape and lynching, "rape was not even alleged in over 80 per cent of all lynchings."[45] Rather, lynchings occurred for any number of reasons from merely non-criminal to fundamentally arbitrary. However, retributive themes continued to dominate, centralizing the values of honor, deservingness, and the maintenance of the just community.

At the same time, counter-narratives were posited by critics of lynch law, most

---

[43] McGovern 1
[44] Grant 12.
[45] Grant 11.

notably Frederick Douglass and Ida B. Wells who indicted the practice as explicit attempts to control and terrorize the black population. Such criticism was actually the precipitating factor Wells's exile from the South—she permanently abandoned the South after the offices of her newspaper, *The Free Speech*, were torched and the editors threatened in a local evening paper with the following editorial:

> If the negroes themselves do not apply the remedy without delay it will be the duty of those whom he has attacked to tie the wretch who utters these calumnies to a stake at the intersection of Main and Madison Sts., brand him in the forehead with a hot iron and perform upon him a surgical operation with a pair of tailor's shears.

Examples such as the outrage that Wells faced, the range of trangressions that prompted lynchings, and the relationship between lynch law and the formal law of the land converge to create an opportunity for analysis that moves beyond basic understandings of the political tensions at play. While the tension that Angela Davis pointed to exists—here specified as a stress between the values of retributive justice and the impulses of white supremacy—it is not simply a matter of a normative value undermined by competing interests. Instead, the colonial order demands another interpretation. This retribution follows the logic of a colonial retribution, wherein the offenses range from acts that are universally considered crimes, but which because of the status of the accused, are deemed to require a special response for retributive justice, to offenses against the colonial order that would not be considered crimes were they not commited by a colonized subject. Interpreting lynch law as an expression of colonial logic, moves beyond mere critique of practice as against policy, instead, this colonial logic provides a means for the reconciliation of this tension—which negates space for political resistance.

The distinction between the success of a colonial logic and the simple failure of practice to live up to a regulatory ideal is important. Were this a mere failure of practice, appeals to system itself can act as a means of political resistance, by this, I mean that if one interprets lynch law as a mere failure of political practice to live up to the regulatory ideal, then the liberal system already provides a means of redress. The domination of colonial logic, however, undermines this possibility of political action. As Memmi argues, the end goal of colonial ideology is to make the colony disappear—to naturalize the privileged position of the colonizer. Colonial logic parallels the tensions between the liberal ideal and the challenges of meeting it, obscured by the legitimating narrative of internally legitimate justifications for punishment, like retribution. However, retribution in the logic of the colony functions on colonial assumptions and along colonial lines of power.

Lynch law was arbitrary, comprehensive, totalizing, and effectively ensured the continuation of rigid social, political, and economic relations between whites and blacks, both inside institutions and beyond—but because of colonial logic, it could be widely defended as necessary. That there existed resistance to lynch law could be pointed to as evidence that the rule of law would prevail. However, this resistance was never able to make the radical critique of white supremacy that would be necessary to disrupt colonial logic—not for lack of trying, but resistance to white supremacy being the core of lynch law, tended to result in a lynching—think back to Wells's Southern exile. She had committed the meta-offense of questioning the myth of lynch law, her property was destroyed and she and her colleagues were explicitly threatened.

Colonial logic renders lynching legible as a part of rather than an exception to the political order. Lynching's most comprehensive effect, of terrorizing the black population, is constructed as righteous and in the interests of the just society when the black population is posited as a threat to democratic justice as blackness is constructed as lacking rational will and humane ethics.

This vision of lynch law diverges from philosophically driven accounts of retribution in a modern democratic system, but does reinforce the legitimacy of the colonial order. Accounts that imagine the American South as a just system actually require Jim Crow and lynch law. There could not be one standard of justice because of the co-existing and primary view that white supremacy was both natural and necessary. Lynching was retributive not only for the criminal laws that applied to the dominant class, but fundamentally defined black Americans as another class. A great deal of time and effort was put into naming the lynching victim as "bestial," "animalistic," "gorilla-like," while at the same time imbuing him with only degraded human characters, "depraved," "cruel," and "lustful." The only humanity that the black lynching victim had was a distorted, grotesque parody of humanity, the rest of this "creature" was subhuman. Here, the idea of retribution is recreated in a parallel legal system. Lynching becomes a righteous expression of retribution because inhuman crime calls for inhuman punishment.

**VI. Retribution and the Limits of Desert: Who Deserves to Die?**

Before re-contextualizing lynch law within the discussion about retribution and the current system of punishment in the United States, I turn here to a more explicitly normative engagement with practices of retributive punishment. In this section, I use the

contemporary Supreme Court jurisprudence on retribution as a means of working through the relationship between philosophical constructions, legal constructions, and how much punishments play out in the practice of punishment. This discussion focuses on extreme punishments—death penalty, punishment of juveniles, and full life term punishments—these extreme conditions do not reflect the vast majority of punishment, this case law is where retribution is most explicitly discussed as a guiding principle of American practice.

In the cases analyzed, retributive narratives are mobilized by the Supreme Court of the United States. However, instead of providing a philosophically coherent account, I argue that these cases show that there is something else at hand—there is conceptual breakdown between the ways that the Supreme Court is defending retribution and the ways that retribution becomes analytically coherent. Further, I also recontexualize the legal debates presented in these cases into death penalty jurisprudence as it is practiced in the United States—a context in which the logic that is actually in play can be discerned—ultimately arguing that the narrative is most coherent under the colonial logic described earlier in this chapter. I focus on the cases *Atkins v. Virginia* and *Roper v. Simmons,* in both these cases the Supreme Court banned the death penalty for whole categories of offenders (the mentally retarded in *Atkins* and juveniles in *Roper*). In carving out the boundaries of legitimate application of the death penalty, the Supreme Court defends it as a political practice and strengthens its core mission—as the ultimate punishment for the ultimate criminal—with retribution at the center of this mission. However, I argue that these boundaries also show that this ultimate punishment is reserved for those defendants who are constructed as outside the limits of the human community, unrecognizable as

peers. This construction reflects an estrangement from the criminal that runs counter to the redemptive narratives offered in normative constructions of retribution.

In these cases, in which the Supreme Court found that the execution of juveniles and the mentally retarded is prohibited under the Eighth Amendment, the nature of crimes and criminals for which capital punishment is sanctioned are discussed. Through focusing on the distinctions made by the Supreme Court about legitimate and illegitimate state violence, the regulatory ideal of retributive practice is articulated; when these ideas are re-contextualized into the American setting of capital punishment, the centrality of the criminal who is irredeemable is clear. He (and it is almost always he, women have made up only 2% of executions since the death penalty was reinstated in the US in 1973[46]) is described as "depraved," "extremely culpable," and "most deserving" of the state's most serious punishment. In this section I review these death penalty cases, situate the narratives offered in both American jurisprudence and contemporary American practice, and conclude by re-theorizing the construction of capital punishment as contingent on racialized constructions of retributive thought and policies.

In current American death penalty jurisprudence, retribution is one of the only two justifying purposes for punishment from which a Constitutionally permissible execution can be derived (both purposes must be present). In recent years, through decisions in 2002 in *Atkin v. Virginia* and 2005 in *Roper v. Simmons,* the Supreme Court has narrowed the field of permissible executions by excluding the mentally retarded and juveniles from death penalty eligibility. In each of these decisions, Justices explicitly discussed the

---

[46] Streib, Victor. "Death Penalty for Female Offenders, January 1, 1973, Through October 31, 2010." (2010): 25. Retrieved from http://www.deathpenaltyinfo.org/documents/femaledeathrow.pdf

nature of retribution and desert as legal and ethical principles. In this section, I analyze the ways that retribution is mobilized and argue that though the rhetoric is not explicitly racialized, the structuring of desert and the death penalty is implicitly built on racialized ideology, and then is implemented in racially unequal ways. I argue that the concepts of desert and retribution that form American capital jurisprudence emerge from racialized understandings of crime and punishment. This occurs through the conflation of act and character in assessing desert, and indeed in the structure of how desert is in itself conceived. By identifying certain instances of criminal acts as inhuman, evil, and deserving of death, legal reasoning is subsumed into the ideological division of humanity into worthy and unworthy—in ways that have long been inseparable from racial thinking in the United States. Despite being clothed in the language of retribution, this rhetoric has little to do with coherent systems of retribution, instead emerging from racialization notions of worth, now re-formed through a post-racial discourse.

In *Atkins v. Virginia* and *Roper v. Simmons*, the justices struggle with the limits of culpability. In these cases, it is determined that through their status, neither juveniles nor the mentally retarded can act with sufficient culpability as to be deserving of the death penalty. In defining these boundaries of culpability, the discourse in these decisions (including the majority and dissenting opinions as well as the record of the oral argument) produces a language of retribution that is indistinguishable from the language of vengeance. This conflation creates a retributive jurisprudence that constructs the death penalty as the permanent excising of the ultimate Other from the political community and a denial of the humanity of the criminal as embodied in that Other—in stark contrast

to the modern systems of retribution that posit a closed system of justice wherein retribution is as much a matter of recognizing the will of the criminal as it is about the status of the innocent and harmed.

In *Atkins v. Virginia*, the 2002 Supreme Court case, in a 6-3 opinion, determined that the execution of a person deemed mentally retarded (under standard definitions) was a violation of the prohibition on cruel and unusual punishment enshrined in the 8th Amendment to the US Constitution. Atkins, along with an accomplice, had been convicted of robbing, kidnapping, and killing a local man. The jury determined that Atkins pulled the trigger, thus his case was tried as capital murder. Upon conviction, he was sentenced to death. During the penalty phase of the trial, defense presented evidence that Atkins had an IQ of 59 and was therefore mentally retarded, and that this should function as a mitigating factor. Yet the jury imposed a capital sentence.

In addition to retribution, the Supreme Court also noted two other grounds for their finding that capital punishment was not a permitted punishment for the mentally retarded: deterrence and the potential for miscarriages of justice as there was a significant likelihood that a mentally retarded person might not be sufficiently effective in supporting his/her own defense. Retribution and its attendant concerns, such as culpability[47] and how to determine proportionality, were key grounds for controversy and were discussed explicitly in both majority and dissenting opinions.

Justice Stevens, writing for the Court, summarized the Court's finding that, "Because of their [mentally retarded persons] disabilities in areas of reasoning, judgment,

---

[47] Under American death penalty jurisprudence, culpability refers not only to the factual guilt of whether someone has committed the crime, but the extent to which that person is personally *responsible* for that act.

and control of their impulses, [...] they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[48] Acknowledging the difficulty in determining moral culpability, the Court relies on a pre-determined standard (developed in *Thompson v. Oklahoma*), that the best way to determine these fuzzy and subjective definitions is through a consensus of the states.[49] However, in addition to the determination that there is a national consensus against executing the mentally retarded, they also explore the significance of proportionality and moral culpability, both issues central to theories of retribution.

In discussing proportionality, Stevens notes that there is no limit to the boundaries of proportionality, meaning that if there is no desert, there can be no proportional punishment, giving the example, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[50] The claim is ultimately that there is, categorically, no way to impose a proportional punishment of death on a mentally retarded person no matter how depraved their crime. This works on two sides of one coin in the Court's jurisprudence as a result of the mentally retarded person's diminished culpability. First, the mentally retarded person, with diminished capacities for reasoning, impulse control, and consequence envisioning cannot be held to the highest levels of responsibility for his actions. Illustrating this, Stevens quotes a psychologist from the trial record who argued, "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive."[51]

---

[48] Stevens in *Atkins v. Virginia.* pg. 1

[49] The stated goal of this method is to ensure that the judgment of the individual members of the court does not replace the democratic impulse of the American people, though Scalia argues in his dissent that what a consensus is is nearly equally subjective.

[50] Stevens pg. 6

[51] Stevens pg. 5

Further, following the court's assertion that the death penalty be reserved for only the most heinous offenses, and the mentally retarded—because the qualities of retardation limit foresight and the ability to plan—cannot meet this requirement. Drawing out this argument, they rely on *Gregg*,[52] wherein the Court found that a merely "average" murder was not sufficiently grave or depraved as to warrant capital punishment—instead the seriousness of capital punishment can only be protected when applied to particularly depraved murders. The Court reasons that even if the mentally retarded murderer commits a particularly grave offense, the diminished capacity drops it below the level of depravation were the same offense committed by a person of average intellectual capacity.

This legal reasoning was picked up three years later in 2005 when the Court determined in *Roper v. Simmons* that it was unconstitutional to execute a murderer who was a juvenile at the time of his offense. In this truly horrible case, Christopher Simmons, at the age of 17, broke into a woman's home, tied her up, wrapped her head in duct tape and plastic, and threw her off a bridge. It was reported at trial that he had previously expressed a desire to murder someone to explore the experience, and that he was certain that he would get away with it because he was a juvenile. The trial court imposed a death sentence; Simmons appealed. The Supreme Court of Missouri, following the reasoning in *Thompson* and *Atkins* set aside the sentence concluding that the execution of juveniles was indeed a violation of Simmons's Eighth Amendment rights. The Supreme Court affirmed Missouri's decision.

---

[52] *Gregg v. Georgia, Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina, and Roberts v. Louisiana,* 428 U.S. 153 (1976)

As in *Atkins*, deterrence and procedural concerns were part of the decision, but again the central concern was about retribution, with particular focus on the nature of proportionality as it functions under the Eighth Amendment. Re-articulating the principle, Kennedy, writing for the Court, states, "As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[53] Here, proportionality itself is posited as a right, and the challenge is to determine the limits of that proportionality in death penalty jurisprudence. As in *Atkins,* the Court attempts to articulate that level of offense which requires capital punishment as retribution, "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[54] As the Court limits who is eligible for capital punishment, they are also positing an ever narrower category of offenses that meet the bar of "most deserving." Regarding juveniles specifically,

> The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' […] Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.[...] The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.[55]

---

[53] *Roper v. Simmons*. Kennedy's opinion, pg 6.
[54] *Roper.* 14.
[55] *Roper* 17

Further, the Court worries about the ability of juries to effectively consider youth as a mitigating consideration in those most heinous cases "even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[56] The Court reasons that "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[57] Though it was in her dissent, Justice O'Connor supported the Court's reconsideration of capital punishment, citing *Trop v. Dulles*,[58] in acknowledging the grave responsibility that the Court faced in making this decision, noting that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[59] The Court's decision can be summarized by saying: there is, categorically, no way that a juvenile, by dint of being a juvenile, has sufficient moral culpability to deserve to die—and even if there could be such culpability, the possibility that a jury will be unable to determine this correctly is great enough that justice demands that the option of death be prohibited, simply as a matter of human dignity.

Analyzing capital punishment in light of *Atkins* and *Roper.* Normative retributive philosophies ground punishment in the attempt to re-make the ethical community which was broken by the crime. This does not only mean addressing the resulting harm of the crime, but also has been articulated to re-centralize the humanity of the criminal. However, the vision of retribution put forward in these cases instead structures capital punishment as the appropriate punishment for an actor marked as nearly inhuman in his

[56] *Roper.* 19.
[57] *Roper.* 17.
[58] Trop v. Dulles, 356 U.S. 86 (1958).
[59] *Roper.* O'Connor dissent, pg. 3

depravity. Discursively, retributive punishment is mobilized as a means of permanently marking the criminal as beyond the realm of human dignity. As discussed earlier in this chapter, modern theories of retribution posit the centrality of the human criminal as a dignified being who must be brought back into the fold through their punishment. However, in the Court's construction, capital punishment is appropriately meted out to those who, through their acts, have cast themselves outside human community. By acting in such "depraved" ways, these criminals have shown their inhumanity, and it is only through righteous killing that the political community might express its outrage. Roper is spared because his youth indicates that it would be difficult to be assured of a "irretrievably depraved character," which would thus require condemnation. This language reveals a line that is drawn between the redeemable human on one hand, and the criminal who must be executed on the other—undermining the idea that the justification for this punishment requires that the humanity of the criminal be recognized through the punishment itself. Retribution's normative construction attempts to centralize human agency and rationality in every criminal is lost in this excision. The Supreme Court ultimately fails at producing a philosophically or ethically coherent argument, blurring the line between retribution and vengeance.

As is central to Enlightenment practice across fields, key to Hegel's formulation of the rule of law is the element of consistency. If the state is to be an ethical entity, then it must have internal coherence in its exercise of power. The legitimacy of the state is derived from its position as that organ singularly capable creating a society wherein power is mediated more rationally. However, here, the irrationality of the state is clear on

its face, so the logic it follows must be seen to emerge from political discourse grounded elsewhere, or as I argue, in the logic of the colony. The clearest damning of capital jurisprudence is the material reality of death penalty practice, in the face of these carefully constructed deliberations. The vision of the rational society and the rule of law is at its core a statement of resistance to the arbitrary exercise of power. However, even a review of death penaltypractices[60] reveals profound inconsistencies in the exercise of capital justice in contemporary America. The first site of this inconsistency is the glaring inequality in death penalty implementation across state lines. Certainly justice allows for regional variety to a certain extent, but the glaring inconsistencies across the states and regions suggest something more than mere variation. Of the 1259 executions since the 1976 re-instatement of the death penalty,[61] over 82% of executions took place in the Southern states. Of those 1033 executions, over fifty percent were carried out in only two states (Virginia and Texas), meaning that nearly 46% of all executions were carried out in those two jurisdictions.[62]

In these discrepancies, white supremacy persists as the re-organizing principle. While African-Americans are more likely than whites to be executed (representing 56% of the defendants executed since 1976, despite making up less than 15% of the population), this statistic is less telling than the clear premium placed on white victims. Throughout the history of capital punishment in the United States, white life has been valued more highly than non-white life. As Amnesty International found in their review

---

[60] Perhaps even more provocative is that these reviews are done all the time and they still produce no crisis of democratic legitimacy!

[61] 1972's *de facto* moratorium on the death penalty declared in *Furman v. Georgia*,

[62] Death Penalty Information Center. 2013. "Facts about the Death Penalty." Retrieved from http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

of capital sentencing, "the single most reliable predictor of whether someone will be sentenced to death is the race of the victim. "[63] In a 2011 study that found that in the state of Louisiana, killers of whites were 97% percent more likely to be executed than killers of blacks and other racial groups, Pierce and Radelet theorized that these discrepancies could exist because "prosecutors' offices, jurors, judges, investigating police officers, and others involved in constructing a death penalty case are (consciously or unconsciously) not as outraged or energized, on average, when a black is murdered as when a white is murdered."[64] They continue, suggesting that in this era where the expense of a capital trial is so great, and the other perceived benefits of the death penalty so diffuse, one of the primary motivators to try a case as capital is for the benefit of the victim's family. "Decision-makers have to arrange families of homicide victims on a vertical hierarchy, making decisions about which is most "deserving" of a death sentence." The killing of a white person is sufficiently depraved to be cause for excision from the human community; the killing of others is, by this evidence, significantly less depraved.

The base fact is that if one takes capital jurisprudence seriously, white life is legally worth more than non-white life. The idea of just desert is corrupted, leaving retributive sentiments severed from their philosophical grounding. This leaves retributive theory severed from its justificatory framework. The normative values of rationality, equality, and dignity lose their stated meaning, and instead serve to legitimate the reproduction of the colonial order. As the normative philosophy is detached from a materialist praxis, it can only serve to reinforce the biases of the power-elite, as the vision

[63] Amnesty Interantional. 2003. "United States of America: Death by discrimination - the continuing role of race in capital cases." Index #AMR 51/046/2003.

[64] Pierce, Glenn L., and Michael L. Radelet. "Death Sentencing in East Baton Rouge Parish, 1990-2008." *La. L. Rev.* 71 (2010): 647.

of dominant culture replaces the way that the world is experienced by real, material human beings, versus the abstract citizens often postulated in Supreme Court decisions.. Criminal punishment is interpreted as serving the demands of justice because it is serving the demands of the white bourgeoisie colonialist.

The Supreme Court's discussions of retribution reveal a conception of retribution that resembles, but on closer inspection departs from, a philosophically defensible theory of retribution. Vengeance, that act that is emotional, irrational, and unjustifiable in the political community of the Enlightenment, takes on the sheen of retribution—thus neutering critiques from that same Enlightened position. The criminal is cast out of the political community, but as can be seen from the racial imbalances in the implementation of the death penalty—the political community was already defined by its exclusionary structure. Were the political community restricted to those designated *a priori* as non-criminal, then this form of retribution might be functional, but as discussed in the introduction and start of this chapter, the presence of the colonial order in criminal justice characterizes large swaths of the population as inherently, endemically suspect. This characterization has traditionally been focused on blackness, but is plastic, encompassing other people as is convenient or necessary for maintaining/creating the political hierarchy. The legal system functions to uphold the rule of law, but the law is unable to act as a moral redeemer for a system embedded in a logic of domination. Resonating with lynch law, the value of human life under contemporary death penalty jurisprudence is contingent, uncertain, and constructed against subjective assessors who are themselves embedded and working through the colony.

As with the case of lynch law, there are two ideological regimes functioning, but in this, contemporary moment, they are more fully intertwined—the colonial logic is less clearly in tension and is instead subsumed more fully into the hegemonic fabric of law and order. However, these ideologies—liberal and colonial—are also contradictory, so as they are more fully fused, the internal coherence of the regime also begins to break down. The result of this is the bizarre and nearly nonsensical output of the Supreme Court that dwells on the minutiae of "most depraved" and "most deserving" while refusing to address the structuring influences embedded in American institutions of criminal justice. The post-racial discourse, that flatly denies the existence of structural influences, emerges as the new dominating discourse—there is no more need to resist the white supremacist impulse because it no longer exists. The colonial logic is asserted to be irrelevant, the post-racial discourse wherein the racialized, colonized body is the invisible referent dominates. When the Supreme Court talks about the "most heinous" "most depraved" crimes in a context where the killing of a white person is exponentially more likely to result in the ultimate punishment, white supremacy persists—dominating the retributive impulse of contemporary capital jurisprudence in a way that retains much of the violence of the era of lynch law.

**VII. Envisioning a just retribution in a real world.**

In the case studies preceding this section, I argued that the supposed line between retributive punishment and state sponsored white supremacist violence is largely meaningless both in American history and in the present policy context. I have argued that the way that retribution has been mobilized is so inflected by a colonial ideology

grounded in white supremacy that the differentiation between criminals and colonized bodies is largely erased. This prompts two important questions as regards an analysis of retribution: 1.) To what extent might a retributive justice be possible? And 2.) Even in the current system, real crimes are committed—people are killed—so how might one differentiate, even in an unequal society, between those who deserve to be punished in accordance with an ethical project and those who are constructed as deserving per the demands of a colonial ideology?. In this section, I begin to address these two questions, a challenge that is taken up more fully in chapter five of this dissertation.

Retribution as practiced in the United States, at minimum, fails to live up to the regulatory ideal to such an extent that its aspirational quality is meaningless and in its worst consideration is a complete and utter farce, merely providing rhetorical cover for a system of punishment that serves primarily to reproduce the power structure. But at the same time, as is central to the structure of this dissertation, retribution remains an important and perhaps even inexcisable element of a political community.

Indeed, to the extent that a liberal state is possible, retributive punishment, must to a certain degree, be necessary. However, the structuring of that retribution as a form of punishment that stands separately and replaces the irrationality of vengeance will never be able to account for the historical nature of political organization. The ideal of the liberal state assumes that rights and duties are equally distributed; ideal retribution departs from this assumption. The problem is that in modern American society (and probably any actual political organization) develops dialectically, becoming something new, while also retaining the old. In this, the pre-modern impulses—anti-Enlightenment

values of domination and irrational drives—retain power in obscured, but meaningful ways.

A retribution that *could* function defensibly andlegitimately would, rather than dismissing the impulses of vengeance and domination, would require an institutionally viable intervening entity. As I do throughout this dissertation, it is actually not terribly difficult to identify moments of illiberality in American punishment. Critics from across the public sphere are doing so and have always done so, from Ida B. Wells to Michelle Alexander, these voices are loud and clear, However, it is more difficult to imagine how these critical voices might be incorporated into the process of creating justice. It does not seem unlikely that any entity fully assimmilated into the government would suffer from the institutional biases that already plague the American system.

In many ways this is the classic problem of the rule of law, whereby the static nature of a liberal rule of law guards against the arbitrary exercise of power, but that exact same staticness tends to solidify and reify extant power relations. In the American situation, the extant power relations of race and class have intersected to render the normative form and the practice of retribution suspect. Retributive punishment must be able to withstand ongoing, immanent critique to retain legitimacy as a regulatory ideal. Expanding the possibilities for both immanent critique and for constructing a punishment that stands up to such critique are explored systematically in chapter five of this dissertation.

**Conclusion**

Retribution as a justification for punishment has a long tradition in both pre-

modern and modern political theory. It is regularly mobilized in the United States as a core justification and goal for punishment. However, the retribution that is formulated in modern democratic theory is qualitatively different than what appears in practice and even in rhetoric in historical and contemporary American punishment. The retribution mobilized in both formal legal practice and in extra-legal discourse is grounded not in recognition of subjective will (as it is structured in normative theories), but rather is more like a vengeance formalized through institutions. As the philosophical coherence of retribution breaks down, other ideological and political motives take on an organizing presence.

This replacement logic is the ideological foundation of the colonial-style order in which criminality is identified as deserving of punishment, but is also simultaneously identified with the sociopolitical reject—who is black, brown, poor, young—a category that is flexible, but damning. To be identified as outside the dominant order is to be identified as a criminal, and under retributive theory, to be a criminal is to have brought punishment upon oneself. The modern state is identified by its ability to legitimately wield violence, and the criminal is defined as one who is the legitimate object of state violence—there is nearly no category for whom state violence is more appropriate. Indeed, under retributiontheory, all crime is somewhat comparable to treason, in that it violates the order of the state—thereby jeopardizing the state's reason to exist (namely to ensure justice). Therefore to be identified in this way is to be designated a legitimate site of state violence; the crime of the Colonized is to exist as a Colonized person. The actions of this colonized Other become crimes by the very nature of the person

committing them. This was seen historically in the near infinite number of transgressions for which a black man could be lynched (it could be rape and murder or it could be merely succeeding as a farmer—both were punished with brutal slayings and mayhem), and can be seen today in urban police departments' 'stop-and-frisk' practices which subject individuals who are suspected of criminal activity to lawful police stops, questionings, and frisks. In every city that maintains records, these stops are disproportionately effected against racial and ethnic minorities, despite the fact that studies have shown that of those stopped, whites are more likely to be actually engaged in a criminal act.[65] The legal basis of these stops is that under the "totality of the circumstances" the officer must have a "reasonable suspicion" that a criminal act is in process. Examples of conditions that together meet this "totality" are: loitering in a high crime area, or looking "suspicious" (engaged in "furtive behaviors" is the catch-all phrase used in charging papers here). Despite the fact that some of this might be a simple matter of living for some people—loitering in a high crime area might also be waiting for the bus outside your apartment building, acting furtively might be checking that your wallet is still in your pocket—this is becomes legitimate and defensible police action because minorities are pre-identified as "suspicious." By existing, the colonized body is a threat to the democratic order because he gives the lie to the democratic nature of that order. In American punishment, the logic of retribution is inextricable from the logic of the colony.

[65] Center for Constitutional Rights. 2009. "Racial Disparity in NYPD Stops-and-Frisks." 10.

## Chapter 3

### "To be better disposed": Deterrence and the line between citizen and criminal.

Criminal punishment marks the division between the criminal and the non-criminal. In the United States, one of these lines has always been civic in nature, criminals are lawfully deprived of rights that are otherwise guaranteed to citizens; for example, while under parole supervision, there is no need for a warrant to search home or person.[1] Generally, the line between law-abiding citizen and law-breaking criminal is imagined to be thick, bold, an incontrovertible boundary, drawn for the betterment of the democratic order. Creating this boundary is a key mechanism by which the state proceeds towards the production of that more perfect union, establishing justice and insuring domestic tranquility, indeed as Keally McBride has argued, state legitimacy writ large is inextricable from the state's ability to punish legitimately. In this chapter, I argue, however, that this line is drawn not between the popularly imagined virtuous citizen and the nefarious criminal—who has, through his crimes forfeited his claims to the benefits of citizenship—but rather serves to demarcate the boundaries of a complex colonial-style order which is organized around "global white supremacy."[2] The dominant order defines criminality through this colonial order, creating a narrative that legitimates an oppressive social order and reproduces dominating material conditions while simultaneously appearing to be in service to democratic values.

I make this claim through an examination of deterrence, a core legitimating

---

1 This is constitutionally permitted because the 4th Amendment states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [...]." It is not considered legally unreasonable to search the person or property of a criminal currently serving a sentence.

2Charles W. Mills. *The Racial Contract.* p. 20 Cornell University Press. 1997. Mills, Charles W. "Race and the social contract tradition." *Social Identities* 6, no. 4 (2000): 441-462.

justification for punishment in the modern liberal state. I build a theory that articulates the processes through which a rational construction of deterrent philosophies comes to support a system of oppression that stands in direct opposition to the normative vision by which deterrrence claims its legitimacy. Specifically, defenders of deterrence justify punishment through claims that deterrent punishment is an expansive form of self-defense, but I argue that deterrence as it is used in the United States instead identifies certain people as objects and justifies the use of these objects as part of the maintenance of an oppressive social order. Further, as deterrent punishment emerges from and articulates itself as legitimate through liberal political theory, this critique of deterrence is inherently also a critique of the American liberal order itself.

In constructing this argument, this chapter is broken down into five major sections. The next section (following this brief introduction) describes the background of deterrence. I examine both the political history and normative constructions of deterrent punishment. This section presents deterrence as it is structured as a justification for punishment. In the third section, I build the theoretical framework of this chapter, which argues that deterrent punishment, in its most fundamental structure, is a mechanism for enacting and legitimating what is tantamount to the political murder of vast swaths of black, brown, and poor people in America. In the fourth section, I apply this model to a pair of cases in which deterrence is a central theme. The first case study, an examination of California's "Three-strikes" law, argues that this policy, articulated in the language of deterrence, actually results in the legal, though arbitrary, designation of large numbers of people as irredeemably outside the protection (and indeed, destructive) of the civil order

—based not on material measures of social harm, but rather on a hazy race-class status. In the second case study, I discuss the unification of surveillance and deterrent punishment subsequent to the 1968 Supreme Court decision in *Terry v. Ohio*, [3] I conclude the chapter by reviewing the overall role that the ideology of deterrence plays in the criminal justice and overall political system at large.

**I. Conceptual Background of Deterrence**

When political scientists engage with deterrence, they are more likely to be referencing nuclear deterrence than domestic penal policy, however deterrence as a goal and legitimating function of punishment is a central feature of American punishment. The roots of deterrence stretch into the liberal intellectual heritage of the founding of this nation, present as penal institutions and logics were developing, becoming embedded in deep structures of penal policies. The Supreme Court has steadfastly held to the precedent that the death penalty is permissible only when there is an reasonable expectation that the execution will have deterrent effects.[4] Where deterrence cannot be expected, capital punishment becomes cruel and unusual—transgressing the acceptable boundaries of American civil society. For most people, deterrence is an intuitively satisfying purpose for punishment.[5] We all avoid certain behaviors because we wish to avoid corollary outcomes; this avoidance may be as simple as the rejection of an extra piece of cake in

---

3This case study is fundamentally in conversation with Michel Foucault's *Discipline and* Punish, wherein Foucault argues that the replication of surveillance technologies across society has created a constantly reinforced system of internal and external discipline. I argue that this is true, but without a materialist approach, the different ways this power is enacted/experienced is obscured in meaningful and problematic ways.

4It must also have retributive effects as is discussed in the previous chapter. The SC states that retribution and deterrence must both be present in sufficient ways in order to justify capital punishment. See *Roper v. Simmons* 543 U.S. 551 .

5Work by contemporary analytic philosophers in particular often begins with a discussion of the intuitively satisfying concept of deterrence. Cite.

hopes of avoiding indigestion or weight gain, but this is often extrapolated uncritically onto criminal punishment with the assumption that the underlying principles are identical across categories. However, the internal architecture of theories of deterrence are not fundamentally behavioral, but rather are grounded in liberal visions of natural law and order.

To deter, etymologically understood, is 'to frighten away from.' In modern punishment, deterrence is described as the theory that punishment is just when the purpose of it is that either one or more individuals are dissuaded from committing criminal acts that they would otherwise have committed, were there no negative consequence for committing such an act. Deterrence as a primary goal of and justification for punishment emerged in the modern era and is always associated with a system of individual rights.[6] In contemporary American contexts, it is most explicitly referred to in death penalty cases, where for capital punishment to be considered constitutional, it must have both a “deterrent and retributive effect,” but it is also present in policy debates across a number of penal initiatives. Implicit in the concept of deterrence is the necessity of threat. Fundamentally, deterrent punishment is a threat to one and all that if they act in X fashion, Y negative consequence will occur.

Deterrence as a desired effect, as opposed to an organizing principle, was present in the earliest formulations of state punishment.[7] Any public statement of intent to harm if an offense is committed has, at least on some level, an element of deterrence. By threatening a harm in response to an act, the threat itself carries with it a deterrent

6Prior to the modern era, deterrence was considered a fortunate consequence of punishment, but was not considered central to the logic that permitted a state to enact violence on its own people.
7Though Hammurabi's Code justifies punishment as an inherent power of the sovereign, the practical dissemination is widely read as a deterrent action.

possibility. However, deterrence as a primary justification for punishment emerges in the West with the modern era, in a simplistic form with Thomas Hobbes, and later developed with a more complex line of argumentation in the work of John Locke.[8] Deterrence was (concurrently and) subsequently taken up by utilitarian philosophers, but at that point became a function rather than a justification. Contemporary defenses of deterrence as the justification for punishment emerged in the twentieth century analytic tradition. However, these normative theories both emerge from and feed into problematic views of human nature; deterrence is—more so than other theories of punishment—a behavioral process. The problem of praxis in deterrent theory resides not only in the translation of implementing the regulatory ideal, but in the internal logic of the theory itself. In this section, I trace out normative theories of deterrence and identify junctures at which the logic relies on secondary value judgments; I begin with Locke's theory of deterrence, which predominates in American ideology, and then contrast it with Hobbes's vision arguing that through this comparison, the assumptions in Locke's theory become more apparent. It is in these interstitial spaces of subjectivity that discriminatory impulses are reproduced. Thus, when deterrence recreates colonial-style oppression, it does so not merely as a failure to sufficiently approach the regulatory ideal of deterrence, but rather inheres in the articulation of deterrence itself.

**II. Normative Theories of Deterrence**

In the American context, justifications for deterrence are often presented less as philosophical arguments than as pragmatic political action, but they often rely on

8Grotius also developed a deterrent theory of punishment, but it was fundamentally a theological argument rather than a political one. While Hobbes and Locke represent the turn toward deterrence, it was more accurately a gradual and epochal turn

foundational ideas about deterrence that are intertwined with ideas about the state, political legitimacy, and views of "the citizen." In this subtextual sphere, John Locke's vision of just punishment as articulated across *The Second Treatise on Civil Government* and *An Essay Concerning Human Understanding* both informs and reflects the internal logic of American deterrence. In drawing out these normative logics, I also re-articulate the assumptions and processes implicit in them. Locke's vision of deterrence is problematic in both its internal logic and its material assertions about human behavior and psychology; Locke relies on colonial dogma, which he then reproduces uncritically in his liberal philosophy.

Locke, Rationality, and the Criminal. The Lockean theory of punishment, as articulated in both the *Essay Concerning Human Understanding* and *Second Treatise of Civil Government*, is organized so as to best protect the rights of legitimate members of the social contract. While it has elements of a retributive or restorative justice, the right to punish is fundamentally deterrent, or what Locke calls the right of "restraint." Lockean punishment is about defending the social order and the rational life. In this section, I trace Locke's argument on punishment from the state of nature to its refinement under the established state.

Locke articulates his theory of punishment in the *Second Treatise of Civil Government*, building on his arguments about the nature of human reason in his *Essay Concerning Human Understanding.*[9] In the state of nature, man *qua* rational actor, has the right to punish any other human being for violations of the self-evident natural law. This

9Locke also discusses his views on punishment in the *Letter Concerning Toleration.* However, the arguments offered in that text tend to merely retread the same argument, in a less clear way. Locke, John. *The second treatise of government and a letter concerning toleration*. Dover Publications, 2002.

right derives directly from the right to self-defense, which in turn is an inversion of the right to life itself. If one has the right to live, which is considered to be self-evident in that God gave man life, then man also has the right to protect that right. Locke argues that in the state of nature, punishment may legitimately have two central aims: "reparation and restraint."[10] In the state of nature, the victim of a crime has the right for reparation as recompense for the crime committed against him. However, all humans have the right to punish an offender for restraint, or deterrence.[11] This is because any rational actor in the state of nature has an interest in a lawful state (reflecting the core idea that Locke's state of nature is structured by natural law). Locke argues that a criminal act disrupts the natural order, creating a state of war, which any rational being would want to escape..

The entrance into the social contract changes the form of these rights and obligations. Duties and obligations are redistributed according to the nature of the contract. Reparation becomes a civil issue, whereas restraint becomes the central feature of state punishment, a division that is echoed in the current division between American civil and criminal law. Under the social contract, the state assumes the obligatory responsibility of responding to criminal offense with the goal of defending the social order. Indeed, in the Lockean state, responsibility for punishment is a key purpose of entering into the social contract—Locke acknowledges that humans as individuals may fail at responding to crime in constructive and rational ways, for example, if a person accidentally hits my child with a car, despite my general rationality, I might not be able to

---

10As opposed to vengeance, which might be a happy accident, but cannot be an organizing principle for a legitimate act of harm.

11I identify Locke's "restraint" with deterrence because he explicitly argues that one should be punished in order to prevent him (or others) from committing further criminal acts. While this may be incapacitative, there is no necessity that it be so.

see all the facts clearly in my response to that drive. The state's assumption of this right is proposed to result in a more consistently rational society.

For Locke, the right of punishing a criminal derives from the natural right to protect one's own life, and by extension (because we are necessitous beings), our property. As humans, endowed with reason and the powers of observation, the right to our life and our property is a natural one, discernible and self-evident. The right of a reactive self-defense is an obvious consequence of these premises, but Locke argues that the right of self-defense is actually quite expansive when considered in the context of law-breaking itself. Specifically, in the state of nature, the only laws that exist are natural laws—laws that, with only a little reasonable consideration, are discernible and intellectually coherent. Transgressions of these laws then, are identified with a failure of reason or a fundamental misunderstanding about the world around oneself. This failure of reason sets the aggressor apart,

> In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men, for their mutual security; and so he becomes dangerous to mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him.[12]

Further, one ought not regard the law-breaker as merely an oddity, but as an endemically flawed and dangerous character, a "noxious creature" who has "quit the principles of human nature."[13] Indeed, the aggressor has shown that he ought not even be considered human at all, but instead is more like a "lion or a tyger."[14] From this stance, the punishment that on its face seems less intuitive becomes natural—clearly capital

---

12Locke, John. 1689. *Second Treatise on Civil Government.* (II, 8).
13Ibid, (II, 10).
14Ibid, (II, 11). Also see Keally McBride's discussion of punishment in Locke's theory (114).

punishment is appropriate for a murderer, but Locke argues further that even a thief may be punishable with death. Explicitly, Locke argues that since the thief has shown himself to defy the laws of reason, he has shown himself to be irrational—and thus cannot be trusted to act rationally in the future, thereby renderingwhatever punishment "as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like," sufficient for justice with no external limitations on the "degree" or "severity"[15] of that punishment.[16] Implicitly, Locke is suggesting here that the criminal, by transgressing the law of nature, has removed himself from that category of individuals he considers to be fully human.[17] The criminal is defined by his irrationality, in opposition to the definition of a human being as rational.

Analogous to the right in the state of nature, the just and rational use for state punishment must be an extrapolation of that self-defense onto the political body, in the form of deterrence. Deterrence is, in Locke's usage, a form of active self-defense. The body of the criminal becomes an instrument for an object lesson demonstrating why crime won't pay.[18] Under Locke's formulation there is no objective standard that governs the quality or quantity of deterrent punishment. Just as man has license to use the world and animals to increase his own bounty, the criminal has placed himself in a position

---

15Ibid, (II, 12).

16Scholarly interpretations on this element of Locke's theory vary, for another position see Simmons, A. J. 1991. "Locke and the Right to Punish" *Philosophy and Public Affairs* 20:4. pp 311-349. He argues that Locke intends proportionality in punishment, but ignores the passages I quote. For an explanation of Kantian punishment that is focused on the role of the executive, see Tully, James. "Political Freedom." *The Journal of philosophy* 87, no. 10 (1990): 517-523.

17This category has important parallels with those other groups that Locke considers to be less than capable of participating in political society---the in-group/out-group problem, often decided on *irrational* grounds, reveals a fundamental flaw in the liberal project itself, and certainly in the arbitration of just punishment.

18Revenge or retribution isn't a viable political agenda, indeed, Locke argues that the general inability for men to see their own situations clearly (and thereby want excessive revenge) is one of the best reasons to enter into the social contract. To desire revenge is understandable, but not governed by natural law.

where he has forfeited his human standing and can thus be used to counter his own and others future transgressions, by whatever means are necessary.[19] This vision of deterrence relies on the assumption that crimes under the social contract are analogous to violations of natural law, or, alternatively, that laws of the state acquire the rational ordering of natural law. The consequence is that this form of deterrence posits crime as dichotomous with reason, while siumltaneously uniting reason with humanity. Crime, for Locke, becomes an act which indicates the irrationality, and even the in-humanity of criminals.

In Order that They Might Be Better Disposed: Deterrence in Thomas Hobbes Leviathan On the other hand, Locke's liberal predecessor offers a much starker, more functionally driven account of punishment. I recount it here as a springboard for comparison and critique. Hobbes devotes an entire chapter of his *Leviathan* to the subject of "Punishments and Rewards," and in this chapter produces a specific definition of punishment that narrowly defines the boundaries of legitimate punishment while preserving the unlimited power of the sovereign.[20] An act, Hobbes argues, is only rightly called a punishment if it "is an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience" *emphasis mine)*. Any act of state violence that fails to adhere to this definition is not a punishment at all, but rather an act of hostility.

---

19Locke has a particularly linear view of punishment. As crimes that threaten life and property are punishable by death, which is of course, the ultimate punishment, all other punishments are permissible. "POLITICAL POWER, then, I take to be a RIGHT of making laws with penalties of death, and consequently all less penalties." (Ibid, [I, 1]).

20Hobbes also takes up the isssue of state punishment in *De Cive*, but the substance is identical to that presented in *Leviathan*, but with less development.

Clarifying, Hobbes takes a realistic look at punishment as the state legitimately harming its own people. The central reality of punishment is that it is an evil. We do not wish to be punished, and in fact, Hobbes continues, any punishment that isn't so bad as to want to be avoided, should be categorized as a "cost" of the banned action, rather than an actual punishment. Further, an act of harm "which is inflicted without intention or possibility of disposing the delinquent or, by his example, other men to obey the laws" is not a punishment at all, but merely an act of hostility.[21] As part of this, Hobbes requires both that punishments be legal (in that they must be pre-defined, or else there is no deterrent effect to them-- if one cannot expect punishment X, why should one fear it?) and publicized. Hobbes recognizes that acts that do not fit this definition may happen, but wants to clarify that acts of "punishment" as he defines them, carry with them certain obligations *per se.* This distinction is important because it delineates both obligations on the part of the public, as well as points to the continuance of a successful state, which is the central purpose of submitting to the authority of the sovereign in the first place.

Rational individuals will enter into the Hobbesian social contract on the basis of the likelihood of a decrease in the arbitrary exercise of power in their lives. In defining punishment, Hobbes seeks to articulate the ways in which the sovereign can legitimately and non-arbitrarily exercise power in the lives of social contractors. The sovereign will seek to do this because an arbitrary exertion of power, what Hobbes calls hostility, will only serve to destabilize the social and political order, the possible deposition of the sovereign, and the threat of a return to a state of limitless war. Punishment is permitted and necessary because lawlessness recreates the state of war—thus negating the benefits

21Hobbes, Thomas. *Leviathan.* Ch. 28. "On Punishments and Rewards."

of the social contract.

The vision of punishment Hobbes lays out is that vision that he believes will contribute to the most peaceful and perpetual maintenance of the internal society—nothing more, nothing less. He is not concerned with deriving a just source of authority for punishment, as he regards it as part of the original right of the sovereign, who retains utter freedom. His concern instead is with the creation of a coherent social whole, that through entrance into the social contract, each contractor becomes obligated to become the punisher of the lawless. Here Hobbes' rejected state of a war of “all against all” is transformed—when confronted with a criminal—into a war of *all against one*. Punishment becomes a method by which political power is leveraged to protect the Leviathan, not necessarily from the criminal as an individual, but from the specter of the expansion of that terrible state of war.

Deterrence, Hobbes argues, is the only legitimate purpose of punishment, because it is the only penal logic through which the preservation of the social contract is central. Hobbes argues that criminality is a challenge to the political order itself. Not only is the criminal individual in violation of the law, he is actually considered to have put himself in a state of war with every individual still bound by the social contract—via a violation of the political tie, he has effectively dissolved all bonds. Though the sovereign retains the ultimate freedom of the state of nature, the name of punishment is reserved for this lawless actor in order to re-affirm and strengthen the political order. Violence can be enacted on this criminal member of the social contract in order that the lawlessness that he has created may be counter-acted. Deterrence, or punishing so that men may "better be

disposed to obedience," is enacted for the future success and security of the social order. Hobbes argues further than any act of violence done by the state to a criminal for other purposes, such as retribution, are merely acts of irrational vengeance and can only contribute to further destabilization of the political order.[22]

Unlike Locke, Hobbes makes no statements on the moral or rational failure of the criminal. Instead, Hobbes regards criminals as individual actors, making choices that are personal and varied as any other actor. That the act is unacceptable to the sovereign is not an indication of the criminal's personality, but rather is more a reflection of the sovereign. The legal power to punish reflects the sovereign's interest, not the criminal's humanity.

**III. Critiquing Deterrence, Critiquing Liberalism**

In comparing Hobbes' and Locke's visions of punishment, three divergent elements are relevant for analyzing deterrence: the vision of the criminal, the relationship between the criminal and the body politic, and the permissible limits of punishment itself. First, and most importantly is the vision of the criminal himself (and indeed, as has been previously noted, these theories are written as though women barely exist). As I have argued above, Locke portrays the criminal as a person who has either abandoned reason, or shown that he is incapable of reasoning, either of which makes this person extremely dangerous, untrustworthy, and potentially destructive. Hobbes however, argues that it is likely that all human beings are extremely dangerous, untrustworthy and potentially destructive; for Hobbes this has little to do with our capacities or inclinations toward reasonable living, and more to do with the fact that we are human. In Hobbes' view any

22At points, Hobbesian deterrence has a distinctly utilitarian flavor to it. However, as I will argue in the next chapter of this dissertation, justifications that can rightly be called utilitarian are more flexible in their potential range of goals.

of us might be criminals if we believed we might benefit from the transgression, but Locke argues that there is a qualitative and moral difference between the rational, law-abiding citizen and the irrational, lawless criminal.

The second and third differences between Hobbes's and Locke's vision focus on the relationship of the criminal to the body politic and the limits of punishment. Punishment under these two ideal regimes might look identical, but while under both ideals, the criminal has forfeited his right to protection under the social contract, there are different judgments made about the act and the criminal himself. The Hobbesian criminal may be judged as immoral to the extent that the Hobbesian state of war is immoral, which immanently is a matter of semantics; the Lockean criminal, is, by dint of his criminal actions, immoral. The core difference between Hobbes and Locke on criminal punishment turns on whether the tie to criminality is necessarily a moral question *per se* or whether the morality inheres not in the instant act, but in the political consequences of the act. This judgment also bleeds onto the possible extents and purposes of punishment. Hobbes argues that punishment is legitimate to the extent that it deters—any punishment, no matter how severe may be legitimate, but it must have this function; this follows the organizing principle of protecting the social contract; Locke argues that the criminal has absented himself from the social contract—shown himself to be inhuman, like "a lyon or a tyger"--and thus can be used for whatever purposes the state so desires.

Political Relevance of Hobbes and Locke. Neither Hobbesian nor Lockean articulations of deterrence have been imported whole cloth into the contemporary American system, Lockean ideals in particular have been adopted and interpreted into

criminal justice practice. Locke's influence in the founding of the American state is well documented;[23] in the contemporary era, the Lockean legacy persists with the dominance of particular strains of ideology: possessive individualism, a rhetoric of natural rights, the connections between property rights and personal liberty.[24] Locke's vision of punishment also resonates across American criminal justice in the dominance of morality, and in specific examination, the construction of criminality itself. However, Hobbes vision is invisible in American discourse as the rhetoric of punishment is grounded both in moral claims and in a view of the criminal as fundamentally different from the legitimate body politic.

The Problem of Locke's Punishment Locke's vision of punishment as an ethical and defensible practice, however, breaks down as it is realized, both within the theoretical structure itself and more dramatically as the abstract theory is mapped onto the historically formed world. First, the internal flaws emerge with the assumption that the laws of the state are equivalent to natural law in the state of nature, and further, that complying with state law is a rational and moral act. This simplification makes a mockery of the complexity of modern political life, wherein the regulation of day-to-day life is both encompassing and conventional, standing in clear contrast to the clear moralism of a discourse of natural law. That is, in a legal order complicated by drug classifications, "free speech zones," and status offenses, the presumption that criminal offenses are identical with moral offenses is either stupid or doing different political work.

---

23 Pangle, Thomas L. *The spirit of modern republicanism: The moral vision of the American founders and the philosophy of Locke*. University of Chicago Press, 1990; Brown, Gillian. *The Consent of the Governed: The Lockean Legacy in Early American Culture*. Harvard University Press, 2001.
24 Isenberg, Nancy. "The Genius of Democracy: Fictions of Gender and Citizenship in the United States, 1860–1945." *Journal of American History* 99, no. 3 (2012): 951-951.

Further, and returning to the broader thesis of this dissertation, as this theory is mapped onto the world, it relies on and replicates a colonial ideology, while simultaneously reasserting the philosophical purity, and hence the natural universality of the order it creates. In the Lockean vision, there are two types of people: citizens and those who masquerade as citizens, but are really more like animals. The deeply democratic impulse in Locke is the breadth of the category of citizen—any person who is rational, or "understanding" as he marks the distinct category;[25] the anti-democratic counter-impulse develops from the assumption of the dominant order of its own rationality. If the dominant order makes a determination—legally, legislatively, or even culturally, the judgment is assumed to be rational, even or perhaps especially when it comes under challenge in democratic discourse. As an example of this we might think of the shifting boundaries of contentious policy arguments, as an argument is seen to emerge from the position of the center, no matter whether the position might have been seen as radical in another era, it is understood as legitimate because of its origins.

Locke's deterrent theory, much like the whole of liberal contract theory, requires a world where history, structural identity, and particular experience have no role in political realities. The diverse experiences of individuals and communities are obscured in place of visions of the human being as existing as an ideal abstraction, “roughly equal in terms of mental and physical power,”[26] as well as free from socially constructed inequality.

By centralizing deterrence in the penal theory, with its assertions about the distinct nature of the criminal, this vision of society is naturalized, with the consequence that

---

25Locke, John. *Essay Concerning Human Understanding.* Book I,i; Book II, xxvii
26Nussbaum, Martha. *The Examined Life.*

structural inequalities are erased from penal logic. Echoing long established critiques of liberalism, deterrence practice problematically proceeds from a fictional—structureless and historical—vision of society. Because of the predominance of this fictive vision, actual causes and conditions of crime (as well as the socially defined nature of it) are obscured, instead creating a pre-determined narrative about the nature of crime. This narrative posits the social unit as unquestionably good, and anyone identified as a criminal stands in opposition to that social good. In the American political order, where a colonial logic dominates thinking about crime and punishment, the colonized body is cast as the natural criminal. As colonial and deterrent logic are united, the colonized body/criminal are constructed as dangerous to the political order, as deterrent thinking is implemented, the colonized body is cast ever further outside the political union. Deterrent logic naturalizes a divide between the colonized body and the citizen, naturalizing both prior lack of access to the benefits of citizenship by the colonized individual and then further retrenching any remaining benefits in the process of punishing.

Through deterrent punishment, the colonial-order is inscribed into the political institutions of citizenship and civil rights. After the Civil Rights movement, equality under the law became a paramount American democratic value. By de-racializing the letter of the law, the colonial order is increasingly obscured, but through analysis in light of policy it is again made visible. That is, in the current political moment, criminalization claims to be "post-racial;"[27] the legal code has purged "Black Codes" and segregationist

27Lopez, Ian F. Haney. "Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness, A." *Stan. L. Rev.* 59 (2006): 985. Armstrong, Margalynne, and Stephanie Wildman. "Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight." (2008). p. 648;Morrison, John E. "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action." *Iowa L. Rev.* 79 (1993): 313. ; Higginbotham Jr, A. Leon, Gregory A. Clarick, and Marcella David. "Shaw v. Reno: A Mirage of Good Intentions with Devasting Racial Consequences."*Fordham L. Rev.* 62 (1993):

positive law. However, the ahisoricity of liberal ideology—resurgent in the domination of neoliberalism, but also bedrock in that these classical liberal ideals never actually gave way—asserts that the contemporary order is the entire reality, denying the relevance of historically persistent forms, most importantly institutions and ideology. The deterrence offered then, is also ahistorical functioning on the premise that the social relations that currently exist are natural and timeless. Consequently, the vision of social relations of naturalized and eternal inequality determines the conceptualization and practice of deterrence.

Lockean punishment defines crime as an irrational act through which the criminal excludes himself from the social contract. However, in the United States, the boundaries of the civic union come to be defined by the logic of the colony itself. In other words, through the construction of punishment as that act which marks the punished subject as separated from the social contract, punishment functions to simultaneously construct and identify those individuals who are considered neither worthy nor capable of citizenship. At the same time, the social construction of crime—through marking acts of the colonized as criminal in and of themselves, as well as recreating structurally criminogenic conditions—tends to serve as further proof that those who are punished have brought punishment unto themselves. Deterrent philosophy provides a legitimating narrative that says that the punishing that the state is doing is necessary to a democratic, contract-based society while actually creating a penal ideology committed to domination of real, historic bodies.

---

1593. Bonilla-Silva, Eduardo. *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States*. Rowman & Littlefield Pub Incorporated, 2010.

However, as rationality, particularly as regards crime and punishment, is constructed through a colonial logic (as argued in the previous chapter), those who are defined in their political existence as irrational are already defined as criminal.[28] As has been argued by many, punishment plays a crucial role in organizing political life. This is because the state, throughlegitimate punishment, claims the legitimate power to use bodies for its own purposes (rather than deferring to the self-determination of the bodies themselves). As a central purpose of the Lockean social contract is to expand the possibilities for self-determination of contractors, this represents a critical moment in the political legitimacy of the state while at the same time reinforcing the political exile of the colonized body that is the consequence of punishment.

These colonized bodies, marked as irrational, criminal, and outside the social contract, are rendered inhuman, Locke says that criminals are like a "tyger or a lyon," a dangerous animal that must be always regarded as such. In that they are inhuman, they are also reconstructed as instruments to be employed in the maintenance and furtherance of the political community. This vision of utility is directly tied to the Lockean vision of productive, rational man as living in the image of God.[29] God's defining act is creation, man is created in God's image, and so productivity becomes an ethical, civil-religious dictate—the extent to which man is able to produce is the extent to which he succeeds in his quest to follow in godly footsteps. Productivity is only possible under a lawful, rational socio-political order. Under a deterrent ideology, the only political use for these

---

28In addition to my previous chapter, also see Khlalil Muhammad's excellent work *The Condemnation of Blackness* which explores the way that social science was used to construct blackness as deviant across the twentieth century.

29Simmons, A. John, and John Locke. *The Lockean theory of rights*. Princeton: Princeton University Press, 1992. p.77

dangerous creatures is to further that order. While McBride argues that Lockean punishment is "ultimately circular," used to both confirm the offender's personhood by holding him accountabile, while also denying his personhood through identifying him as this irrational actor, under a colonial logic, deterrence makes perfect sense. By punishing the irrational harshly and visibly, perhaps he and others like him will learn what their own reason cannot teach them. Just as a dog can be trained by violence without any expectation that the dog is a rational, ethical actor, so, it is supposed, can the criminal body.

**IV. Citizenship & Punishment**

Further, this construct of criminality and punishment is politically recursive, by which I mean that the political marginalization of criminalized communities only reinforces dominant visions of the marginalized community as unfit for citizenship. At the same time that the criminal is identified as the irrational, under liberal contract theory and particularly in the Lockean system, rationality is identified as the core requisite for citizenship. The consequence of this pairing is that the criminal is constructed in conceptual opposition to the citizen. To be designated as deserving of punishment becomes both conceptually and functionally to be simultaneously designated as undeserving and incapable of meaningful participation in the civic project. This manifests in two concrete ways in American punishment. First, is the denial of the privileges of citizenship to the colonized class. Second, and more clearly connected through present policy, is the stripping away (often permanently) of further privileges of citizenship. These are two sides to the same coin—a prefigured denial of the functions of citizenship

and a *post hoc* denial of the forms.

As McBride argues, under the liberal order, punishment both defines the boundaries of the living social contract and (when accepted as legitimate by the public) reaffirms the power of the state to exist. However, in the American formulation of this liberal order, the political order is simulatenously structured by what Charles Mills calls the "racial contract," wherein "racism (or, as [C.W. Mills] argue[s], global white supremacy) is itself a political system"[30] In other words, the socio-political order was founded in the maintenance and logic of white supremacy and that internal structure persists to this day; state punishment functions to maintain and legitimate the white supremacist colonial order . Indeed, punishment is the modern site of legitimate racial oppression, as Michelle Alexander argues in her recent book The New Jim Crow, but I argue that it is through the juxtaposition of punishment and citizenship that this can be accepted and defended as a legitimate practice in a democratic society.

The conceptual formation of the social contract is explicit in its designation of certain people as included in or excluded from the contract itself. Hobbes identifies this as a rational, self-interested choice, but a choice contingent on locality and other options; Locke, however, argues that entrance into the social contract is the necessary outcome of existing as a rational man in a populated world. The difference here is that under Hobbesian visions, being outside the social contract makes you an enemy, but for Locke it makes you irrational, casting doubt even on your humanity.

**V. A Functional Deterrence.**

I have spent the whole of this chapter thus far critiquing deterrence as it has been

30Mills., 3

imagined and implemented, but in this section I mount a critical defense of deterrence, sketching out the boundaries of an ideal practical account of deterrence, and begin to do the work of contextually situating it. In a previous section, I used Hobbes's vision of deterrence as a contrast agent to highlight Locke's assumptions, however, in striving for a theory of deterrence that can be defended as a practical ideal—even in a complex society—Hobbes's vision offers much that is of use.

Hobbes's theory of deterrence argues that punishment is legitimate to the extent that it is legal, focused on the defense of the legitimate state, and most importantly, effective. If the evil done by punishment does not actual protect the state, Hobbes argues, then it is mere hostility—more akin to an act of war than of advisable governing. In the democratic state, the relation still holds effectively. If the demos declares a law and punishes in such a way that deters effectively, then this simpler vision of deterrence can be defended; crime happens, personal security is a paramount political objective, and if a clearly stated, simple deterrence works, then the simplicity of Hobbes's account suffices.

Except that deterrence rarely works, and does not at all work in the ways that the American criminal justice apparatus has constructed it. The appeal of deterrence is its intuitive satisfaction, humans learn through understanding causal chains, if we touch a hot pan, our hands will hurt; we will not touch a hot pan. However, criminal deterrence in the US has extrapolated this emotionally satisfactory process across an unwieldy, uncertain, massive set of institutions. Certain police practices can deter, speed and adeptness at intervention can deter, but the current dominant process of criminal punishment, structured in the lengthy mass incarceration complex has been shown to

have little deterrent effect on the crimes of the vast majority of those who are the objects of such punishment. The political question turns out, then, to be a practical question: how much deterrence is required in order for deterrent punishment to be legitimate in the democratic state? To this (pre-saging the next chapter of this dissertation), I say that deterrent punishment may be legitimate to the extent that it is more effective than less harmful alternatives. But this judgment, once again creates the challenge of measuring harm and benefit in a political context complicated by competing and conflicting colonial and democratic ideologies.

**VI. Recreating the Colony through Deterrence**

In the next section, I will analyze two phenomena, "three strikes" laws, and the rise of surveillance culture within the context of colonial deterrence. I argue each depends on a colonial logic in order to gain traction as legitimate options in contemporary American and that they also serve to reproduce and further legitimate that colonial logic as natural to a democratic order. Of particular note in these cases is the indeterminate expansion of this colonial logic over an ever greater expanse of the population, making the challenge of defending the legitimacy of American democracy all the greater.

<u>"Sports are probably not suitable analogies for criminal justice policy."[31]: Three-strikes laws, deterrence, and the de-identification of criminality.</u> In this section, I bring the theoretical problems explored above to analyze "three strikes and you're out" policies as examples of deterrence theories in action. These policies, driven by the deeply irrational, yet expectable, impulses of anger and fear, are articulated as deterrent, but rely

31Wiatrowski, Michael. 1996. "Three Strikes and You're Out": Rethinking the Police and Crime Control Mandate. In *Three Strikes and You're Out: Vengeance as public policy.* Eds. David Schichor and Dale Sechrest. London: Sage Publications. 131.

on a racialized vision of the Lockean criminal. Despite empirical evidence to the contrary, these policies identify all criminals as dangerous, irrational, and utterly irredeemable. At the same time, these policies are tailored to effect predominantly black and brown groups of criminals, whose crimes do not reflect the monstrosity that was imagined in the policy-making.

Three-strikes policies use deterrent rhetoric to enact policies that cast whole groups of real, material human beings as endemically dangerous, and thus deserving of being permanently removed from the political union. These policies reveal underlying assumptions about the inherent criminality of the anti-citizen, thus making it logical that these colonized bodies ought to be removed from political life. By mobilizing deterrence of criminality, these colonizing policies are rendered permissible even in this age of nominal political equality—thus reconciling the desire for the oppressing class to feel morally superior while also supporting and enacting policies that have the clear effect of re-institutionalizing the oppression of people of color, poor people, and others who at particular times are positioned as the political Other. Through an analysis of three-strikes policies, it becomes clear that they are enacted in concordance with a fictional narrative about the world, in which an uncritical, reductive logic about crime, for example the idea that justice can be brought about with sports analogies, superficially dominates allowing deeper held beliefs about social hierarchy to dictate the terms of politics.

“Three-strikes and You're Out” laws, or laws that substantially increase penalties —often to life imprisonment for repeat offenders—emerged en mass across the United States in the early 1990's, creating new classes of sentencing requirements, a shift in

penal practice, and intensified policies of prison expansion that had been ongoing in a patchwork manner over the previous decade. Media and political attention focused on a series of horrific high-profile cases that produced a quick and dramatic policy response that caused contemporary scholars to state that the passage of these laws was less than carefully considered public policy, for example: "Undertaking such a profound change in the private sector without a thorough analysis of the effect would be considered foolish and unheard of,"[32] and more directly, "based on raw, emotionally driven opinion."[33] This approach to penal policy making is grounded in a rageful attitude about criminality and the political community, despite claims that it is a reasoned, necessary response. The criminals imagined in this penal vision are not fully-realized human beings, but rather are like Locke's lyons and tygers. These attitudes persist despite the reality that these laws, particularly the Californian version (on which I focus in this case study) were most likely to affect individuals who had committed non-violent, often "non-serious" offenses in order to trigger three-strikes sentencing. "Three Strikes" as a deterrent policy relies on an uncritical structuring of criminality that collapses petty, weak, and self-oriented criminal acts into the violent, vicious, and terrifying acts that haunt the public imagination and are in fact the self-told narratives that legitimate ongoing sociopolitical domination.

Under three-strikes logic, all criminality is imagined as Locke imagines it—irrational and an indication that the criminal is unfit for the social contract, and thus an entity that ought to be used as an instrument to deter others who are equally unfit for the

---

32Cushman, Robert. 1996. Effect on a Local Criminal Justice System. In *Three Strikes and You're Out: Vengeance as public policy.* Eds. David Schichor and Dale Sechrest. London: Sage Publications. 102.
33Surette, Ray, 1996. News From Nowhere, Policy to Follow: Media and the social construction of "Three Strikes and You're Out." In *Three Strikes and You're Out: Vengeance as public policy.* Eds. David Schichor and Dale Sechrest. London: Sage Publications. 199.

social world, but who might be detered from crime the way a dog might be trained with a large stick. This penal ideology is observable in the three-strikes advocacy of Mike Reynolds, father of Kimber, a young woman who was murdered by an individual with a lengthy history of crime. In mourning his child, he became a key figure in the expansion of the three-strikes legislation to apply to sixteen year olds. As a grieving father, he became a public face of the movement, and was clear in his view of criminals who he described as "criminal garbage," "a socially destructive machine."

Despite the fact that his daughter was not killed by a gang member, he focused on and exploited the vision of incorrigible and random violence of gang-populated Southern California. In reflecting on the policy process, he argued "kicking the age down to sixteen was a very easy sell because of gang violence in California" (Domanick 41). In his grieving, he collapsed all criminal acts into the heinous and senseless murder of his own child. Criminals became a separate category, valuable not as human beings but dangerous in themselves and only valuable as object lessons for others. All criminals, murderers or not, became identified with the man who killed his child—to the extent that any criminal —young, old, rich, poor, black, white, becomes scum, irredeemable detritus whose social value could only be negative.

Since Three Strikes has been implemented in California, the already present racial inequites in the corrections systems have been accentuated and expanded. While racial and ethnic minorities had already been criminalized at higher rates, as it was reported

> African Americans are sentenced to life under three strikes at 12 times the rate of whites, a disparity far greater than any found in other criminal justice policies. Latinos are 78% more likely to be sentenced under three strikes than whites. In many ways, the incremental racial and disparities evident in the overall criminal-justice process

combine geometrically in three strikes enforcement, resulting in such gross disproportionality of application,[34]

The major shift represented by "Three Strikes" is that it represents the process through which the explicit un-mooring from act-based penality in exchange for a character-based penality, by which I mean the replacement of the criminal act with the criminal body, occurs. The deterrent theories of punishment identify criminality as violations of a rational public right in ways that cast the criminal out of the social contract, rendering him inhuman, the ultimate Other. Three-Strikes, through its peculiarities functions in along the exact same lines. The most controversial aspect of "Three Strikes" is the fact that a third strike can be any felony, while the definitions for "serious" felonies also encompass a broad swath of crimes that have debatable possibilities for harm. Also problematic for many is the fact that there is no room in the law to account for length of time between crimes. For example, the case of Rene Landa, sentenced to 25 to life on a third strike in 1995. Landa's instant offense was the theft of a spare tire.[35] Prior to this offense, Landa's first two "strikes" were residential burglaries in 1986 and 1972. Though none of these crimes was violent, residential burglary is defined as a "serious" offense, and since there is no allowance for re-setting on the strikes time-clock, it did not matter that there was a generation between Landa's first and third offenses. Instead, "Three Strikes" codifies the underlying sentiment that criminality/broken-ness/anti-Citizen, is an eternal category. No matter Landa's life story, the policy designates him as an irrational actor, one who has forfeited his citizenship

34Sciraldi, V. and Silva, G. "Thee Strikes: the law that fails on all counts." Los Angeles Times. 7 March 2004. Retrieved from *http://www.threestrikes.org/latimes_7.html* on 7/30/2010.
35Landa contests this conviction, claiming that he was set up and railroaded. While this would be an even greater miscarriage of justice, my concern for this moment stands no matter his factual guilt.

status and rendered himself fit only for use by the state.

Stories like Rene Landa's have become part of the public narrative of the bill itself, everyone can cite a story about a “pizza thief”[36] or a guy who stole a VCR who ended up sentenced to life. Despite this, persistence of a belief in the rectitude of this model of criminal justice remains strong. In 2004, voters rejected Prop 66, which would have narrowed application of three strikes to include only “serious” or “violent” offenses as all strikes, as well as loosen application of the law in a few other key ways (such as by allowing greater discretion by sentencing judges). The pizza thief himself, released early on appeal, “gets” mission of the law, “If I go back to jail, it proves three strikes is right -- that this is where I belong."[37] However, this view of the law not only represents a particularly punitive vision, but it also denies the concrete practice of criminality—which is almost universally an age-related activity. Even the most constant of transgressors stops engaging in criminal behaviors as she ages. After the age of sixty, criminal activity is rare and tends to be isoalted in a few, defined, crime categories. Yet the proliferation of life sentences relies on a vision of criminality that is inextricable from the assigned individual's personality.

The uncritical view of criminality is, because of the persistence of white supremacist ideology in the United States, arises along with the implicit dogma that criminality is aligned with race. Just as being “race-blind” provides cover for the guilty being, accepting uncritically the permanence of criminality is contingent on a complex structure of racism, classism, and basic ego defense that continually re-asserts the

36Jerry Williams made headlines after being sentenced for 25 years to life for stealing a slice of pizza from a group of children. Though his sentence was later reduced, this case persists as one of the stories out of school that makes the shine of “three strikes” so bright for the public imagination and scholarship alike.
37Retrieved from: http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10/5 7/30/2010.

essential nature of the character—a position that is itself rendered 'rational' by those same processes of reification. This un-mooring from act-based penality, is in fact also a divorce from fact-based penality. As the public imagination becomes ever more enmeshed in the vision of a criminal as reified anti-citizen—the colonized, obscure subject, the actual harmfulness of criminality and punishment becomes less recognizable. Here, the process of reification that Lukacs describes, "man in capitalist society confronts a reality 'made' by himself (as a class) which appears to him to be a natural phenomenon alien to himself; he is wholly at the mercy of its 'laws,'"[38] comes to describe the public inability to assess criminality as a legal and social construct. As an objective referent for criminality disappears, the deep prejudices of race and class that haunt the American subconscious are allowed to flourish, re-racing criminality and re-criminalizing blacknesss.

This section was headed with the quotation, "Sports are probably not suitable analogies for criminal justice policy," which was a quote from a reporter on the whirlwind passage of California's three-strikes law, and while sports may not make for great policy, there is something apt in the fervor that this phrasing has inspired. As criminality becomes ever more identified with an ideological Other, it is less and less associated with real human beings. As those real human beings are further considered through a colonial logic, their humanity becomes ever less recognizable. Indeed, the criminals imagined are animals (like Locke's tyger), they are SuperPredators[39]—defined only by their violence. However, the challenge to this is that these people rarely exist. Jeffrey Dahmer exists, but he is rare. Today, over fifty percent, well over a million

38 Lukács, Georg. *History and class consciousness*. Vol. 215. Mit Press, 1972. From the Antinomes of Bourgeois Society – Part II

39Templeton, Robin. "Superscapegoating: Teen 'superpredators' hype set stage for draconian legislation." Extra! Newsletter for FAIR (Fairness and Accuracy in Reporting). January/February 1998.

people, are incarcerated in the United States on non-violent offenses. The gap between the vision of the criminal and the persons as individual human beings reveals that the imagined vision is more fictive than descriptive. This is a world reduced, manageable, safe—much the same as the world of sport—it is about feelings, aspirations, acting out the desires of the unconscious. In baseball we can play out not only the mechanics of the game, but also the triumph and tragedy of life, in reductive and safe ways. The deterrent order creates a space in which the criminal becomes a construction of the dominant order; that construction is then mapped onto the very real bodies of the colonized classes—only to further confirm to the colonizer that this order is natural and rational.

**VII. Terry Stops, Deterrence, Nuisances and Petty Indignities.**

In this next case, I examine "stop-and-frisk" policies as an elemental structure in the post-racial penal apparatus. Building on the legal groundwork established in the 1968 Supreme Court decision in *Terry v. Ohio*, expansive stop-and-frisk policies have in recent years become a structural feature of urban policing. The New York City Police Department's approximately 800,000 stops each year for the past several years has been the focus of much analysis and critique, just as the experience of being stopped by the police has become a regular feature of life for certain members of certain New York communities. In the decision, the Court determined that police stops, based on the "reasonable suspicion" of police officers were permissible under the Fourth Amendment because they produced only a "minor inconvenience and petty indignity," while representing an important tool in the maintenance of public safety. However, as the policies have become wholesale, they are experienced by America's internally colonized

peoples instead as an expansion of deterrent punishment—violating basic human dignities and Constitutional principles enjoyed daily by the dominant culture.

"Terry Stops," or "Terry Searches," are police mini-investigations during which "police officers stop, question, and sometimes frisk people as part of their routine patrol duties."[40] The practice emerged formally after the 1968 Supreme Court decision in Terry v. Ohio, in which the Court expanded police powers to stop, question, and detain individuals based on the police officer's "reasonable suspicion"[41] that the individual is engaged in a crime or is about to engage in a crime. Further, if the officer may have a reasonable belief that the person might be dangerous, she has a right to pat down the individual in order to ensure her own safety. Though the policy is race-blind, the practice —contingent on standards of reasonableness determined by police officers themselves— both emerged from and continues to function in ways marked by racial, economic, and spatial disparity. In formalizing these police powers, the court "justified [its decision] in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity."[42] Whether the police officer's "reasonable suspicion" was influenced by the race of the suspects was not discussed. Race did appear, as Justice Warren acknowledged that there was a concern about the "wholesale harassment" of racial and ethnic minorities by police, but it was determined that this ruling would not affect police-public relationships significantly.[43]

Since 1968, some police departments have built patrol policy around the rights

---

40 Jones-Brown, Delores D., Jaspreet Gill, and Jennifer Trone. *Stop, question & frisk policing practices in New York City: A primer.* Center on Race, Crime and Justice, John Jay College of Criminal Justice, 2010.
41Differentiated from "probable cause," the general standard for search and seizure.
42Ibid.
43The reasoning behind this aspect of the decision was grounded in the case being about evidence exclusion. Interestingly, the Court seems to assume that police will engage in a variety of behaviors that

granted in Terry v. Ohio, but in certain policy settings the use has developed in ways that mark certain demographic and geographic areas. The New York City Police Department has faced recent scrutiny as as series of news and research reports have emerged detailing implementation of the "Stop, Question, and Frisk" policy. According to data collected by the Center on Race, Crime and Justice, at the John Jay College of Criminal Justice, in the year 2009, police reported 575,996 stops in New York City. The authors of the report estimate that only about 70 percent of all stops are reported (under NYPD policy, certain stops do not require reports), meaning that there were likely over 800,000 stops made by New York City police officers in 2009. 2009 was a highpoint in number of reported stops in recent years, representing the zenith in a steadily rising pattern, according to data collected since 2003. Data from multiple years indicates a consistent pattern of concentration of stops in specific neighborhoods, as well as a consistent imbalance in the race and ethnicities of those who are stopped. Stops were most often made on the basis of "furtive movements," a highly subjective category. More than 80 percent of all subjects stopped were black or Hispanic. ""In 2009 [...], Blacks and Hispanics combined were stopped 9 times more than Whites," and of all those stopped, by 2008 (with an upward trend since data started being kept in 2003) almost 90 of those stopped were "completely innocent."[44] In addition to the racial imbalances, recent analysis by the New York Times cross-references precinct data with racial data, concluding that

> On average, the police conducted one stop and frisk a year for every one of the 14,000 people who live [...in the Brownsville neighborhood of Brooklyn]. More than 99 percent of the people were not arrested or charged with any wrongdoing. Brownsville

may constitute harassment of minority populations, but also seems to think that structural incentives (or disincentives) such as exclusion of evidence will not affect these actions. This points to a particularly flat view of race relation by the Court.

44Jones-Brown. 11.

> has the highest marijuana arrest rate in the city. The top 10 precincts for marijuana arrests averaged 2,150 for every 100,000 residents; the populations in those precincts are generally 90 percent or more nonwhite. [Mayor] Bloomberg's neighborhood has the lowest rate of marijuana arrests; the 10 precincts with the lowest rates averaged 67 arrests per 100,000 residents. The population in most of those neighborhoods was 80 percent white.[45]

The NYPD is one of the most diverse police departments in the world, but the deeply embedded psychological and political definitions of criminality dominate the policing activities—even of minority officers. Race-blindness, here, functions to disproportionately "inconvenience" and impose admitted "indignities" on black and other non-white New Yorkers, in such ways that it becomes increasingly difficult to argue that these stops are in fact minor inconveniences and that instead of "petty indignities," they become a form of siege, in fact a penal practice applied to a demo/geography—thus impinging on the dignity, and indeed the humanity, of those who are its objects. This has a self-reinforcing effect wherein police are trained to identify certain markers with "suspicious," the deep-grained, inherited identification of blackness with criminality makes a great deal of black maleness, particularly with the flourishing of gangster and hip-hop culture, start at a level of potential dangerousness that triggers an unidentifiable level of suspicion at the level of recognition. The process of human recognition is replaced with the recognition of a potential criminality, which is then enacted onto the subject—guilty or not. When, as in the approximately 6 percent of cases, deviance of some sort is confirmed, the view that these bodies are naturally criminal is also re-affirmed; when there is no criminal act discovered, the process of stop-question-frisk is confirmed to be a deterrent success. There is no place in this exchange for an interruption

---

45Dwyer, Jim. Retrieved from http://www.nytimes.com/2010/07/21/nyregion/21about.html?_r=1&scp=1&sq=bloomberg%20neighborhood%20stop&st=cse on 8/3/2010

of the alienated relation, in either situation—because the constant and repetitive act of violation, that happens to specific, historically criminalized bodies, is experienced as a violation, but also as the natural consequence of appearing in public in a criminalized body.

Stop-and-frisk represents a moment at which penality, policing, and the colonial ideology unite. Though many might argue that this is not a form of punishment, but rather is merely an expansion of surveillance practice, because it is articulated as deterrent, it should be understood as part of the ideological impulse of deterrent punishment. These policies rely on penal ideology because they require that the dominant culture assume that those who are stopped deserve to be stopped. Nicholas Peart describes his experience after being stopped-and-frisked for the third time in three years:

> I worried when police cars drove by; I was afraid I would be stopped and searched or that something worse would happen. I dress better if I go downtown. I don't hang out with friends outside my neighborhood in Harlem as much as I used to. Essentially, I incorporated into my daily life the sense that I might find myself up against a wall or on the ground with an officer's gun at my head. For a black man in his 20s like me, it's just a fact of life in New York.[46]

This can only be described as a minor nuisance and merely petty indignity if there is a simultaneous assertion that those subjected to these intrusions have no prior right to appear as public citizens—this is decidedly not the common experience of white, wealthy American citizens. Deterrent logic emerges because these are the political subjects who are identified as being rightfully used by the state to ensure the public safety of the social contract. That the contract does not include these people is the core of colonial logic.[47] These practices, which are explicitly discussed as deterrent by both policy advocates and

---

46Peart, Nicholas. 2011. http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html?pagewanted=all

47This understanding of the social contract is also a key thesis of Mills' *The Racial Contract.*

scholars,[48] are acts of punishment that carried out in the name of preventing crime.[49] This deterrent effect has even been credited as likely having a major impact on the drop in NYC homicide rates, calling it a "very regressive tax," that might well be worth it for hit most hard by that tax.[50]

Structural racism is obscured by the interaction of colonial ideology and policies that are *de jure* non-discriminatory. Deterrent rationalizations create a narrative where the legitimate state, as embodied in the police, is able to rationally identify suspicious individuals. These suspicious individuals are, because they have been identified by state agents to be suspicious, simultaneously categorized as Locke's "tygers or lyons," and thus outside the social contract and best used to protect and support the sociopolitical union as imagined by white supremacist colonial thinking. These punishing policies are only permissible because of the dual standing of the policy as *prima facia* non-discriminatory, while at the same time being applied to already criminalized populations. The criminal can be justly punished, because he is a criminal. The young African-American man on the street, like Nicholas Peart, can be identified and treated in this penal fashion because he too is constructed as a criminal. Looking back to Hartmann's history of the slave as only existing as a legal person when he or she is structured as a criminal, these colonized bodies continue to be only recognized in public as criminal. The liberal order is in fact defended by his punishment—the irrational criminal is a threat to the existence of the rational state itself.

---

48http://www.jjay.cuny.edu/forum/SQF_forum_summaryFINALJUNE28.pdf , http://news.change.org/stories/a-black-man-being-frisked-for-absolutely-no-reason-welcome-to-philadelphia

49The use of stop-and-frisk as a mass policy follows the rise of CompStat policing which focuses on quantitative based enforcement and has been used to focus policing in certain, "high-impact" ways.

50Zimring. Princeton paper.

Even those who might object to this practice might argue that it ought to be understood through Foucault's framework of the exportation of penal technologies through all channels of power dispersion, I argue that it ought to be understood differently. Discipline, used by Foucault to describe the functioning of power as a relation dispersed along "capillary" lines, is a process of control that is dispersed, technological, and equal opportunity. Discipline is "representative, scenic, and collective," the panopticon designed by Bentham is the purest architecture of discipline, transforming the individual prisoner into an "object of information." The prisoner is seen, but never sees; the design induces "in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power." Foucault argues that the expansion of the disciplinary mechanism was a process of historical transformation "from a schema of exceptional discipline to one of a generalized surveillance," moving slowly over the 17th and 18th centuries. As the prison as a total institution developed the model of the carceral was exported into mass society. Carceral mechanisms allowed other institutions—schools, hospitals, workers' estates—to function more effectively, more rationally, more productively through a double-sided process of normalization and excision of deviance. These technologies develop dialectically between institutional systems with the prison as its organizing center. These technologies regulate time, space, and the psychological state of the observed—which is increasingly a universal state. Foucault argues that this expansion becomes all pervasive, and thus forecloses the possibilities for individual agency and liberation across society.

One of the most effective immanent critiques of Foucault, however, points

directly to the erasures that the massification of discipline enacts. As Joy James argues, Foucault "reveals that penal territory is so massive, so intricate, and so internalized that it circumscribes and burdens all. Hence everyone is "incarcerated" in some sense, and captivity and violation are carceral shared experiences." However, James continues, that revelation also obscures the fact that these experiences are not shared equally across the carceral landscape, that a school is in fact different from a prison, and that there are constructed differences in the ways that captivity and violence are measured out. While we all may have internalized carcerality in our day to day lives, there are different people and groups in society who experience that penality differently—specifically, the experience of containment and surveillance quanitifably dominates life more fully when you are poor, brown, and a "high-crime" neighborhood. I take up this difference here, and focus on ways in which discipline as surveillance is enacted unequally, and how that inequality is a historically constructed practice—and that being unable or unwilling to acknowledge those routes reinforces an uncritical view, allowing extant inequalities to flourish and take on new institutional (technological) forms.

The omnipresence of observation is undeniable, and affects behavior and attitudes in immeasurable ways. However, this universality masks the fact that the mechanisms and intensity—the captivity and violation—of surveillance are not distributed equally, instead falling on certain sectors more than others. Stop-and-frisk becomes a site of punishment that is defended as logical, but relies on a deterrent logic that certain groups are legitimately designated to bear the burden of state punishment, in order that others remain free of that burden.

**VIII. Conclusion**

This chapter is a contribution to the literature that sits at the relatively bare nexus of 'citizenship and race' literature, 'punishment and citizenship' literature, and 'race and punishment' literature. In this chapter I articulate the role that deterrent ideology has in legitimating the continuation of white supremacist, colonialist policies—it does the work of appearing to resolve what Alan Ewald called "the paradoxes of inclusion and exclusion," that have defined the American political order since long before the founding.[51] By rendering punishment in a Lockean liberalism where criminal acts are expressions of inhumanism, the criminal is fit only to be used as instrument to succor the righteous and legitimate political union. When the flip side of liberalism, wherein historical sociopolitical structure does not exist, is used to obscure the colonial ideology that forms dominant interpretations of what it means to be criminal and deserving of punishment, then colonial ideology is mapped onto citizenship through punishment. By centralizing a race-neutral rhetoric of deterrence, colonial domination is reproduced without any reference to the colony.

In the previous chapter I argued that American dominant conceptions of punishment were informed by conceptions of race itself. That is, blackness and non-whiteness are conceptualized in dominant culture as endemically deviant, problematic, and criminal. Thus, when developing penal practices, measures that disproportionately damage non-white individuals, families, and communities seem not only not-racist, but actually comport with pre-ascribed to notions about blackness and its periphery. The

51Ewald, Alan. 2002. "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States. *Wisconsin Law Review* v. 2002 no. 5 (2002)p. 1045-137

implicit narrative is that blackness deserves to be punished. In this chapter, I have argued that building on white supremacist notions of criminality, deterrent theories of punishment legitimate two things: first, the exclusion of colonized bodies from the political union (through both literal exclusionary practices such as stripping of suffrage and experiential stripping through such policies as the expansive stop-and-frisk, which undermines the colonized person's ability to appear in public), and second, through the transformation of colonized peoples into instruments in the recreation of the successful white supremacist state. In the next chapter, I look at utilitarian approaches to punishment in the United States and argue that under punishment, colonized bodies are reconstituted as unrecognizable objects, useful not only for supporting the state, but also necessary for creating a narrative in which the white supremacist is able to see him/herself as an ethical actor, even in this age of rhetorical rejection of white supremacy.

# Chapter 4

## The Use and Utility of Punishment

"All punishment is mischief; all punishment in itself is evil."

- *Jeremy Bentham*

*An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907).

"The punishment must be mild indeed which does not add more to the sum of human misery than is necessarily or directly added by the execution of a criminal."

– *John Stuart Mill*

Speech In Favor of Capital Punishment, April 1868.

Appeals to utility are perennially popular across American public policy spheres, and nowhere more so than in criminal justice policy. While retribution and deterrence are more directly discussed within case law, utilitarianism is persistently evident in both text and subtext of penal practice. In the utilitarian view, the crime/criminal is viewed as the problem and criminal justice (and especially penal) policy are the solution. However, in this chapter, I argue that the discourse of utility obscures the work that is actually being done under the banner of utility. Instead, utilitarian solutions are used to reinforce, recreate, and legitimate structural inequalities.

In building this argument, I begin by reconstructing the normative defenses of utilitarian punishment, which are grounded in a moral utilitarianism that espouses a harm reduction approach so as to maximize the individual freedom of the member of the body politic. I then, however, juxtapose this normative construction with a theory of the 'use' of penal practices, which argues that American punishment serves to recreate and legitimate

a new form of what Orlando Patterson coined as "social death." Re-constructing Patterson's argument through Memmi's typology of the colonizer and the colonized, I argue that the contemporary system of punishment functions to create a political order in which inequality appears to be a necessary, permanent, and natural feature. In this order, inequality is fetishized, and concepts of deviance and harm are meaningful to the extent that they support capitalist white supremacy. I also explore how these social relations have taken on new forms through the guide of "post-racialism," while also arguing for the continued relevance of race. Once I have articulated my theoretical frame, I then use this frame to analyze a series of utility-driven penal practices, both contemporary and historical. I begin with the example of convict-lease, which may seem an extreme case, but emphasize the malleability of utilitarian rhetoric.[1] I then turn back to the contemporary moment and analyze incapacitation and the resultant mass incarceration as expressions of colonial ideology. Concluding the chapter, I re-integrate normative and critical visions of utilitarian punishment, and argue for a re-assessment of the moral obligations of liberal utility as an instrument of freedom, rather than oppression.

**I. Articulating Utility: Bentham, Mill, and the Ethics of Utilitarianism.**

Appeals to utility in contemporary discourse are grounded in a moral vision, which is often implicit, but exists in the subtext as part of the moral legitimacy of the state. Punishment is posited as being directed at the well-being of the state and nation, lending it a utilitarian flavor.[2] While this rhetoricis sometimes explicit and sometimes implicit, when utility is put forth as a philosophical concept, its legitimacy is inextricable

1 I discuss case selection more extensively in that section of the chapter.
2 This seems like an odd statement, but other philosophical justifications do NOT actually have direct aims at the health of the nation.

from the assertion of the state as a moral unit. Utilitarian visions of punishment argue that the act of punishment, even when harmful to an individual, is in actuality a moral good because, when properly designed and meted out, it actually improves net happiness across the political order. Because the idea of the government harming some members of the state stands in direct opposition to the core ideals of utilitarianism, Utilitarian philosophers have explicitly engaged state punishment in their work in quite extensive ways.

In this section, I briefly summarize the work on punishment by the two most prominent utilitarian philosophers, Jeremy Bentham and John Stuart Mill, and then discuss how utilitarian discourse has been mobilized in American penal narratives. By comparing formations of utilitarianism that ground themselves in an ethical project, the ethical possibilities of utilitarian punishment can be more effectively critiqued.

**II. Mill & Punishment**

Mill's conception of punishment, while philosophically grounded in utility, is deterrence oriented in function. Laws ought to be the products of public discourse, and behaviors ought only to be designated criminal when they infringe on the rights (which are established by positive legislation or tacit understanding) of others. Rejecting the idea of a contract-based society, Mill casts social relations as transactional, "every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest.."[3] Punishment for crimes isthe cost of doing business. A crime might be a reasonable choice for a person to make, but Mill argues that punishment

3 Mill, John Stuart. *JS Mill:'On Liberty'and Other Writings*. Cambridge University Press, 1989. Ch. 4, paragraph 3

should make the balance of that choice both a poor trade for the crime at hand, and sufficiently proportional that it will be imposed by reasonable people.[4]

Central to his utilitarian vision, Mill's primary concern in laying out his theory of punishment is focused on differentiating between those behaviors which a government ought to criminalize and those that should merely be left to social disapprobation. Though the line can be difficult to draw, he acknowledges, any action that is not directly harmful to another must be excluded from criminal sanction. Social policy is grounded in two core utilitarian ideals: one, the radically democratic idea that all individuals are capable of determining, better than anyone else, what is best for themselves, and two, the basic fact of human fallibility, which determines that all human judgment must be held suspect—including that judgment that someone else is an idiot. Only behavior that harms or has distinct and immediate potential for harming others can be legally be the target of sanctions, the succinct example he offers: "No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty."[5]

As for the punishment itself, Mill argues for a specificity of punishment that is tailored to the offense, makes the crime a bad bargain, can be practically executed, and will produce a reduction in the future crime—both through deterring that offender and deterring the general public. Most of Mill's writings on severity and types of punishment come in the form of letters and speeches commenting on the news of the day. The theme

---

4 By this, Mill means that a punishment that is too severe will be mitigated at various points in the legal system, thus removing any sort of fear of the poor bargain by potential criminals. In a speech to Parliament in 1868 he gave the example of the breakdown of capital punishment for theft: "The failure of capital punishment in cases of theft is easily accounted for; the thief did not believe that it would be inflicted. He had learnt by experience that jurors would perjure themselves rather than find him guilty; that Judges would seize any excuse for not sentencing him to death, or for recommending him to mercy; and that if neither jurors nor Judges were merciful, there were still hopes from an authority above both."

5 Mill. *On Liberty*. Chapter IV, paragraph 10.

that persists through these notes is that punishment as it is practiced in his contemporary England tended to preserve and respond to the demands of the hierarchical order. He critiqued what he saw as a law defending something other than a universal liberty; men were not punished for beating their wives, though they would be punished for doing the same to any other member of society; thieves and economic fraudsters were subject to severe corporal punishments, while failed assassins are merely transported (to the colonies).[6]

Mill's critiques of extant law can all be reduced to his position on equality under the law, and the universal right to liberty. His general requirements for an appropriate punishment are that a criminal sanction be meted in measure to the offense—with the presumption that all victims (and criminals) are equal, and thus harm should be considered as such across the general population. An attack on the Queen should merit the same amount of penal response as an attack on one's wife or a pauper. This focus on liberty, despite the tendency towards deterrence, is what sets Mill's utilitarianism apart from theories organized by deterrence itself.

**III. Bentham & Punishment**

Bentham, the father of utilitarianism, focused a great deal of energy on all aspects of penality, from criminal law to penal technology. This expansive focus comes from his vision of the purpose of government itself, which he described as "the business of government is to promote the happiness of the society, by punishing and rewarding…. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is

6 Mill. "Corporal Punishment," "The Law of Assault Morning Chronicle, 31 May, 1850, P. 4

pernicious, will be the demand it creates for punishment."[7] Under Bentham's more mechanical formulation (as compared to Mill), punishment is identified as a harm—creating a debit in the "felicific calculus" upon which all actions ought to be measured. Bentham argues that punishment should be deterrent because this is the most efficacious (greatest impact at lowest price) form of punishment, contrasting it to restitution-based models, which may compensate for the pecuniary loss, but fail to recompense for the psychological damage caused by crime, or "mischief" as Bentham refers to criminal acts. Bentham, unlike Mills, maintains that there is no inherent superiority of deterrence as goal for punishment other than its positive contribution to the calculus. In laying out general rules for punishment, Bentham advises a set of restrictions:

> All punishment in itself is evil […] It it plain, therefore, that in the following cases punishment ought not to be inflicted. -Where it is groundless; where there is no mischief for it to prevent; the act not being mischievous upon the whole. - Where it must be inefficacious; where it cannot act so as to prevent the mischief. - Where it is unprofitable, or too expensive; where the mischief it would produce would be greater than what it prevented. - Where it is needless; where the mischief may be prevented, or cease of itself, without it; that is, at a cheaper rate.[8]

In his warnings against the evils of punishment, he argues that if a mischief will be better mitigated / prevented through means that are not in and of themselves "evils," such as instruction, then that too makes punishment needless for that case.

After articulating these general principles, Bentham makes the turn towards the technology of punishment, by which I mean both the actual technological advances in surveillance like the panoptic device, but also the techniques by which a utility-oriented legislator. This argument is constructed quite literally like a calculus, with

---

7 Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation* (1789; reprinted New York: Hafner Press, 1948). ch. 7, section 1.

8 Bentham, Jeremy. Ch. 13.1 *Introduction to the Principles of Morals and Legislation.*

proportionality cast in mathematical terms, orders of magnitude, relationships to the central point of impact, and the types of people involved at various points in various offenses. Preemptively responding to critiques, Bentham argues that in cases of mischief, even in passionate mischief, "Men calculate, some with less exactness, indeed, some with more; but all men calculate." By articulating, promulgating, and ensuring the consequence to any act, Bentham wishes punishment to do its greatest work of maximizing happiness.

Similarly, in his development of the panoptic device (which should be noted is not only meant for penitentiaries and prisons, but also "HOUSES OF INDUSTRY, WORK-HOUSES, POOR-HOUSES, LAZARETTOS, MANUFACTORIES, HOSPITALS, MAD-HOUSES, AND SCHOOLS"[9]), lays out the logic of his practice of punishment which is grounded in a social view of human development and behavior. The underlying premise is that people will be more likely to behave in ways desired by those who have power over them if they are subject to inspection. Bentham positions this as a basic truth of human behavior, applicable to the full range of human development,

> the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose X of the establishment have been attained. Ideal perfection, if that were the object, would require that each person should actually be in that predicament, during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reason to believe as much, and not being able to satisfy himself to the contrary, he should *conceive* himself to be so.[10]

Given this assumption, the technology of punishment is oriented toward maximizing inspection while minimizing costs of that inspection. The structure of the panoptic device is designed to intensify the "feeling" that the subject is being inspected at any

9 Bentham, Jeremy. *The Panopticon Writings.* Ed. Miran Bozovic (London: Verso, 1995). p. 32
10 Ibid.

particular point.

The core of Bentham's conception of a utilitarian punishment is grounded in a particularly agnostic view on crime itself, as one of many choices that an individual might make, which happens to create a material harm in the fecilific calculus. The individual act of "mischief" in question does not have an inherently moral or immoral quality, but rather is measured by its relational value. As such, the general criminal is held in higher esteem than in retributive or deterrent theories of punishment—this person is indelibly a part of the calculus and must simply be treated as such.

Similarly, Bentham approaches slavery as both a historical fact (he references American slave policies explicitly) and as a potential form of punishment, and true to form, designates all forms of slavery as an evil, but not an exceptional type of evil. This is all merely a weighted measure within the calculus. As such, there is no final check, for Bentham, on the quality of misery faced by an individual.

**IV. Utility in Practice**

Despite utilitarian philosophy's grounding commitment to a democratic order wherein the good of the commons is the basis of the calculus, in American practice utilitarian narratives (often synonymous to appeals to pragmatic solutions) have not produced reductions in social misery in ways that reflect an egalitarian politics. However, unlike my critiques of retribution and deterrence, in critiquing utilitarianism, I argue that despite intuitive prospects for a system of punishment that produces uncontroversial social goods, utilitarianism is structurally incapable of producing an epistemological check against prevailing ideologies. It can result in the development of systems of

punishment that are *useful,* but not at creating a world of diminished suffering for all. Rather at producing and reproducing a capitalist white supremacist order that is also sustainable in an era that also disavows the legitimacy of racial- and class-based political inequality. That is, the utility of the American system of punishment is to create a system that re-entrenches sociopolitical inequality, without broad-based democratic benefits, while also obscuring this reality. It is able to do this because it functions according to a logic that resides alongside the logic of American democracy. Utilitarianism, in all policies, will reproduce the assumptions of the center—particularly when that center asserts the essentially democratic nature of its organization—which confers a near mystical It intones: these practices are for the good of the whole, without a natural mechanism for checking the construction of the imagined whole itself.

The ideology that motivates the utility in contemporary American punishment produces a skewed calculus in which the misery of some and the happiness of others is constructed in terms of a calculus, but one that cannot count the input of those who are not identified as 'real Americans.' Rather than a radically democratic calculus, utilitarianism functions along a metric of a mythical democratic calculus. Those structurally positioned as against the social order—as I argue, those who are identified as criminals—become an instrument through which the good of the rightful democratic body can produce the greatest good.

The role the punished occupy in the utilitarian framework is that of the object against which security, freedom, and success are measured.

**V. A Theory of Social/Political Death and Utility**

The utilitarian argument is so skewed because of the lack of a truly cosmopolitan democracy. While the forms of cosmopolitan democracy are evident and functioning, encapsulated by default universal adult suffrage and a transparent, rule-driven system of law, the dominance of colonial and racist ideology creates any number of material challenges and limitations to the democratic forms. That is, because of the living legacy of a racist and colonialist logic, the democratic nature of contemporary institutions is undermined—both through the creation of accumulating 'exceptions' to the coherence of the democratic structure and also the normalization of oppressive practice within the institutions as natural, acceptance, and in accordance (and even in support of!) democratic practice. In this section, I sketch out the logic that I propose structures this process.

The logic of the American carceral reality is best understood through from Orlando Patterson's concept of slavery as social death and Albert Memmi's vision of social relations in the colonial order as articulated through the typology of the colonizer and the colonized. Contemporary criminal justice is not directly analogous either to a condition of colonization nor to the condition of chattel slavery. However, both of these theories of human relations and orders offer much in analyzing the status of the contemporary criminal—particularly in considering what the 'utility' of contemporary forms of punishment might be.

Social Death & the Criminal. In his text, *Slavery and Social Death*, Patterson argues that slavery is a unique historical category that is separate from other forms of economic, political, or social inequality, characterized instead by the social death of the

slave. As a socially dead entity, the slave occupies a certain social marginality, wherein his personality is denied. In this social death, the slave "is not an outcaste," rather he has a role in society, it is merely not a *personal* role.[11] The slave is an "exile" of sorts; one who is an outsider, no matter his actual point of origin. At the same time, the condition of slavery is proximal in nature—the slave is not physically exiled or prevented from moving in free space—rather the relation between master and slave is most defined when the master and slave exist in intimate relation. To cement this complex, contradictory relation (where the slave is both the intimate and the stranger), Patterson traces a series of processes that are regular features of slavery across historical cultures; which include a symbolic stripping of previous identity, re-naming, re-construction of socio-familial relationships.

The socially dead slave is degraded, "the archetypical outsider, the eternal enemy within, in a formalized state of marginality." This degraded status derives, dialectically, both from the origins of the enslaved status and from the condition of enslavement itself. Because of the multi-dimensional processes of alienation,[12] the status of the slave replaces the possibility of recognition of the enslaved human being. Because of the pervasiveness of this category in a "slave culture," there is no room for the human-as-slave, instead there is only slave. As Memmi argues, the condition of being a colonizer creates a pervading sense of shame as the oppressor knows—in his deepest consciousness—that his position in the hierarchy is illegitimate. In those who "stay" (as opposed to absconding from the colony or refusing the role of the colonizer), there is a psychic

11 Patterson, Orlando. *Slavery and social death: A comparative study*. Harvard University Press, 1982. 47.

12 Especially as outlined by Lukacs in the "Reification Essay," the processes of alienation obscure the material humanity of the criminal as criminality becomes the defining, recognizable characteristic. Lukács, Georg. *History and class consciousness*. Vol. 215. Mit Press, 1972.

backlash—refusing to take responsibility for what is clearly his responsibility, the colonizer instead reconstructs the relationship as legitimate. In order to retain a valid sense of self, the colonizer—or in this case, the slave-owner (or even one who merely remains complicit in slave culture), re-constructs the slave-as-slave, refusing the obvious humanity of the slave. Illustrating this refusal, Memmi gives the example of an ultimately sympathetic figure that, because of the alienation of the colonial relation, is rendered unrecognizable, "Even a native mother weeping over the death of her son [...] reminds him only vaguely of the grief of a mother or a wife."[13] Such refusals are not conscious, but rather are made possible through the long habits of racism which define and exclude the racialized/colonial subject as outside of the colonizer's conceptual sphere of community.

For the purposes of this study, I am interested in the ways in which the criminal status echoes and reflects a status of social death, and how that can help to clarify an understanding of how visions of utility are used in contemporary society. I propose that, much like the inheritance of retribution and deterrence as racialized, historic categories, the utilitarian vision of punishment in the contemporary United States relies on a vision of criminality that, draws on slave culture, is essentially degraded, irredeemable, and useful only to the extent that it confers honor and benefit on the 'free' class.

The criminal, as both fictive being and actual human being is, through processes of racialization, selective criminalization, impoverishment, separated from dominant society in a manner that replicates social death. Policies like the abandonment of rehabilitation, three-strikes, and the rise of mass-uses of solitary confinement reflect an

13 Memmi. *The Colonizer and the Colonized* 86.

attitude towards those designated as punishment as permanent strangers to the collective culture.

Key to Patterson's investigation was the importance of social death in creating a class that could exist side by side with the owning class, performing the functions of slave (conferring honor, conducting economic roles); this is also a formulation that makes social death an apt metaphor for understanding contemporary practices of punishment. The criminal is cast as the other, and in dominant culture remains faceless. By casting the criminal in a role that is separate from dominant society, but that is not explicitly raced or classed, the dominant narrative of criminality creates a scenario in which the life of the punished is unrecognizable. The criminal has suffered a social death because s/he appears only as a criminal, one who is dishonored and irredeemable, and as the disgrace is attached to the criminal condition, it retains democratic legitimacy—as criminality is—as Patterson describes the enslaved condition—both reflective and productive of the dishonored condition.

Also relevant in this analogy is the permanent cast of criminality. While there is much talk of the convict who "pays his debt to society," with the implication that there is some point at which the debt is settled, the US has long embraced post-penal punishments as a matter of civil policy. They included, for example in felony disenfranchisement law[14] and recent history has seen the rise of background checks and proven economic and social discriminations against those who have arrest or conviction records.[15] However, as I have argued in earlier chapters (and many others have argued

14 Brooks, George. "Felon Disenfranchisement: Law, History, Policy, and Politics." *Fordham Urb. LJ* 32 (2004): 851.

15 Pager, Devah. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. University of Chicago Press, 2007.

before me), the mark of criminality is not exclusive to those who have felony convictions —nor are all those who are engaged in harmful (or even legally criminal) acts identified with this criminal group. As discussed in chapter one, in discussing conceptions of desert, the vision of who is or might be a criminal is a raced and class category. The same calculus is in place when visualizing the utility of punishment as regards the criminal class. However, the content of that racial and class judgment is obscured behind the central category of criminality.

Blurring the Line This blurring—the rendering of criminality as an ahistorical category, determined only by a flawed and dishonored will—is central to the construction of a system that hinges on the systematic oppression of the internally colonized black population. The criminal is constructed as unrecognizable as a similarly situated subject; instead of a fully realized human subject, the criminal is something else. The criminal is not dehumanized, as he is not re-constructed as non-human; dehumanization does not accurately capture the criminal's position. Instead, the category of the socially dead is more accurate. The socially dead criminal is uncritically degraded. His degradation is considered to be endemic and permanent. Through this construction, utility becomes a matter for the non-criminal. The criminal is excised from the calculus. This is the logic that undergirds the rise of mass incarceration in the post-rehabilitation era. Utilitarian thinking and mass incarceration will be discussed in a separate section later in this chapter.

*Exceptions* – Despite the determinative nature of the system I have just laid out, also key to making this system viable in the contemporary moment is that it is minimally

permeable. By which, I mean that while much of the system is structurally determined, there are regular features of spontaneous porosity, wherein those who are not part of the "criminalized class" experience a dramatic fall and become the ultimate criminal, and there are (even more rare) situations in which the firmly criminally-classed body transcends the class, becoming popular paragons, acting as examples that can be pointed to in the denial of the existence of a "criminalized class."

First, let me re-cap what I mean by "criminalized class." The criminalized class is that sector of American society which, as a default position (in the eyes of both the state and dominant culture), is presumed to be criminal.[16] This presumption sits squarely on young, poor, black men and boys, but functions according to an invisible, but broadly understood spectrum-based algorithm with wealthy, white, suburban girls and women at the opposite end.[17] It is not a completely linear binary, and is characterized by a multi-dimensionality that includes geographic and temporal considerations in addition to the more common demographic measures. It is a categorization that closely adheres to dominant cultural constructions of dangerousness. The ideology of the criminalized class tracks with, but is not tied to rates of incarceration which themselves do not accurately reflect criminality broadly considered. As Bruce Western, Meredith Kleykamp, and Jake Rosenfeld, among others, have argued, those outside the criminal class, wealthy, white, etc., are often under-penalized for several categories of crimes, for example: drug use,

---

16 Muhammad. *Condemnation of Blackness.*18

17 The spectrum of criminality is closely aligned with, but is not identical to deviance. Considering deviance, non-penal forms of discipline—such as those experienced by poor black women through public assistance programs (see, for example Soss, Joe, Richard C Fording, and Sanford F Schram. *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. University of Chicago Press, 2011. Especially Ch. 10.)

domestic, and sexual violence.[18] Similarly, this criminalized class is conceptually divorced from victimhood. The ideological binary of the raced criminal class posits the black male in opposition to the white female. Penal policy is envisioned as protecting the anti-criminal—the ultimate innocent—think back to Amber Reynolds, the inspiration for California's Three-Strikes rules. This binary functions to erase the real, material victims of crime, who tend to reflect the demographics of those committing such crimes—most notably, the young black and brown men who make up the majority of the nation's murder victims.[19]

Instead of recognizing that the demographic most consistently implicated in violent crime is equally subject to the trauma of victimhood (and certainly not recognizing the role that trauma plays in subsequent criminal activity), the mark of criminalization removes the possibility of victimhood. In constructing the criminalized class as socially dead, dominant ideology paints with a broad brush—it is unable to distinguish between the criminal and the criminally-designated class. This arises because of the lack of recognition of young, black and brown mean as meaningful sociopolitical subjects. They appear in the public eye as socially dead figures, indistinguished by act, their station determining their subjectivity.

Further, the stain of social death is not limited to the core of the criminalized class and instead spreads out across social and geographic communities, rendering large swaths of law-abiding civilly degraded–with the practical result of rendering these subjects fit for

---

18 Western, Bruce, Meredith Kleykamp, and Jake Rosenfeld. "Crime, Punishment, and American Inequality." *Social inequality* (2004): 771-96.

19 See: U.S. Census. "Statistical Abstract of the United States: 2012, Table 311. Murder Victims by Age, Sex, and Race: 2008." 2012; and New York City Police Department. "Murder in New York City." (2011).

state surveillance, but not for effective state protection. Here, the failures of a democratic utilitarianism are stark. The state fails to protect a class of citizens it knows are at risk. As I will discuss further in the next chapter, I further argue that the American state expects and accepts such a failure—because the stain of criminalization, as a social death, is so impenetrable, that an alternative seems, uncritically and immaterially, to be both impossible and unnecessary in pursuing a just society.

This vision of the just society is at the core of the minimal permeability of this class. If it were hermetic, it would be impossible to deny the ideological character of criminalization, a denial necessary for American dominant culture to retain a vision of itself as just and progressive. Indeed, just as class and racial domination are at the core the American project, so is the mythos of equality, justice, and democratic progress. To retain legitimacy, both internally and externally, ideological criminalization must not appear to exist. Rather, instead of characterizing the sociopolitical position of millions of people, the creation of what has been called "the new Jim Crow,"[20] must appear to be a puzzling, unfortunate, but reasonable accident.

The obscuring of this ideology has occurred, I propose, through a convergence of two trends that have found their pinnacle in this turn of the century, globalizing moment: post-racialism and neoliberalism, which have emerged in the wake of the Civil Rights era reforms and the post-industrial shifts that characterized the 1970s through the current moment. Post-racialism and neoliberalism are interdependent ideologies; that is, neoliberalism as a dominant, mass phenomenon does not appear without the simultaneous emergence of a post-racial white supremacy, and post-racial white supremacy

20 Alexander, *The New Jim Crow.*

materializes through neoliberalism. Neoliberalism is marked by the transformation and intensification of state functions from protecting the sphere of the market from interference (liberalism) to the state functioning directly in service to market forces (neoliberalism).[21] Post-racial white supremacy works to retain oppressive racial orders, while stripping these power relations from their explicit racial content.[22] Both are characterized by both a dispersal of authority—i.e. it becomes increasingly difficult to identify specific agents of the power order, disciplining influences are instead spread through structures and agents, and have a tendency to self-obscure—that is, inherent in their ideology is the assertion that these are 'natural' forms. This is because of congruences and connections in the deep ideology of each, which make them inseparable in the ways they manifest in day-to-day experience.

Post-racial white supremacy capitalizes on the pervasiveness and persistence of racist ideology in American culture. It conditions not only what is acceptable, but what is even thinkable in confronting raced bodies. In a sentiment so common it could make a chorus, many (from Bill Clinton to Loic Wacquant) have exclaimed that the expansion of criminal punishment would be literally impossible if it was experienced by whites in the same ways it is experienced by poor black and brown Americans. The general public would simply not tolerate the levels of state intervention into the daily lives of white,

---

21 See: Soss, Joe, Richard C. Fording, and Sanford F. Schram. *Disciplining the poor: Neoliberal paternalism and the persistent power of race*. University of Chicago Press, 2011. Harvey, David. *A brief history of neoliberalism*. OUP Oxford, 2005.

22 Morrison, John E. "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action." *Iowa L. Rev.* 79 (1993): 313. Higginbotham Jr, A. Leon, Gregory A. Clarick, and Marcella David. "Shaw v. Reno: A Mirage of Good Intentions with Devasting Racial Consequences."*Fordham L. Rev.* 62 (1993): 1593. .Bonilla-Silva, Eduardo. *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States*. Rowman & Littlefield Pub Incorporated, 2010.

particularly middle-class, Americans. The drive under neoliberalism is not to control a group of dominated subjects, but rather to remake them into disciplined market actors. Actions that comport with market desirability—desired forms of consumption and production are rewarded and ones that are deemed to be not related to appropriate forms of market participation are punished.

Under these ideological forms, thrusts toward utility are conditional. The utilitarian policy does not account for structural inequality; it does not question the value of punishment, it merely checks efficiency; perhaps most damning and damaging, utilitarian policy in a framework of post-racial white supremacy and neoliberal statehood, cannot ground itself in democratic practice. The socially dead are merely that; they become bodies to be managed rather than subjects to be engaged. The resulting practice is so divorced from an ethical utilitarian ethos, that such considerations disappear from the policy models.

Despite the recent emergence of post-racialism and neoliberalism, this subversion of utilitarianism is nothing new in the American schema of criminal punishment. Indeed, post-racialism and neoliberalism are the most recent forms that legitimate the mobilization of a utility that has almost nothing to do with utilitarianism as a coherent political theory.

In the next two sections of this chapter I review two cases of punishment in American history that make ostensible claims to utilitarian legitimacy, or at least derive their legitimacy from a position of an ethical pragmatism. There are problems to be solved and these cases claim to have provided an answer. However, in both, the creation

of the problem and the solutions implemented are only coherent if the punished exists outside the democratic order—if, indeed, the punished is socially dead. If the punished—raced, criminalized, conceptually external to the domestic order, while impossibly internal to the nation—are socially dead, then the uses to which they can be put, or that it makes *sense* for them to be put, solve problems other than crime, serve interests other than public safety.

**VI. More Useful than Slavery: Utility and Convict-Lease**

Facing a devastated landscape, a disrupted system of labor, and the single most dire challenge to its own supremacy since its emergence, the white elite of the American South confronted Reconstruction by crafting its own version of a new sociopolitical order. Through constructing a number of technical approaches to working within the restraints of both the letter of the newly passed 13th, 14th, and 15th Amendments, and the still present Union forces, the white supremacist elite created a penal system that served to reinstitute institutional white supremacy, but which also conformed to a legal framework that prohibited literal slavery. Its formation was framed in narratives of utility. A cornerstone of that system was the recasting of the previously slaved population into a clearly criminal population, and the development of the institutional response: the convict-lease system.

<u>Background & Development of the Convict Lease System</u> Convict-lease was a utility-driven response to a problem faced by the white supremacist colonial-order. The newly freed black population and the labor shortage created by Emancipation were looked upon as problems to be solved. Further, while Mississippi officials, instituted

Black Codes developed to restrain black publicity, there was no pre-imagined institutional response to those who were deemed to have violated the law. Prior to the institution of these laws, punishment in the South functioned on a small scale. Most social control, particularly that of the black population, was considered a private affair. On plantations overseers and masters relied on punishments that correlated with the condition of enslavement: whippings, or even being sold 'down the river' if the offense were severe enough. Penitentiaries, which had begun to be built in the early 19th century, were designed to hold only a few hundred prisoners at the extreme.[23] Though convict lease was never framed in the explicit language of a Benthamic utilitarianism, it followed the logic of utility by turning to technological solutions to social problems. The felicific calculus in play departed from the ethical utilitarianism of the best for the most by structurally excluding the black population. Memmi, in his typology *The Colonizer and the Colonized,* describes the mechanisms of a colonial order that articulates these logics. The colonial order demanded simply what was best for itself, developing technological solutions through a logic of colonial utility that served to reinforce and legitimate that knowledge. This colonial logic dictated that it was useful to re-institutionalize white supremacy, deploy state and social power in ways that recreated the benefits that the white elite had previously garnered from slavery, while simultaneously reproducing a dominating discourse that legitimated these practices under the new federal restraints.

Because of the nature of the federal system, convict-leasing policies developed differently across the American South in between the 1860's and early twentieth century.

---

23 The Georgia Pentitentiary at Milledgeville was typical for the era holding Bonner, James C. "The Georgia Penitentiary at Milledgeville 1817-1874." *The Georgia Historical Quarterly* (1971): 303-328.

Some recognized the practice as an atrocity from the start, as Frederick Douglass called it one of the "twin infamies" along with lynch law.[24] In his excellent history, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*, David Oshinsky draws a stark portrait of the practice in Mississippi, situating it within both antebellum Southern history and in the broader political setting. The first of its kind in the nation (and quickly copied by many confederate states), the Mississippi Black Codes were adopted in November 1865, mere months after Lee's surrender at Appomattox.[25] The Black Codes criminalized nearly all public black activity, and required the newly freed black population to recommit itself to binding apprenticeships and servitude. They created broadly applicable vagrancy laws (one such requirement prohibited that citizens "misspend what they earn," an interestingly vague statute), anti-miscegenation laws, weapon ownership prohibitions, and reinforced separate criminal codes for black people (it stated that all such crimes that were identified as crimes by slaves were now to be considered crimes by all black persons[26]). Perhaps the most important of these provisions was the final section of the 1865 Penal Code revision which stated:

> *Be it further enacted,* that if any freedman, free Negro, or mulatto convicted of any of the misdemeanors provided against in this act shall fail-or refuse, for the space of five days after conviction, to pay the fine and costs imposed, such person shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs and take such convict for the shortest time.[27]

Even with the federal presence, these laws created the legal mechanisms through which

---

24 Douglass, Frederick, and Philip Sheldon Foner. The life and writings of Frederick Douglass. Vol. 3. International Publishers, 1975.

25 Text of legislation available "Mississippi Black Code." http://chnm.gmu.edu/courses/122/recon/code.html.

26 While free blacks had previous occupied a precarious position, until the era immediately preceding the Civil War, the they were generally free from explicit legal restrictions based on race—the dominant status previously had been a matter of slave status.

27 "Mississippi Black Code."

the functions of slavery could be re-instituted under means that would not be interfered with by the government in Washington. The laws and practices of convict-lease were possible specifically because the part of the populace that was targeted was not part of the dominant calculus. Through the rhetoric of utility, there was no mechanism by which the dominant logic could be challenged.

Codes like these enabled states to assert control of the black population, whereas before Emancipation, it had largely been left to slave-owners as a matter of property maintenance; in the era immediately following the Civil War, it was unclear what the relationship between the re-ceded states and the federal government would be. In establishing these laws, the states created new structures that replaced slave codes with racial codes and at the same time established the state as the jurisdictional authority. As Oshinsky described the jurisdictional shift from the slave-owner to state, "An offense against Mr. Shields had become an offense against the state."[28] This had the simultaneous effect of creating a new class of state-defined criminals. While whites had long "viewed criminal behavior as natural" to the black population, these laws made virtually all behavior potentially criminal—by law rather than by social judgment. At the same time, Southern states were institutionally unprepared for the newly criminal mass population.[29] Oshinsky documented the response:

> There were calls to bring back the gallows for serious property crimes, and the whipping post for misdemeanors such as vagrancy and petty theft. In Alabama, vigilantes punished hundreds of "thieving n-----" on their own. Some were flogged;

28 Oshinsky. *Worse than Slavery.* 32.

29 What few prisons there were across the South were often either woefully unprepared for any sizable corrections population or were no longer able to hold prisoners. Oshinsky gives the example the "The Walls," Mississippi's first modern prison. Built in 1852, it was designed to hold only 200 inmates. Further, it had been significantly damaged by the Union Army which had determined that it was functioning as a manufactory during the way.

> others were lynched. In Mississippi, farmers were urged to gun down loitering freedmen and 'let the buzzards hold an inquest over [their] remains.[30]

Leasing was instituted as a utilitarian response to the contemporary situation—as the penitentiaries and other state institutions were unable to manage the mass of the newly criminal, private-public partnerships were formed. Not did they not have the infrastructure to deal with an expanding criminal population, with war-ravaged treasuries, they were unable to build such infrastructure, making inexpensive options through leasing partnerships all the more attractive. These partnerships, which were often arranged between well-acquainted local elites (county officials and powerful plantation owners), were framed as problem-solving, utility-driven initiatives. There were problems that needed to be solved: labor shortages, the newly freed black population. Convict lease solved both.

The original provisions that provided for convict-leasing mimicked the slave-holder/slave relationship, but this was quickly transformed into something even more vicious. The most common model of penal servitude in the post-Emancipation South convict-leasing emerged in Mississippi as a major feature in the modernization of Southern capitalism, rather than a continuation of the agrarian-plantation model. A few select entrepreneurs[31] began to capitalize on the crisis, offering to solve the problems of the Southern prison authorities in exchange for a fee and permission to retain any profits

---

30 Oshinsky, *Worse than Slavery* 33.

31 See Oshinsky's discussion of Edmund Richardson for example: "In 1868, he struck a bargain with the federal authorities in Mississippi. Richardson needed cheap labor to work some land he had bought in the sparsely settled Yazoo Delta; the state had a gutted penitentiary overflowing with ex-slaves. The result was a contract that allowed Richardson to work these felons outside the prison walls. He promised to feed them, clothe them, guard them, and treat them well. The state agreed to pay him $18,000 a year for their maintenance and an additional sum for their transportation to and from his primitive Delta camps. Richardson got to keep all of the profits he derived from the labor of these convicts." (35).

from convict labor. In addition to the emergence of a labor-exchange, wherein convicts would be leased by individuals with significant capital and then subleased to smaller farms and plantations, non-agricultural interests such as railroad and land development interests took advantage of the system, resulting in what Kahn and Minnich called a "virtual reinvention of slavery."[32] Eventually, the practice grew to be so profitable that states charged for the services of their convicts, making the system profitable for the cash-strapped state governments as well. At the height of the system's successes, in Alabama, for example, "convict-leasing generated about 6% of the state's total revenue."[33]

The conditions for individuals hired out under convict-lease provisions were also devastating. Oshinsky's title *Worse than Slavery*, described the living and working conditions of convict-lease. Without the capital investment of purchasing a slave, as well as without the concern for future labor or resale value, convict workers were subjected to impossible conditions. In some years, the annual mortality rate was over 40%.[34] Assessing the conditions in Mississippi, Oshinsky notes "Not a single leased convict ever lived long enough to serve a sentence of ten years or more."[35] Convict-leasing operated despite, as with lynch law, the widespread knowledge on the part of all involved, that these practices were only tenuously connected (if at all) to recognizable criminal acts,

> A journalist in 1907 described an all-too-common arrangement between a local sheriff and a turpentine operator in desperate need of men. "Together," he wrote, "they made up a list of some eighty negroes known to both as good husky fellows, capable of a fair day's work," The sheriff was promised five dollars plus expenses for each negro

32 Kahn, Si, and Elizabeth Minnich. *The fox in the henhouse: How privatization threatens democracy.* Berrett-Koehler Publishers, 2005.
33 Oshinsky. *Worse than Slavery.* 80.
34 Ibid, 63.
35 Ibid. 46.

> he "landed." Within three weeks, he had arrested all eighty of them "on various petty charges--gambling, disorderly conduct, assault, and the like. The larger part of the list was gathered with a dragnet at Saturday-night shindigs, and hailed to the local justice who was in [on] the game.[36]

While convict leasing was not exclusively a punishment for black people, the vast majority of those sentenced to it were black, and those whites who were sentenced tended to both have committed more serious crimes and were treated to better conditions under the sentence. By the time convict leasing was banned nationally in 1928, (largely over objections that this labor unfairly competed with white labor), convict labor had built railroads across the South, drained thousands of acres of "malarial swamp," and Jim Crow laws and culture had become firmly established as the default social order.

Convict Lease and Utility. Convict-leasing is a relevant analogy to the modern order not because the contemporary system of punishment recreates the lease system through prison labor, instead its relevance is as a means to work through the process by which benign (or even laudable) justifications are effectively mobilized to promote and defend government action that is not defensible in its own right.[37] Convict-leasing was defended as *useful*—it solved the problem of what to do with criminals AND the need for cheap labor in the post-slave economy. It is impossible to say that its heinous nature was not recognized at the time—remember Douglass's identification of it as one of the "twin infamies." Despite this it was defended and propagated as solution to the state's problems.

By invoking the concept of social death, that category that enables intimate bodies to appear as non-persons, the reasoning behind this utilitarian vision becomes more clear.

---

36 Ibid 71.

37 And certainly this is the nature of punishment in itself—punishment is, by definition and necessity, something that is unacceptable to do to a citizen without the primer of criminal disruption. The difference here is that the defense is divorced from means and ends.

Though the previously enslaved population had gained formal legal status at the federal level, at both the sociopolitical and state-levels, the population was still unrecognized as dignified subjects—instead, the category of the socially dead followed these particular bodies as they became re-marked as criminal. Convict-leasing became a legitimate, useful policy solution because its targets existed outside of the democratic calculus. These bodies, being marked criminal—thus having their status as socially dead sanctioned under the liberalizing law—are once again made available for the benefit of the living, dignified public.

It is interesting to note with the convict-leasing example, that we actually do see during the period when it flourished, the beginning of a loosening of the bounds between social death and race. Just as slavery/social death was not a category that was always "raced" in the same way,[38] convict-leasing complicated the story of criminalization and race as it reconstructed both in the post-Reconstruction era. Not all of the black population was legally identified as criminal, though the sociopolitical construction of blackness as analogous to criminal was well underway. Nor were all those sentenced to convict-lease black; as mentioned above, there were white men leased out as well (I have no data on how American Indians or Hispanic convicts were treated, though I assume they would also have been subject to the dominant rules)—the difference is that the record reported by Oshinsky and others points to the fact that the white men sentenced to convict-lease had consistently committed serious, *harmful* crimes; whereas, also discussed above, whether the crimes for which black southerners were sentenced were serious or not was nearly arbitrary.

38 Patterson, *Slavery and Social Death.*

The similarity between these leased persons was not their crime, but rather their sociopolitical status. By committing a heinous crime, any white person might be forfeiting their personhood status—indeed, recall from my argument in the previous chapter that this is a central feature of Locke's construction of rational personality—the difference is in the default. Despite the constitutional transformation of the status of the enslaved, a new legal form arose to regulate race and raced bodies. This new regulation was grounded in and perpetuated the social standing of the new black citizenry as something *like* socially dead.

However, it is important to recognize the distinctions between slavery and freedom. While the category of social death remains relevant for understanding how difference in sociopolitical standing is constructed across material bodies that are radically equal in their materiality, but it is not static. Instead we might imagine the shifting category of the internally oppressed as a kind of social disability. By this, I do not mean the dominant construction of disability—the actual loss of a limb or other bodily function—but rather the re-theorized notion of disability as something that is done *to* different bodies. Under this conception, disability is defined as "the disadvantage or restriction of activity caused by a contemporary social organisation which takes no account of people who have physical impairments and thus excludes them from mainstream social activities,"[39] or as the organization Disabled People International refined it, disability "is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers."[40]

39 Goodley, Dan. *Disability Studies: An Interdisciplinary Introduction*. SAGE Publications Limited, 2010. Pg. 8.

40 Reiser, Richard. "Medical Model / Social Model." http://www.worldofinclusion.com/medical_social_model.htm.

Social death and this concept of social disability both carry with them the construction of a category that stands in opposition to the body politic—constructed as whole, virtuous, and necessary. In this construction, the criminal can be excluded from the metric of the common good because, as the condition of criminality is essentialized, it cannot be changed; it is not subject to the press for the modern interventions of utility, and thus becomes a tool to be deployed in search of the social good that utility seeks. As such, the methods employed become resistant to critique on their own terms, because they do not exist on their own terms—rather the methods of punishment, here convict-lease, are subject only to the critique of whether they further the aims of the dominant order.

**VII. Utility and Mass Incapacitation**

In leaping forward into the contemporary criminal justice context, this section re-forms the analogy of social death/disability as excluding the criminal from the commons, and argue that this model helps to elucidate one of the logics that governs the push towards mass incarceration between the 1970s and the present moment. As both incarceration rates and carceral populations have exploded, so structural approaches to rehabilitation, reconciliation, and restoration have either withered away or failed to take hold.[41] At this point in history, mass incarceration in the United States is largely a system of mass incapacitation—warehousing as a form of intervention. Indeed, the long-term spike in incarcerated populations has not tracked with new convictions, instead there is a split as terms of incarceration were lengthened throughout the period. The result is that people are staying in prisons longer for the same crimes, even as crime rates themselves

41 Brown, Michelle. *The culture of punishment: prison, society, and spectacle*. NYU Press, 2009. Ch. 5.

fall.[42]

The same time that has seen prison populations explode has also seen the abandonment of models of imprisonment as a locus of criminal improvement. In, *The Culture of Punishment, a* critique of the role of social science in reproducing carceral ideologies, Michelle Brown points to Robert Martinson's 1974 article, “What Works ? Questions and Answers About Prison Reform?” as a touchstone for the rejection of rehabilitation and treatment based models of criminal punishment. She argues, "the impact of [Martinson's] work spread quickly and the slogan "nothing works" became the lynchpin of correctional and crime policy throughout the next few decades.”[43]

This historical moment is also the point at which the corrections population begin to dramatically expand, a trend that has only shown signs of slowing in the wake of the economic upheaval since 2007. However, as Martinson himself and many others have argued along the way, the social science did NOT show that this population was incorrigible, rather it showed simply that the research being done on these program was not terribly effective. Martinson's critique was less of the direct programming and more of the methods by which programs were being assessed, dressed up in the flair of the concept “nothing works” for the purposes of attention-getting and . This common criticism of public policy was seized upon and as Andrews and Bonta argued, "satisfied conservative political reactions to the apparent disorder of the 1960s [and] liberal sorrow over perceived failures of the Great Society.” This criticism is periodically and routinely

---

42 Law-and-order advocates point to this as a success of mass incarceration, but the vast majority of criminological research argues that there is little to no evidence that mass incarceration has contributed to lower crime rates, and that instead there are aggregated causes that are more likely to account for fluctuations.

43 Brown. *The Culture of Punishment.* 162.

made of public policies and reflects the split between practitioners and researchers in a relatively mundane way, but in this case functioned to legitimate the structural rejection of redemption through punishment as a possibility. This moment also marks the rise of the War on Drugs, which oversaw the expansion of already existing racial disparities in arrests, convictions, and carceral sentences.

The result of the combination of the rise of mass incarceration and the abandonment of rehabilitative models has resulted in the solidification of mass incapacitation, where prisoners are held for a type of quarantine, prevented from acting out their virulence on the general population. As Frankin Zimring argues, "incapacitation now serves as the principle justification for imprisonment in American criminal justice: offenders are imprisoned in the United States to restrain them physically from offending again while they are confined."[44] This justification is a utility-driven one; it serves the common good through its practice and is justified by that service. Though not formally grounded in a utilitarian ethos, the contemporary system of incarceration is accepted in general culture as a legitimate, if flawed, institutional structure. The legitimating subtext of utility-driven or pragmatic approaches is that they are achieving some good. However, the real effects and outcomes of this justification function along a line of utility that excludes significant portions of the populace on the base of race and class—it excludes the socially dead and disabled. That is, the usefulness of mass incapacitation does not create a general public good, but rather creates a public good for an exclusive construction of the American public—a shifting and elusive construction of the public, but one focused on an unarticulated affluent whiteness

44 Zimring & Hawkins, *Incapacitation.* 3.

The persuasiveness of my argument aside, how can the reader be sure that the ills of mass incapacitation are the result of the pervasiveness of an ideology of social disability and not of a merely incompetent set of governing institutions? After all, I am not claiming that there is some conspiring set of actors determined to retain the second class status of black American citizens. So what is the process by which this happens and how can it be discerned?

To defend this argument, one must go to the real, material effects of incapacitation as a policy, and engage in an immanent critique of the proffered defenses themselves. In assessing the real effects of mass incapacitation, I begin with the defense of mass incapacitation—that it works. That through incarcerating the number and kinds of individuals (mostly poor, black and brown men), society as a whole is safer, more secure, and is, in general, improved. This is a popular defense, at least in politics, if less so from academic circles, but is singularly revealing when three key outcomes of mass incapacitation are examined: First, I will discuss the dislocation of criminal harm. Second, I will examine the results of the prison on prisoners themselves. Finally, I will discuss the halo effects of mass incapacitation.

To argue that society is safer, more free from harm under the system of mass incapacitation, fails to provide a satisfying defense because it cannot be shown that it is actually reducing a more free society over all. First, there are minimal returns in measured crime reduction from the expansion of mass imprisonment, while there are a number of costs. One of the costs almost universally overlooked is the exaggerated and intensified level of violence within prisons. This is an acceptable treatment for prisoners

only when they exist outside of the social union—in a state of social death. The violence and threat of violence that characterize prison life appear in the dominant narrative only as a fitting corollary to the prison experience. At the same time, prison violence is decried by policy makers and practitioners, primarily pointed to as a justification in calling for expanded resources. This visible-invisible phenomenon relies on a narrative about criminality that relies on the axiom that criminals are themselves corrupt, rendering their victimization while in prisons both inevitable and deserved.

This construction of the imprisoned criminal can, however, be challenged--centralizing a more complex vision of the humans involved. One challenge to this is the re-assertion of the minority violent offender. Non-violent offenders consistently make up the majority of the incarcerated population (and a more than significant majority of non-custodial supervision populations). These offenders have not been judged to be more violent than the general population, though the stigma of criminality often masks these differences.[45] As he offers strategies for reducing prison violence, Donald Spector argues that reducing prison violence requires a re-evaluating of the nature of prison violence itself. He argues "American prisons promote violence and abuse by their design and operation;" citing the Stanford Prison Experiment, Spector argues for a reconstruction of the relational mechanisms within prison—as standard practice invites the worst kinds of violence, rather than providing structural disincentives. While Spector (and I) acknowledges that prisons have an inherently dangerous element, "they are far more dangerous than they need to be."[46] As Wolff et al have argued, levels of violent

45 Pager, Devah. 2007. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration.* Chicago: University of Chicago Press.

46 Specter, Donald. "Making prisons safe: Strategies for reducing violence." *Wash. UJL & Pol'y* 22 (2006): 125.

victimization in prisons, which outstrip levels in even the most dangerous American cities,[47] reflect an attitude that the incarcerated are not worthy of protecting. Thus social harm is not reduced, it is instead re-focused, and indeed, intensified against the punished mass.

Another point of breakdown in the logic of mass incapacitation is the predominance of a view of the prisoner as essentially incorrigible. Despite the predominance of this narrative *since* the rise of Martinson's "nothing works" study, it is abundantly clear that researchers and practitioners have a clear idea both of "what works" and the fact that prisons are themselves criminogenic places. Most prisoners will eventually be released from prison, not withstanding the trend towards more severe sentences that persisted through the 1990s. Though consistently high recidivism rates are pointed to as failures in criminal justice, data consistently shows that with even the standard penal experience, about half of offenders will never be re-arrested. Of those offenders arrested a second time, about half will never be re-arrested a third time. Despite the resounding rhetoric of the career criminal, most people who are incarcerated will return to "society." Despite this knowledge, penal systems have resisted investing in a range of programming from therapeutic to occupational; further, these programs are often the first targets when institutions make budget-based decisions.

At the same time that programs to improve prisoner outcomes are scarce, research has also shown that prisons and other carceral sites are in fact criminogenic, or likely to produce criminality. While there is not universal scholarly agreement on the extent to

---

47 Wolff, Nancy, Cynthia L. Blitz, Jing Shi, Jane Siegel, and Ronet Bachman. "Physical Violence Inside Prisons Rates of Victimization." *Criminal Justice and Behavior* 34, no. 5 (2007): 588-599.

which, or which factors of imprisonment result in increased risk of future crime, the weight of research—across methodological approaches—argues that incarceration has significant, measurable, criminogenic effects.[48] The result of ignoring this substantial body of research is an increase in anti-sociality and crime. While at any given moment, criminal A—being incapacitated by incarceration—is being prevented from harming the "outside" world, criminal B has been released from a carceral sentence with fewer pro-social skills and an increased risk for offending. The calculus on this vision of incapacitation functions only if one supposes that criminals will *never* return to non-carceral communities.

However, they will return to communities. And when they do, they will face the challenges of limited/degraded skills, increased embedded-ness in a network that stands in an opposing position to socio-legal frameworks that might enable these individuals to achieve a non-criminal status. At the same time, the dominant argument that defends mass incapacitation as 'good' for society, seems most ludicrous when incarcerated individuals are contextualized as parents and members of families and communities. Ernest Drucker has recently called the effects on children and families, the "collateral damage" of punishment. The halo of incarceration affects nearly every realm of social success as generally measured: economic, health, family integrity, educational attainment, infant mortality, and life expectancy.[49] Perhaps the most clear challenge to the legitimacy of the current system of incarceration is the emerging evidence that incarceration is transgenerational; that is, the children of incarcerated persons are at an

48 Cid, José. "Is imprisonment criminogenic? A comparative study of recidivism rates between prison and suspended prison sanctions." *European Journal of Criminology* 6, no. 6 (2009): 459-480.

49 Drucker, Ernest. *A plague of prisons: The epidemiology of mass incarceration in America*. New Press, The, 2011.

increased risk of incarceration themselves, even controlling for other criminogenic indicators.[50] The presence of a condemning predestination presents a fundamental challenge to the legitimacy of the modern liberal state.

**VIII. Convict Lease, Mass Incapacitation, & the Utilitarian Impulse.**

Mass incapacitation, much like convict-lease, derives a great deal of its legitimacy from the narrative that these policies, no matter how flawed, came about as reasonable, effective solutions to emergent public problems. While mass incapacitation is not directly reproductive of convict lease, I have paired them here because they have broadly along parallel logics. They offer a *utility* in that they are posited to be mechanical responses that serve the public good, while also reducing harm. Tracing these logics enables a more direct critique, as the internal assumptions of the contemporary issue come into relief against the historic example.

As I argued in the previous section of this chapter, the utility that the current system offers is not actually a matter of reducing harm, but rather a matter of leveraging harm—most directly against the criminalized population itself, but also against the communities of which these individuals are part. However, critics of my argument might in fact defend this leveraging—arguing, quite fairly, that if someone must bear these costs, then it is quite appropriate for criminals to do so. In this sub-section, I address this critique by emphasizing the material reality that characterizes mass incapacitation and thus mass incarceration.

By re-centralizing the complex and problematic context of the racialization of crime and the criminalization of race, the utilitarian concept of localizing the costs of

50 Ibid.

crime onto criminals—which seems utterly rational in concept—loses its democratic coherence. Were it that criminalization were consistently, or even primarily based on the willed actions of freely rational subjects, as in the liberal imagination, then even relatively dire harms However, while certainly some criminals are these freely willing, rational harmers,[51] the alternative—externally constructed criminals, who are actually real human beings existing in time and in space, undermine the use mass incarceration as a utilitarian policy.

I suggested a moment ago, with a certain degree of flippancy, that criminalization —or the process by which an individual becomes marked as a criminal—is not generally the consequences of criminal actions (or actions that are prohibited by moral or legal codes) made by freely willing rational actors. This suggestion might be interpreted as either wildly offensive to those individuals who have committed crimes—after all, who am I to say that these individuals (again, predominantly young, black and brown men) are not freely willing, rational actors—or excessively naïve—indeed, if these are not 'real' crimes, then what am I saying about the millions who are victimized each year? Less flippantly, I am arguing that in the United States, the track record for legally determining criminality is suspect unto illegitimacy in such ways that the legitimacy of even the most unambiguous cases of vicious criminality do not provide sufficient grounds for the system as a whole. Structural criminogenesis aside, the functional inequality—from inconsistency in drug use v. drug prosecution, to predictors of capital prosecution--that persists across criminal justice apparati undermines the utility of the overall structure as it

51 I will address the ways in which my theory functions when taking 'real' criminals into account in the next chapter of this dissertation.

is incapable of making distinctions between "hardened criminals" and those who re-criminalized through structural inequality on the outcome end.

Further, the utility of mass incapacitation is contingent on a timeless excision of the criminal from the body politic—social death, to the extent that it is relevant, does describe the permanent status of the criminal. However, the viciousness of this system is both false and un-useful. These criminalized bodies, for the most part, are only temporarily removed from society—the damage they suffer (rightfully or not) is returned onto the communities to which they will also return. As real, material bodies, with some political rights, the status of these individuals again suggests the utility in thinking through the metaphor of social disability. However, this disabling stands outside the formal legal code—it is not the stated, legislated, *defended* purpose of punishing. Indeed, this aura of punishment cannot be ethically defended as part of the penal project, though it has been amply demonstrated that it exists and is devastating.[52,53]

The logic of utility involved here, however, makes perfect sense if the concept of social death is re-incorporated through Memmi's typology of the colonizer and the colonized. The excision of the criminal and the criminalized (constructed as one undifferentiated category) from the political body is a process under constant negotiation —indeed this negotiation has been a feature of American political development from the

---

52 See for example Ernest Drucker. 2011. *A Plague of Prisons,* New York: The New Press. and Todd Clear. 2007. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse.* Oxford, UK: Oxford University Press.

53 There is also the matter that utilitarianism as an ethical system demands that the least harmful or invasive method of problem-solving be applied—given the comparable harm of imprisonment vs. mandatory social programming participation, there are a number of ways that the state could intervene in less harmful and invasive ways. However, the extent to which this is relevant is questionable as when the state appeals to utility, it never claims to be following a specific code of utilitarian ethics, instead relying on a common sense ideology of usefulness and pragmatism. The dominant narrative relies on the veneer of utilitarianism, not on a coherent plan of utility itself.

3/5 Compromise, to *Plessy v. Ferguson*, to the quite recent *Boumediene v. Bush.* The process of this excision, and it is an excision rather than an inability to incorporate—there has been no moment in American history where this wasn't an active, ongoing process: one might think of the promise of Reconstruction, a promise to which convict-lease was part of the quashing response—creates a means by which policies that benefit a part of the population can be posited as benefiting the whole. Memmi discusses this excision as the apotheosis of the colonial relation, as the colonizer—in attempting to make his usurpation appear legitimate, desires that the colonized actually disappears. Practically, this is almost never an option (though in the case of American Indians, the combination of genocide and child removal has done a great deal of this work), so this "disappearing" occurs instead through the ideological assignation of social death. There is no responsibility to the socially dead; the calculus of utility simply will except them.

**IX. Conclusion**

In this chapter, I have argued that utilitarianism functions in the United States, but not according to any democratically recognizable metric. Instead, the implicit calculus of utility excepts the 'criminal' element, placing the constructed category of criminality as outside of the public union. This is possible because of the ideology constructed around criminality itself, which posits criminality as akin to social death. At the same time, the way criminality is posited to be a self-evidently concrete category—whereas under material analysis (in this and prior chapters), it is clear that criminality in the United States is a multi-layered process that functionally excludes significant forms of social harm while also expansively capturing swaths of the population marked as deviant, not

for harmful acts, but rather because of their social position. These categories are largely consistently with race and class, where white affluence, with only extreme exception, is defined as the center, and poor minorities—especially black men are identified as criminally deviant in such ways that everyday life comes to be seen as a hallmark of criminality. Thus those who are suspect are not counted in the felicific calculus of utility (no matter how implicit), and are re-constructed as legitimate instruments for the good of the innocent core.

I have argued that one way to recognize and articulate the process of sociopolitical excision is to imagine that to be identified with this heavily constructed category of criminality results in a form of social death, as theorized by Orlando Patterson. The socially dead exist with and in relation to the legitimized populace, but are both shunned and reprobate. The concept of social death, in combination with Memmi's construction of the condemnation of the colonized, articulates both the psychological and political construction of a social category that is imposed and then used as confirmation of the degradation of the criminalize class.

I argue that this ideological form is instrumental in justifying certain penal policies as productive, useful, and a legitimate part of a democratic order. While not explicitly framed as utilitarian, a utilitarian ethos informs much of penal practice. To the extent that penal practice is reactive, it is generally articulated in ways that resonate with the arguments that normative utilitarianism has articulated in defense of state punishment. This approach always looks upon punishment as a problem, but given that the criminal has made punishment necessary, it ought to achieve ends that benefit the common good.

However, as 'the criminal' exists outside the commons, the good that is pursued excludes them—and indeed, functions to the particular detriment of them. I argue that this form of utilitarianism is historically dominant in punishing and also has contributed to the conceptual legacy of punishment in practice. Were criminality a coherent, articulated category based in harm, the ways that the practices of punishment echo beyond the penal object him/herself would render these forms of utilitarian philosophy suspect, but even more centrally problematic is the construction of criminality on the form of blackness and racialization itself. Thus the utility that is achieved reflects these ideological premises rather than the goals laid out in a defense of utilitarianism itself.

# Chapter 5

## Conclusion

At this point, I have been in graduate school for longer than I was a probation officer. Only a few faces, and fewer names of my young probationers[1] remain clear: Philip and Cleveland, a heroin addict and an alcoholic, Nicky and his brother, hustlers in every sense of the word, Carlos, trying hard--and probably succeeding after I knew him--to be a thug. Yesenia, ready to fight. Perry, P-money, whose offense I don't remember, but whose normality was striking. Born, who had caught an adult charge (possession w/ intent) before he finished his juvenile term, and had a daughter named Dee. I spent much of time time as a probation officer vaguely confused as to whether I ought to treat these teenagers like naughty children or deviant criminals. I was trained to treat them like criminals, but they sure seemed like naughty children. But ultimately, no matter how I thought I ought to have interacted with them on an individual basis, their progress through the system that required certain kinds of compliance, relied on key assessments, and demanded certain kinds of feedback. Despite the stated goals of this system—reducing recidivism, preparing young people to have a productive adult life, etc.—their experiences seemed more like they were stuck in quicksand than that their punishment was providing any sort of new foundation or actually accomplishing any social good. It made little sense. If we take this system as functional, we must also acknowledge that it is a system that devalues the lives and experiences of millions of people and families,

1 Though awkward, we used the term "probationer" to describe our target population—I worked a juvenile caseload, so these young people were not felons, nor convicts, but neither were they "clients" which was usually the alternative to probationer. Delinquents, though that is what they were according to the legal code, seemed antiquated. They did not seek services, they were instead required to abide by conditions we determined and oversaw, with the threat of arrest and detention framing our relations. Probationer captures the awkwardness.

with the heaviest burden being placed (without defensible reason) on poor people, people of color, and especially poor black people. Despite this, the system is defended as a necessary element of a democratic order founded on freedom. In this dissertation, in trying to make sense of this, I have attempted to expose the concealed oppressive ideologies that function along with the normative justifications for punishment that are forwarded as the basis of American criminal punishment.

Up to this point, many of the arguments I have made and approaches I have taken have been rather blunt. In this chapter, I seek not to soften that bluntness, but rather to sharpen it. I both defend that bluntness, but also complicate my argument by bringing contradictions and paradoxes that emerged in my analysis to the forefront, organizing them in relation to one another, complicating certain key points, and pushing towards an analysis that is hard and precise. The breadth of some of my arguments has significant benefits in both clarity and sweep. The topic of criminal punishment in the United States deserves big arguments, I'd rather be shouting and somewhat blustering than *sotto voce* and impeccable. Of course, I'd most rather project as one trained in the RSC, but I swear that will come in the revision of this text. This chapter is broken into three parts; in the first, I introduce several issues that have been glossed over or ignored as I have opted for clarity in my initial claims. When re-situated within my argument here, they complicate my arguments in necessary ways, without obscuring the commitment of my frame. Issues that I will address include: re-complicating my use of race, addressing the fact that crime —not as an ideological category, but a material descriptor of social harm—is very real, and I also press further on a topic introduced in Chapter 4, the permeability of the

categories that I have, in some ways, suggested are static. The second section of this chapter is be devoted to a consideration of hegemonic ideology as a multifarious reality: specifically, I explore the ideological conflict that I first referenced in the introduction to this dissertation, in Angela Davis's words: the American project has been characterized by an "enduring philosophical emphasis on the idea of freedom alongside an equally pervasive failure to acknowledge the denial of freedom to entire categories of real, social human beings." I re-state this problem as one of parallel, intertwined, but still contradictory ideologies, that do not function independently, but rather have a historical life together and the reconcile of which is best understood through the framework of a Gramscian hegemonic ideologies. Also in this section, I discuss the possibilities of resistance to negating ideologies, re-placing my work within an expressly political project. The conclusion to this chapter is also the conclusion to this dissertation, in which I review the arguments made in each chapter, re-connect them to the overarching narrative, and suggesting areas for future research.

**I. Complicating the Narratives**

Race, Blackness, Criminals, and Everybody Else – I began this dissertation with a nuanced definition of race, grounding the racialization process in politics—arguing, with Martinot and others, that phenotype itself only becomes meaningful through social, political, and economic attachments to the signifier—otherwise, skin color might be as politically important as eye color: notable at times, but almost never determinative. As I develop my argument, I operationalize this conception of race, but also focus on a black-white binary, in which brown—usually referencing, in an undifferentiated way, people of

Latino descent moving in the US—is tied to black with little history or complexity. Up this point, it might seem like people of Asian descent did not exist as racialized figures. This flattening has both uses and pitfalls.

The problems of a white-black binarism are well-identified, most definitively by Parea, in his 1997 article in the *California Law Review, "*The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought." In this article, he argues that the binary opposition of black & white has created an epistemological paradigm that tends to create a narrative of linearity that tends to elide both the contributions and struggles of other racial groups, while also over-simplifying the diffusion of power and the flexibility of institutions. Work challenging the black/white binary more recently has focused on the intellectual rigidity of the binary, that has the result of de-emphasizing intersectional analysis.

In this dissertation, insufficient attention to the limitations of the black-white binary indeed runs the risk of flattening histories—the racialization of criminalization is *not* exclusively a story about blackness. In ways particularly tied to the specific histories of multiple jurisdictions, the criminalization of race is a multi-hued process. In California and Texas in particular, two states that have been leaders in the expansion of mass incarceration, complex racial orders have informed conceptions of criminality as the states themselves began to construct legal orders. For example, regarding California, Nayan Shah's *Stranger Intimacies* explores the role that Pacific migration patterns and xenophobia towards these migrants played in creating legal norms regulating both urban and rural daily life. Regarding Texas and the borderland regions, Mekala Audain in her

forthcoming dissertation discusses the development of racial codes that differentiated between European Americans, Black Americans, and ethnic Mexicans in Texas as part of the process by which Texas was made into a viable part of the American Union. These narratives add an important richness to a comprehensive understanding of penal ideology in the US.

Despite these considerations, I defend this binary as equally crucial for this particular project. Memmi, with his clear, unambiguous typology, models the utility offered in certain kinds of reductionism. In this dissertation, particularly because of the complexity of the competing ideologies involved—ideologies that are alternately explicit and obscure, a paring down enables a more stringent ethical critique. By centralizing the binary, I have tried to retain focus on the fact that the ideologies and the policies exist only to the extent that they diminish the possibilities for self-determination for some, while creating material and other benefits (even if they are tainted) for others—that this is a matter of power, not style.

Further, the black-white binary is not merely a reductive approach, but rather is itself an interpretive determination. As Orlando Patterson argued in articulating his theory of social death, America has had a "historic emphasis on black-white relations." Because of the unique position that black-white relations have had in creating the racial order in the United States, this binary continues to hold theoretical salience. Though somewhat heavy-handed itself, Roy Brooks and Kristen Widner argue for the black-white binary as an important historical frame, with particular emphasis on the formational influences of slavery and Jim Crow, the impossibility of assimilation, and lynching.

In constructing the American political order, the strength and complexity of the hegemonic ideology required (at the Founding) to establish slavery while also forwarding the most progressive liberal agenda in history continued and continues to have meaningful resonance. The structural and conceptual grounding that re-constructed American slaves as Patterson's socially dead—just as it produced Memmi's usurping Nero—was a long historical process that was replicated across all facets of civic life. Indeed, understanding the binary in this way provides a frame through which one might gain independent insight into the way race as a concept in and of itself, and races as diverse categorizations of placed bodies.

Of particular importance is the way that the racial binary parallels, and in practice becomes fused with, a binary of social value. The criminalization of blackness—again, not the idea that blackness is inherently criminal, but rather that sociopolitical determinations of criminality are racialized[2]--coincides with the determination that criminality stands against the civic order. Criminality does not inherently excise a person from the socio-civic order; in ethnically homogenous countries in particular, criminality is predominantly viewed not as a characteristic, but as something that can be treated or changed. Under this framework, rehabilitation is a central feature of the penal process. This approach is so foreign that it regularly leads American journalists to describe facilities like Norway's Bastoy Prison as “summer camp[s],” and “cozy” retreats.[3] As I argued in chapter three of this dissertation, in the American system, criminality is not

2 Muhammad. *Condemnation of Blackness.*

3 staff, Vice. "Inside Norway's Progressive Prison System." http://www.cnn.com/2011/WORLD/europe/08/02/vbs.norwegian.prisons/index.html. Alvarez, Lisette. "Escapes Lead Sweden to Rethink Liberal Prison System." *New York Times*, March 20, 2005.

necessarily tied to specific criminal acts, and instead is considered endemic to the person. This figuring also retains the racialization of crime, creating a feedback loop that excises those identified as criminals from the political union. Through the black-white binary, the sometimes-arbitrariness of this designation remains at the forefront. The work that the criminal-innocent/black-white binaries do becomes a means to assess what is happening to *all* categorized individuals as they are situated in relationship to these binaries--not as on a spectrum, but rather weighted on either side of a fulcrum. Though not, by far a perfect metric, discourses of racialization have often situated non-white-or-black ethnic and racial groups in relation to whiteness and blackness. This is particularly true in understanding how poor, recent-immigrant Latino communities have interacted with the criminal justice system. Though the specific history is often quite as diverse as the origin stories and the construction of communities amongst Latino immigrants, but in many already poor cities, new ethnic enclaves of Latinos have been the target of criminalization through the same mechanisms—quite literally the same patterns of policing, education, and ecological insecurity as many poor, black communities.

Further, a key, unresolved challenge that the binary opens for critique is an analysis of the work that whiteness is doing in this binarism. Whiteness as also racialized —racialized into innocence, and here I give an accounting that expands upon the theorizing in previous chapters. The binary of blackness/criminality v. whiteness/innocence(virtue) is, Steven Martinot argues, an inversion of the origins of whiteness; "Having its origin in coloniality, "racialization" emerges from a history of criminality, including kidnapping, false imprisonment, forced labor, murder, contempt for

personhood, assault, torture, and theft of land. In all this, whiteness signified dominance, or the production of dominance, and as Ruth Frankenberg argues, still does (Frankenber 1993, 231). "Race" and whiteness remain a power hierarchy that takes criminality as its tradition."[4] Whiteness emerges out of the Western/Northern European imperial project, asserting an arbitrary right to power in the exact moments that Enlightenment movements sought to establish the primacy of a right to be free from arbitrary power. As Martinot again argues, "Historically, the primary defining relation of race is that of whiteness to black people, since it was through the oppression of black people that Europeans invented themselves as white in the first place. By extending this originary white/black binary, whites have defined "other" races at will, through the generalizations, derogations, and symbolizations they have created and defined for others."[5] The racial binary, racial distinction as a politically significant category at all, is alloyed with oppressive racial ideology. That the common sense thinking of the white-dominated public sphere retains foundational assertions about the relations between racialized categories, is unsurprising in this formulation. Even in this contemporary moment, when race is *prima facie* removed from the public, or at least the legal, discourse, the forms of thinking—the forms of categorization based on assumed qualities of criminality, persist synthetically as a natural ordering of human relations. To the extent that a person, or category of persons can or does appear as embodying legitimate whiteness, so can they claim (or are they afforded) an inherent, characteristic innocence---which can mitigate, or at least humanize even quite heinous acts; to the extent that one is blackened in this binary is also the extent

4 Martinot, Steve. *The Machinery of Whiteness: Studies in the Structure of Racialization*. Temple University Press, 2010. Pg. 20.
5 Ibid.

to which one cannot escape from being perceived as criminal—as manifest in the glaring example of Trayvon Martin's shooting to the more daily indignities of stop-and-frisk.

Similarly, a focus on whiteness brings us closer to a material understanding of deviance. In *Discipline & Punish,* Michel Foucault (broadly) argued that as penal mechanisms expand the scope of their discipline, all bodies are re-defined as deviant and requiring discipline. As Joy James retorts, some bodies are constructed as more deviant than others and some are certainly subject to more discipline; the public sphere becomes more prison-like, but some people are actually in prisons. In the current, post-racial legal context, the lines along which this distinction breaks are less clear—but whiteness continues to be a core protected value. Investigating the construction of whiteness beyond its phenotypical values creates a lens through which the imaginary true American, s/he who is being protected, can be better understood. For example, as Shklar grounds meaningful access to American citizenship in labor, paying special attention to the ways that unfree labor conditioned race relations, a new dimension in using this framework of citizen might be built on the intersection of race and time spent in prison. One of the consequences of the extensions in sentencing (mostly in the 80's & 90's) has been that young men of color are spending significant numbers of earning years (specifically those years in which income tends to rise) outside of the competitive labor force. As non-criminality and productivity may be further fused in racialized ways, this may provide a mechanism by which racial ideology is reproduced outside of the immediate discourse of race—in a way that reinforce virtuous whiteness while simultaneously staking claim to a non-racial narrative.

What About the 14,000+ Intentional Homicides Last Year? Another point in need of further exploration in this dissertation is the reality of crime and the need to respond to it. In indicting legitimating justifications for punishment, it may appear as though I am claiming that there is no just way to respond to harm. I am not claiming this at all, and in fact, argue that the obscuring nature of America's racialized criminality has in fact impeded public possibilities for both preventing those crimes that diminish quality of life for victims, and for punishing in ways that are defensible on coherent, democratic grounds.

We, as a society, know what could be done to prevent the vast majority of serious offenses—particularly for delinquency, which is a strong predictor for long-term criminal involvement. While there is no determinate combination of factors that either produce or prevent criminality, much like heart-disease prevention, risk factors have been isolated, and meaningful mitigation of those factors can (and has been shown to) result in significantly lower incidences of harmful crime. Examples of evidence-based interventions include long-term mentoring of children with identified risk factors, or increasing parental skills (generally through parenting classes) in homes with high rates of discord. The view of criminality as endemic—despite years of scientific research indicating otherwise, precludes investment in such programming.

This ideology also prevents crime victimization from being taken seriously. While ensuring the security of its citizens is both conceptually and materially, as Lisa Miller argues, “the essence of statehood,”[6] the broad and enduring stigma of criminality on

6 Miller, Lisa. "Power to the People: Violent Victimization, Inequality and Democratic Politics." *Theoretical Criminology* Forthcoming (2013).

racial and racialized communities fosters a public discourse of deserving-ness. In Memmi's typology, we see this deservingness as the colonizer's construction of the colonized, as without history, debased, and irredeemable—and in the illegitimacy of such a construct, the colonizer must constantly re-affirm this status. While this public discourse is not the exclusive narrative across popular channels, it resonates sufficiently and is not effectively countered—this prevents victims of crime from appearing at the center of the dominant narrative. Further, when the policy response of the modern era is to increase policing, surveillance, and other forms of coercive governance, this creates what Miller has called a "security gap," which points to the insecurity that communities with high-risk of crime face—both from the crime itself and from the coercive measures of the state face in relation to other populace sectors.[7] Miller frames this as a problem for democratic politics, which I agree, it is, but I push further and argue that this problem is mere parcel of the broader ideology that has excepted swaths of the *de jure* American citizenry on the basis of identity category. As Sara Ahmed introduces 2004's *The Cultural Politics of Emotion*, the construction of the assumed "we" of the nation does not need to explicitly draw lines when "we" is a constructed, imagined category—instead the public knows from experience (of provision of services, discrimination, access to state goods) who is and is not a real American.

<u>Stickiness, Permeability, and the (Mate-)Reality of Categories</u> The third concept that has been introduced in each of the previous chapters, but that still requires further investigation is the permeability of these categories—or in other words, if the ideology is

7 Miller frames this gap as a problem for democratic politics; I agree but am skeptical of the possibilities for traditional politics in providing meaningful redress.

as encompassing as I have suggested, why are the categories of race/criminality not actually deterministic? Indeed, one particularly stark statistic illustrates this well: one in three African American men will be incarcerated at least once in their lifetime. This statistic is often used to illustrate the magnitude of mass incarceration, and the ways that it moves pervasively in African American communities. However, it may also be rhetoric that pathologizes the African American community even as much of the scholarship that points to this statistic is attempting to re-construct that pathology as exogenous to African Americans. Rather, the constant repetition of this statistic may create a sense that African American daily life is lived in exclusive relationship to criminal punishment. The flip side of this statistic is that despite mass incarceration, the expansion of surveillance, and the existence of police interference in daily life that is so common that it has nicknames —e.g. DWB for Driving While Black, a super-majority of African Americans will never be incarcerated, and about half will never be arrested.[8] Similarly, white people, though at rates that can shock in the opposite direction, are still subject to criminalization. The incarceration rate for white men,[9] at 412 per 100k of the general population, still leads developed nations, more than doubling the incarceration rate for the United Kingdom, for example.

In this dissertation, I have referred to the 'mixed' nature of this as evidence of permeability, where there are those who seemingly escape both the immediate effects of criminalization, but also the broader effects. Oprah, is perhaps the icon for this slippage; though gender complicates this story, as the criminal identity is more securely imagined

8 NAACP. "Criminal Justice Fact Sheet." http://www.naacp.org/pages/criminal-justice-fact-sheet.
9 Mauer, Marc; King, Ryan. "Uneven Justice: State Rates of Incarceration by Race and Ethnicity." The Sentencing Project, 2007.

as masculine, race is salient across gender categories as a marker of deviance and dangerousness. A figure like Oprah, however—coming from a background as bleak and downtrodden as can be imagined in the American story—is widely beloved, admired, and more importantly for this argument: normal. Oprah is, in her struggles with her weight, in her intimate rapport, in her success in achieving the traditional American dream, like *us.* Similarly, there are white figures who *become* irredeemably criminal, unable to retain the innocence and value that whiteness, by its construction, is supposed to accrue. Though there are a few categories of criminals to whom this might apply, perhaps the most analogically accurate is the figure of the "meth head," or a person who habitually uses crystal meth—who is popularly figured as poor, white, "trailer-trash." In recent years, both in popular culture and in law enforcement, this category of criminal has been painted in ways that have generally been reserved for non-white criminal classes: permanently deviant, dangerous, and corrosive.

In accounting for these contradicting figures, I offer two propositions. The first is, similar to Michelle Alexander's arguments in *The New Jim Crow,* that these divergences confer legitimacy on a system that is sustainable specifically because it retains democratic legitimacy. Alexander refers to this as the age of colorblindness, an age in which the successes of the Civil Rights era are, in the dominant narrative, so assured that any questioning of how race might be meaningful is considered *racist* in and of itself. Summarizing her own argument, Alexander offers, "in this age of colorblindness, a time when we have supposedly moved "beyond race," we as a nation would feel very uncomfortable if only black people were sent to jail for drug offenses. We seem

comfortable with 90 percent of the people arrested and convicted of drug offenses in some states being African American, but if the figure was 100 percent, the veil of colorblindness would be lost."[10] Were there an impermeable wall wherein black men were exclusively criminalized and white people were utterly absolved, there would be no way to claim legitimacy in the post-Civil Rights Era—it would be a literal recreation of Jim Crow. As a test, though, Alexander asks the reader to imagine the reverse scenario: "For those who say that the war on drugs and the system of mass incarceration really isn't about race, I say there is no way we would allow the majority of young white men to be swept into the criminal justice system for minor drug offenses, branded criminals and felons, and then stripped of their basis civil and human rights while young black men who are engaged in the same activity trot off to college."[11] Alexander argues that this scenario would simply be untenable for the democratic mass, arguing that such a policy outcome would be met with a strenuous and immediate backlash, and the policy would be reformed.

Accounting, similarly, for the existence of the many African Americans who largely skirt the influence or interference of the criminal justice system, it is important to recognize that there has been progress made in the terms of the racial hierarchy in the United States. Contemporary mass incarceration and all its deleterious effects on individuals, families, and communities are not the same as slavery. It is not the same as Jim Crow. Pointing to this reality does not diminish the viciousness of the current system. American punishment is conceived on, ordered by, and reproduced through the

---

10 http://truth-out.org/opinion/item/10629-truthout-interviews-michelle-alexander-on-the-irrational-race-bias-of-the-criminal-justice-and-prison-systems

11 Ibid.

pervasiveness of white supremacy. These are not the same conditions as when lynch law ruled the American South post-Reconstruction. The Civil Rights era reforms that resulted in a *de jure* legal equality changed the terms of white supremacy in the United States. The legal transformations affected, but did not excise the racial order. Rather, as Jim Crow was negated is was also synthesized, creating the foundation for mass incarceration and the racial inequality that undergirds it. The previous three chapters of this dissertation are devoted to exploring the dominant penal justifications which are used to defend the American criminal justice system as guided by democratic reason. Though they each fail to cohere (in any reasonable way) to the structures by which they might conform to democratic principle, it is not insignificant that these appeals to a democratic purpose are necessary. The justifications for lynch law were often grounded in claims that the crimes for which lynching victims were being "punished" were too heinous for a court guided by democratic principles to properly manage. The contemporary system fails, in every way, to conform to meaningful, Enlightenment-driven democratic values, but it still represents a judicial form that is distinct from Jim Crow and slavery.

Finally, in explaining the mechanism by which ideology and historical forms "stick" or "slide," Sara Ahmed offers an account of affective reason in constructing social relations that I think is fruitful here. In the next section of this chapter, as I explore the ways that multiple ideological threads intertwine and intersect, I argue that the "stickiness" that Ahmed theorizes is useful for interpreting how ideology moves between individuals and across time, while also obscuring agents who forward and defend these ideologies.

**II. Ideology, Dialectics, & Progress.**

Up to this point, I have largely talked about ideology as merely the set of ideas, values, and discourses that together make up a dominant narrative that runs throughout a society. However, as I have discussed at several points in this dissertation, there are several distinct ideological genealogies in play in American society. The most most discursively dominant one, and the one that conditions the normative forms of punishment is grounded in the Enlightenment, liberal tradition. It is from this ideology that the centrality of *justification* emerges. The drive to escape being subjected to the irrational use of power has governed the structure of both governing and reform. As has been discussed, particularly in chapters three and four, this tradition places great emphasis on the power of law in producing a rational exercise of power. At the same time, I have argued in each of the previous chapters, the deeply irrational impulse of white supremacy operates in temporal and spatial simultaneity to the Enlightenment impulse. This "paradox" ought to be understood as a function of the dominance of a hegemonic reasoning that reconciles these ideologies by naturalizing the processes of white supremacy, and universalizing the bourgeois experience. Prior to articulating the specific ways that this hegemonic ideology that governs penal logic, it is useful here to revisit the concept of hegemonic ideology itself. Grounded in Gramsci's notions of hegemony, this concept has been subsequently explored and articulated in ways that are useful for understanding the ways that ideas and discourses move in the contemporary political order.

<u>Articulating Hegemonic Ideology.</u> Gramsci's conception of hegemony emerges

from his prison writings from between 1929-1935; the core of cultural hegemony argues that the oppression of capitalism is not maintained merely by force, coercion, and co-optation, but rather that the capitalist order, primarily through ans as a function of the process of alienation, creates a "common sense" that pervades society and naturalizes the order of the overall society. Explaining and building on Gramsci's work, Carl Boggs in his 1972 essay explained the concept of hegemony thusly:

> by hegemony Gramsci meant the permeation throughout civil society—which includes a whole range of structures and activities like trade unions, schools, the churches, [the mass media,' and the family—of an entire system of values, attitudes, beliefs morality, that, in one way or another, supports the established order and ruling class. Hegemony in this sense might be defined as an "organizing principle," or world view (or a combination of worldview) that is diffused by agencies of ideological control (or organically evolves over a long period of time) and is internalized by the general population...Insofar as all the ruling classes seek to perpetuate their power, wealth, and status, they strive to universalize their own belief systems as part of the 'natural order of things.' To the degree they are successful, people will 'consent' to their own exploitation and misery. Hegemony functions to mystify events, issues, and power relations, induces a sense of fatalism and passivity, and justifies various forms of sacrifice and deprivation. The degree of correspondence or 'equilibrium' between the state and civil society reflects how thoroughly the dominant values have developed among the population at large, while variations in the nature and scope of hegemonic influence will partially determine the amount of political force that ruling groups will have to exercise under specific circumstances.[12]

The specific content of that hegemonic ideology is open; the common thread across hegemonic narratives is that they materially function to benefit a ruling elite and that a significant element of that benefit is to legitimate the elite's location in an irrational hierarchy. For the purposes of my argument, I'd like to stress the idea that hegemonic ideology may "organically evolve[...] over a long period of time." Though the racial and capitalist (and racial capitalist) ideologies that dominated in antebellum and Jim Crow America have changed, they did not face revolutionary disruption. The result has been

12 Boggs, Carl. *Gramsci's" Prison Notebooks"*. 1972.

the continuation of white supremacist ideologies in ways that, with each push towards reform, have become more and more obscure, even as they continue to reproduce racialized relations. These racialized relations may even lose their explicitly 'raced' character, and instead rely on racialized relations of alienation—wherein inequality is assumed to be natural, but the mechanisms of that inequality are inarticulable.

This is perhaps even more relevant in the development and transmission of penal ideology than in other sectors, as a result of the role of the criminal in a liberal society. Whereas other figures in the liberal order do not have the same inherently negative characterization as the criminal, they can more easily become sites of ideological disruption; that is, it is far easier to disrupt a racist narrative when talking about students, for example. Students represent a vision of the liberal citizen working to improve his or her lot in life, this narrative directly disrupts a racist narrative that often relies on images of the black person as “shiftless,” “lazy,” “stupid,” or “untrustworthy.” The individual bodies of black students easily serve to disrupt racist discourse.

Criminals, on the other hand, can become the repository for hierarchical views about lower status persons—often with little challenge. Central to this conundrum is the persistence, before and since the emergence of a racial ideology, of a liberal view of crime. A criminal is viewed to have brought his criminal status upon himself. Criminals, as law-breakers, when imagined in this way, can be defensibly envisioned as “shiftless,” “lazy,” “stupid,” or “untrustworthy.” This relies on the assumption that criminality is a static and natural category, just as in more explicitly racist times, race was assumed to be.

As articulated through Ahmed's conception of stickiness and slipperiness, this

construction of these deviant bodies is both "sticky" and one that "slides."[13] The sliding describes how, via affective reason (or the drawing of conclusions based on one's emotional, or affective, response) racial logic slides from concept to concept. The sliding is possible because the characteristics (e.g. deviance) are not attached to particular bodies, but rather are attached to a signification—the perceiver is ready and primed to locate deviance in particular bodies. Which is precisely where the complementary concept of "stickiness" comes in, as ideology "sticks" to certain bodies—in the case of penal logic, black men's bodies primarily—and persists no matter the articulated ideology. Jasbir Puar explains the relationship between sliding and sticking,

> Sliding works to create likenesses—relations of feared objects to each other—among differences that, despite such variance, appear to be distinctly different from the 'us' at stake. The fact that fear does not reside in a body, but rather could be materialized in anybody within a particular profile range, both allows for the figure of the terrorist to retain its potent historical significatory ambiguity while it also enables the fear to 'stick' to bodies that 'could be' terrorists. Ahmed's focus on *resemblance* allows emotions to slide to and between bodies, impelling stickiness of signs and creating the relations of resemblance of feared objects to each other.[14]

This process of resemblance as the process by which ideology slides across objects while sticking to other signifiers is a means of theorizing the transmission of *similar* ideologies —the relation of the ideologies that underpin slavery to Jim Crow, or Jim Crow to contemporary mass incarceration.

**III. Specifying Penal Ideology**

That the original structures of American penal logic were established with the specific intent of economic and racial control is not a controversial argument. If you

13 Ahmed, Sara. *The Cultural Politics of Emotion*. Edinburgh University Press and New York: Routledge, 2004. 64.

14 Puar, Jasbir K. *Terrorist Assemblages: Homonationalism in Queer Times*. Duke University Press Books, 2007. 61.

recall the sections in this dissertation on the "twin infamies," of lynch law and convict-leasing, even post-Emancipation, the economic element of racial control was central as punishment was codified in state relations. But this still requires further investigation into the conceptual process that is being transmitted. Here again Memmi's insight that the colonial project is at once and inextricably a capitalist and racial project useful; as he argues, structurally, they are fused: "Racism sums up and symbolizes the fundamental relation which unites colonialist and colonized. […] Racism appears [...] not as an incidental detail, but as a consubstantial part of colonialism. It is the highest expression of the colonial system and one of the most significant features of the colonialist. Not only does it establish a fundamental discrimination between colonizer and colonized, a *sine qua non* of colonial life, but it also lays the foundation for the immutability of this life."[15]

This fusing of racism and legitimate domination provides a useful analogy for the ideology at work in the organic development of penal ideology. Memmi's typology postulates a series of categories wherein colonial ideology is explored as a psychological phenomenon. His purpose is to name the internal processes by which personal attitudes come to be formed by and to reform colonial ideologies, thus he exposes and de-naturalizes the ways that colonizers create, conceptually and materially, the hierarchical ideology upon which colonial oppression stands. Memmi refers to the process by which the colonizer legitimates—to himself most importantly—his oppressive acts as the "double reconstruction of the colonized and himself [the colonizer]." Here, the colonizer externalizes the violence of colonizing onto the colonized body. Motivated by ego

15 Memmi. *The Colonizer and the Colonized.* 70

defense, the colonizer consistently asserts his/her own merits while simultaneously insisting on the obviousness of the colonized's faults—Memmi argues, however, that the colonizer is never fully successful in convincing either himself or the colonized of the legitimacy of this relation, creating a scenario wherein the technologies of degradation are continually being reinforced and reasserted. This creates an unsustainable cycle, that ultimately leads the colonizer to wish for the disappearance of the colonized figure altogether. No matter the complexity of the ideology however, Memmi insists on the material origins, out of which colonial ideology emerges. Thus the penal ideology that enables democratic narratives to apply to patently undemocratic practices is posited to be not only habit, but also a matter of ongoing psychological process.

Ideology & Punishment - Analyzing the formal justifications for punishment in relationship to the logics according to which these punishments are conceived is fundamentally a matter of understanding how ideology moves in society and across history. In the context of American punishment, the complex turn is that there is not simply one ideological logic according to which all actions can be understood and explained. Rather there are multiple ideologies that share the common thread of the dominance of bourgeois reason. The unifying presence of capitalism creates a foundational logic that renders these two compatible, as alienation and exploitation are not recognized as political realities, but rather as natural conditions. In his work explicating the dominance of capitalist common sense in the contemporary US, Dean Wolfe Manders articulates the conceptual challenge of recognizing these contradictions,

> Between capitalist ideology and daily reality there exists a wide gap […] This content is lived by working people, though not understood adequately by them. Their lives

> (our lives) are rent with contradictions: between alienating work and commodified leisure, compelled economic necessity and marketed consumer "freedom," social purpose and individual meaninglessness. However such incongruities, and others, within daily life, do not "keep most people awake at night."[16]

Similarly, though the vast, surface inequalities in the American system of punishment are widely noticed, they are not sufficiently striking to the average person so as to provoke a political or ethical response.

Thus progress towards a self-deterministic, democratic ideology is occluded as the simultaneous ideology of capitalist white supremacy retains its force through not only ideology, but also structure, history, and affective reason. The narrative that characterizes the hegemonic ideology currently in play might be articulated as: though the vestiges of white supremacy may persist in some small ways, at this point sufficient progress has been made, any remaining racial inequality is largely inconsequential and destined to wither away, and that the costs of addressing racial inequality are higher than the costs of political intervention. The majority of racial inequality is naturalized, the rest is quaint.

Penal ideology is an expression of this dimorphic hegemonic ideology, as articulated in the Gramscian tradition, seeking to articulate the mechanisms by which they persist. I also argue that capitalist white supremacy is not pre-determined to persist, but rather that it is constantly re-created through affective relations, penal technologies, and the structural conditions of everyday life, but as it is constantly recreated, neither is it determined to desist.

**IV. Grounding the Critique.**

---

16 Manders, Dean Wolfe. *The Hegemony of Common Sense: Wisdom and Mystification in Everyday Life*. Vol. 13: Peter Lang Pub Incorporated, 2006.

We in the United States punish the way we do because capitalist white supremacy is embedded in our institutions and our collective psyche. This persists, despite a public rhetoric that eschews racism, because the hegemonic ideology of the United States is dominated by a bourgeois reason wherein blackness obscures humanity, while whiteness is understood as evidence of it. Hegemony does not indicate universal consent, but it does indicate sufficient acquiescence by a sufficient mass.

In the epigraph of this dissertation, I quoted Richard Wright's novel *The Outsider,* "Men simply copied the realities of their hearts when they built prisons," a dejected, degraded Cross Damon, murderer now murdered has attempted to escape the crushing nature of his life, and though he repeatedly 'escapes,' physically, he ultimately dies alone, in as abject a state as when he started. Houston the prosecutor, the embodiment of law, unable to give Damon solace, as he tells Damon about prisons and men. He continues, "They simply extended into objective reality what was already a subjective reality."[17] In this moment, Wright is perhaps more interested in men's hearts than in prisons, but his insight remains relevant. To the extent that dominant culture's subjectivity is structured by the hegemonic discourses of white supremacy and a democratic impulse that is conditioned by bourgeois idealism is the extent to which that culture's penal regime will re-enact the processes of oppression that brought about the instant condition.

<u>Possibilities for Resistance / A More Perfect Punishment.</u> Formal law controlling the various persons (groups and individuals) within the Unietd States has undergone profound change since the founding of the American state. Both jurisdictionally and in content, the policing powers of the state have become less explicitly driven by particular

17 Wright, Richard. *The Outsider.* New York,: Harper & Row, 1969. P. 378.

identity. Not the least of these is the emergence of the strict scrutiny of race as a requirement for Constitutional legality. These transformations represent real social and political change. Indeed, this change is reflected in the expanded and expanding role of non-white males in positions of authority at all levels of the social and legal order. At the same time, legal transformations are fundamentally reformist adjustments, not capable of disrupting the full panoply of social organization.

What Does a Just Punishment Look Like? A penal system will generally reflect, as well as reproduce, the dominant ideologies of the state apparatus of which it is a part. However, the hegemony of ideology in the United States is not total, meaning that there are junctures—often significant junctures—at which the "common sense" of hegemonic reason can be disrupted. Significant disruptions have tended occurred when a confluence of diverse critiques form. For example, there was significant progressive criticism of convict-leasing, along with agitation from poor, white men's labor organizations who saw the practice as undercutting their wage possibilities, the combination of social and structural pressure these interests were able to assert led to the banning of the practice, state-by-state (though not before major infrastructure advances across the South were complete). On the other hand, while critiques of lynch law developed far more formal organizations (the NAACP was founded as an anti-lynching organization), it was not able to gain major institutional allies, and organizing efforts floundered for generations before coalescing as the modern Civil Rights Movements.

In the wake of the economic crisis following the 2007 crash of the housing market, states looking to reduce expenditures have started to look at prisons as

problematic elements in a budget. As belt tightening occurs, some critical scholars have been optimistic in the possibilities that mass incarceration will simply be seen as an ineffective investment, leading to progressive change as a matter of necessity. This seems unlikely to me. While the economic crisis may provide a structural moment, or policy window, wherein progressive reform might be more likely, there is nothing in criminal justice policy that foretells a progressive outcome.

In terms of advocating for a progressive reform, Angela Davis argues that real transformation of American punishment must emerge not from piecemeal criminal justice reform efforts, but rather from the radical position of prison abolitionism. She argues that mass incarceration has so dominated the conceptual sphere that it forecloses the possibilities of other penal options, and thus must be rejected outright; "the point is that we will not be free to imagine other ways of addressing crime as long as we see the prison as a permanent fixture for dealing with all or most violations of the law."[18] The rejection of the prison model will make possible the building of a new "vocabulary" through which punishment can be re-understood. The position of prison abolitionism doesn't however, reject the possibility of punishment outright.

Outside of a utopia, it is certain that there there will be need for some form of state punishment. However, refusing the prison as an option, even (or especially) as a political tactic demands a reconsideration of the purposes of, justifications for, and goals in the state project of punishment. In re-envisioning a penal reality, Davis argues that "one of the first challenges is to be able to talk about the many ways in which punishment

18 Davis, Angela. "The Challenge of Prison Abolition." 2004. Retrieved from http://www.historyisaweapon.com/defcon1/davisinterview.html

is linked to poverty, racism, sexism, homophobia, and other modes of dominance." I have attempted to do a small part of that with this dissertation. As these modes of dominance are more clearly articulated, the forms of alienation that inhere in them become eligible for critique, and policies that re-center the real, actual humans beings—at all points, from offenders to victims—can begin to become "sensible."

**V. Conclusion**

In each of the previous chapters, I have examined the ways that one of the dominant justifications for punishment functions in a world dominated by capitalist white supremacy. In chapter two, I focused on the idea of desert and how structural divisions create classes of deservingness. Blackness is constructed as deviant and dangerous, and as this ideological strain permeates society, it resides at the core of penal ideology as well. Under such conceptions, deservingness is settled on a person rather than on the an act, framing the narrative of what is acceptable. In chapter three, I focused on deterrence, the liberal state, and the construction of the criminal as the anti-citizen—as well as how this designation too "slips" when rightful citizenship is connected to status. Chapter four, I turned to utilitarian justifications, arguing that usefulness replaces the democratic dedication of utilitarianism, as the criminalized class is constructed as outside of the body politic, functioning as socially dead and thus preventing a critical approach in assessing the cost and benefits of mass incarceration. I have grounded these arguments in a constructivist view of race, building on Albert Memmi's typology of the colonizer and the colonized. Using Memmi's model clarifies the relationship between the psychological and the structural, as one conditions the other, thus making domination natural, and even

virtuous.

In moving through my argument, I have moved towards an articulation of the ways that justifications for punishment, that seem democratically defensible in the abstract, rely on oppressive principles. Deterrence, retribution, and utilitarianism as envisioned and articulated in racial and class logics that both ensure that they will not produce democratic outcomes, but also, in their ideal state, can retain the appearance of a universal democratism.

Moving Forward. Clearly this work is unfinished, both in the immediate sense of this dissertation finding it best form for future publication but also in the broader sense of wherein I situate this work as part of a broader literature that seeks to critique both the penal order and the oppressive structures within which that order functions. In this section, I briefly discuss some areas of research that could either enrich this study or build upon this work in other projects.

Grounding Frameworks. This work, in many ways, takes off from Foucault's *Discipline & Punish,* the text that for critical prison scholars has formed a touchstone for the past thirty years. However, more direct engagement with Foucault's relational theories, particularly in the lectures collected in *Society Must Be Defended* could be useful in complicating my articulating of the connective processes between race, class, ideology and the state. With particular attention to the construction of modern sovereignty, it may be more possible to work through the matter of agency as the penal mechanism moves. Also useful might be to engage directly with Ranciere's work on policing and the work that policing does in concretizing ideology as a matter of daily life

and in between actual persons. Through this investigation, it may be able to express more clearly the role of the penal apparatus as an inextricable element of the broader social apparatus that is not distinct either from the imagined state nor from those bodies subject to the power of it.

In a different direction, another conceptual framework that might enrch this work is a more formal engagement with new materialist work. Though I mobilized certain concepts developed by Sara Ahmed and Jasbir Puar, their work on the character-type of the terrorist and the model minority might shed significant light on how logics move, and particularly why they do so in certain ways and at certain times. In the post-9/11 penal world, the figure of the terrorist has created new legal and conceptual arenas that are explicitly outside of traditional forms of the liberal order. However, despite their newness, they are also intimately connected to racialized concepts of dangerousness, deviance, and criminality that I have discussed in this dissertation. Drawing out these connections could clarify the well-obscured mechanisms by which oppressive and irrational ideological forms gain traction. This is particularly important as the practices that emerge in these new penal arenas are already being imported back into "Everyday" criminal control—this is perhaps most ominous in the rapidly expanding use of drones, both as weapons in the "War on Terror" and as a regular instrument of municipal police departments. However, it also seems to me that the where the "new materialism" is most incisively political is when it most resembles the old materialism. Thus it will be important to ensure that in engaging this school, I retain a grounded approach.

Final Thoughts - Mass incarceration and the expanse of contemporary penal

practice in their current form represent one of the greatest challenges, in sheer numbers if not in content, to genuine democratic practice facing the United States today. Locating means of significant intervention is a process not only about prisons and prisoners but also about uncovering and challenging domination across life spheres. The completion of this work represents a conclusion, but more importantly a starting point, in both producing critical scholarship and learning how to mobilize that scholarship in a progressive politics.

Bibliography

"Mississippi Black Code." http://chnm.gmu.edu/courses/122/recon/code.html.

Ahmed, Sara. *The Cultural Politics of Emotion*. Edinburgh University Press and New York: Routledge, 2004.

Alexander, Michelle. *The New Jim Crow*. New Press, 2012.

Alvarez, Lisette. "Escapes Lead Sweden to Rethink Liberal Prison System." *New York Times*, March 20, 2005 2005.

Appelbaum, Robert, and John Wood Sweet. *Envisioning an English Empire: Jamestown and the Making of the North Atlantic World*. University of Pennsylvania Press, 2005.

Armstrong, Margalynne, and Stephanie Wildman. "Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight." (2008).

Bard, Ray, Larry Nolan Davis, and Diane Davis. *Winning Ways : A Management Performance Game*. Austin, Tex.: Learning Concepts, 1979.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation (Collected Works of Jeremy Bentham)*. Clarendon Press, 1996.

Boggs, Carl. *Gramsci's" Prison Notebooks"*. 1972.

Bonilla-Silva, Eduardo. *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*. Rowman & Littlefield Pub Incorporated, 2010.

———. *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*. Rowman & Littlefield Pub Incorporated, 2010.

Bonner, James C. "The Georgia Penitentiary at Milledgeville 1817-1874." *The Georgia Historical Quarterly* (1971): 303-28.

Bozovic, Miran, and Jeremy Bentham. "The Panopticon Writings." Verso, London, 1995.

Brooks, George. "Felon Disenfranchisement: Law, History, Policy, and Politics." *Fordham Urb. LJ* 32 (2004): 851.

Brown, Gillian. *The Consent of the Governed: The Lockean Legacy in Early American Culture*. Harvard University Press, 2001.

Brown, Michelle. *The Culture of Punishment: Prison, Society, and Spectacle*. NYU Press, 2009.

Brundage, W Fitzhugh. "Lynching in the New South." *Urbana: University of Illinois Press* (1993).

Bureau, U.S. Census. "Statistical Abstract of the United States: 2012, Table 311. Murder Victims by Age, Sex, and Race: 2008." 2012.

Center, Death Penalty Information. "Facts About the Death Penalty." http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

Chadbourn, James H. "Lynching and the Law." *ABAJ* 20 (1934): 71.

Cid, José. "Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions." *European Journal of Criminology* 6, no. 6 (2009): 459-80.

Clear, Todd R. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. Oxford University Press, USA, 2007.

Collins, John Joseph. *The Bible after Babel: Historical Criticism in a Postmodern Age*. Wm. B. Eerdmans Publishing, 2005.

Court, US Supreme. "Roper V. Simmons." 543 U.S. 551 (2005).

Davis, Angela Yvonne, and Joy James. *The Angela Y. Davis Reader.* Blackwell Publishers, 1998.

Davis, Bill, and Diane Davis. *They Call Me Bill : Musings of an Enlightened Curmudgeon*. Bethel, CT: Rutledge Books, 1997.

Davis, Diane, and Center for Applied Research in Education. *Reaching out to Children with Fas/Fae : A Handbook for Teachers, Counselors, and Parents Who Work with Children Affected by Fetal Alcohol Syndrome & Fetal Alcohol Effects*. West Nyack, N.Y.: Center for Applied Research in Education, 1994.

Davis, Diane, and Keith Neely. *Something Is Wrong at My House : A Book About Parents' Fighting*. Rev. ed. Seattle, Wash.: Parenting Press, 2010.

Davis, Diane A. *Averting Human Extinction : Energy Policy and Environmental Degradation*. Fusion Energy--the Public's Guide. New York, NY: Fusion Energy and the Environment Pub. Co., 2007.

Davis, Diane E. *Discipline and Development : Middle Classes and Prosperity in East Asia and Latin America*. Cambridge, UK ; New York: Cambridge University Press, 2004.

———. *Urban Leviathan : Mexico City in the Twentieth Century.* Philadelphia: Temple University Press, 1994.

Davis, Diane E., and Nora Libertun de Duren. *Cities & Sovereignty : Identity Politics in Urban Spaces*. Bloomington: Indiana University Press, 2011.

Davis, Diane E., and Anthony W. Pereira. *Irregular Armed Forces and Their Role in Politics and State Formation*. Cambridge, UK ; New York, NY: Cambridge University Press, 2003.

Davis, Diane Rae. *Taking Back Your Life : Women and Problem Gambling*. 1st ed. Center City, Minn.: Hazelden, 2009.

Davis, Diane Wicker, and Copyright Paperback Collection (Library of Congress). *Call Back the Dawn*. Toronto ; New York: Bantam Books, 1985.

———. *Heart of the Falcon*. New York: Avon Books, 1990.

———. *Heart of the Raven*. New York: Avon Books, 1989.

Davis, Earl, Diane Perkins-Davis, and Paul Pitzonka. *101 Projects for Your Mustang : 1964 1/2-1973*. Motorbooks Workshop. St. Paul, MN: Motorbooks International, 2003.

Department, New York City Police. "Murder in New York City." 2011.

Drucker, Ernest. *A Plague of Prisons: The Epidemiology of Mass Incarceration in America*. New Press, The, 2011.

Dwyer, Jim. "A Smell of Pot and Privilege in New York City." *New York Times*, July 20, 2010 2010.

Ewald, Alec. "'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States." *Wisconsin Law Review* (2002): 1045-132.

Garland, David. *The Culture of Control: Crime and Social Order in Contemporary Society.* University of Chicago Press, 2002.

———. *Mass Imprisonment: Social Causes and Consequences*. Sage Publications Limited, 2001.
Goodley, Dan. *Disability Studies: An Interdisciplinary Introduction*. Sage Publications Limited, 2010.
———. *Disability Studies: An Interdisciplinary Introduction*. SAGE Publications Limited, 2010.
Grant, Donald L. *The Anti-Lynching Movement, 1883-1932*. San Francisco: R and E Research Associates, 1975.
Gray, Herman. "Black Masculinity and Visual Culture." *Callaloo* 18, no. 2 (1995): 401-05.
Haney-López, Ian. *White by Law : The Legal Construction of Race*. Critical America. New York: New York University Press, 1996.
———. *White by Law : The Legal Construction of Race*. Critical America. Rev. and updated, 10th anniversary ed. New York: New York University Press, 2006.
Harris, Cheryl I. "Whiteness as Property." *Harv. L. Rev.* 106 (1992): 1707.
Hart, H LA. *Punishment and Responsibility*. Wadsworth Publ. Co., 1985.
Hartman, Lars. *Mark for the Nations : A Text- and Reader-Oriented Commentary*. Eugene, Or.: Pickwick Publications, 2010.
Hartman, Saidiya V. *Scenes of Subjection : Terror, Slavery, and Self-Making in Nineteenth-Century America*. Race and American Culture. New York: Oxford University Press, 1997.
Harvey, David. *A Brief History of Neoliberalism*. OUP Oxford, 2005.
Higginbotham Jr, A Leon, Gregory A Clarick, and Marcella David. "Shaw V. Reno: A Mirage of Good Intentions with Devasting Racial Consequences." *Fordham L. Rev.* 62 (1993): 1593.
———. "Shaw V. Reno: A Mirage of Good Intentions with Devasting Racial Consequences." *Fordham L. Rev.* 62 (1993): 1593.
———. "Shaw V. Reno: A Mirage of Good Intentions with Devasting Racial Consequences." *Fordham L. Rev.* 62 (1993): 1593.
Hobbes, Thomas. *Leviathan, 1651*. Scolar Press, 1969.
Isenberg, Nancy. "The Genius of Democracy: Fictions of Gender and Citizenship in the United States, 1860–1945." *Journal of American History* 99, no. 3 (2012): 951-51.
James, Joy. *Warfare in the American Homeland : Policing and Prison in a Penal Democracy*. Durham: Duke University Press, 2007.
Jean, Susan. "'Warranted'lynchings: Narratives of Mob Violence in White Southern Newspapers, 1880–1940." *American Nineteenth Century History* 6, no. 3 (2005): 351-72.
Jones-Brown, Delores D, Jaspreet Gill, and Jennifer Trone. *Stop, Question & Frisk Policing Practices in New York City: A Primer*. Center on Race, Crime and Justice, John Jay College of Criminal Justice, 2010.
Kahn, Si, and Elizabeth Minnich. *The Fox in the Henhouse: How Privatization Threatens Democracy*. Berrett-Koehler Publishers, 2005.
Karlin, Mark. "Michelle Alexander on the Irrational Race Bias of the Criminal Justice

and Prison Systems." *Turthout.org* (2012). http://truth-out.org/opinion/item/10629-truthout-interviews-michelle-alexander-on-the-irrational-race-bias-of-the-criminal-justice-and-prison-systems.

Leonard, Jack. "'Pizza Thief' Walks the Line." *Los Angeles Times*, February 10, 2010 2010.

Liss, Julia E. "Diasporic Identities: The Science and Politics of Race in the Work of Franz Boas and Web Du Bois, 1894–1919." *Cultural Anthropology* 13, no. 2 (1998): 127-66.

Locke, John. *The Second Treatise of Government and a Letter Concerning Toleration*. Dover Publications, 2002.

Lopez, Ian F Haney. "Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness, A." *Stan. L. Rev.* 59 (2006): 985.

Lubiano, Wahneema. *The House That Race Built: Original Essays by Toni Morrison, Angela Y. Davis, Cornel West, and Others on Bl Ack Americans and Politics in America Today*. Vintage, 1998.

Lukács, Georg. *History and Class Consciousness*. Vol. 215: Mit Press, 1972.

———. *History and Class Consciousness*. Vol. 215: Mit Press, 1972.

Manders, Dean Wolfe. *The Hegemony of Common Sense: Wisdom and Mystification in Everyday Life*. Vol. 13: Peter Lang Pub Incorporated, 2006.

Martinot, Steve. *The Machinery of Whiteness: Studies in the Structure of Racialization*. Temple University Press, 2010.

Mauer, Marc. *Race to Incarcerate*. The New Press, 2006.

Mauer, Marc; King, Ryan. "Uneven Justice: State Rates of Incarceration by Race and Ethnicity." The Sentencing Project, 2007.

McBride, Keally. *Punishment and Political Order*. University of Michigan Press, 2007.

———. *Punishment and Political Order*. University of Michigan Press, 2007.

McGovern, James R. *Anatomy of a Lynching: The Killing of Claude Neal*. LSU Press, 1992.

Meilaender, Gilbert. *Working : Its Meaning and Its Limits*. The Ethics of Everyday Life. Notre Dame, Ind.: University of Notre Dame Press, 2000.

Memmi, Albert. *The Colonizer and the Colonized*. Expanded ed. Boston: Beacon Press, 1991.

———. *The Colonizer and the Colonized*. 1st American ed. New York,: Orion Press, 1965.

Michigan. Cooperative Health Information System., Rita Zemach, and Diane Davis. *Inpatient Hospital Utilization, Michigan, 1975*. Mchis Reports. Lansing: Michigan Cooperative Health Information System, Michigan Dept. of Public Health, 1978.

Mill, John Stuart. *Js Mill:'On Liberty'and Other Writings*. Cambridge University Press, 1989.

———. "Speech in Favor of Capital Punishment." http://ethics.sandiego.edu/Books/Mill/Punishment/index.html.

Miller, Jane E., Dorothy Gaboda, and Diane Davis. *Early Childhood Chronic Illness : Comparability of Maternal Reports and Medical Records*. Vital and Health

Statistics Series 2, Data Evaluation and Methods Research. Hyattsville, Md.: National Center for Health Statistics, 2001.

Miller, Lisa. "Power to the People: Violent Victimization, Inequality and Democratic Politics." *Theoretical Criminology* Forthcoming (2013).

Mills, Charles W. "Race and the Social Contract Tradition." *Social Identities* 6, no. 4 (2000): 441-62.

Moore, Barrington. *Political Power and Social Theory ; Six Studies*. Cambridge: Harvard University Press, 1958.

Morrison, John E. "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric against Affirmative Action." *Iowa L. Rev.* 79 (1993): 313.

———. "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric against Affirmative Action." *Iowa L. Rev.* 79 (1993): 313.

———. "Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric against Affirmative Action." *Iowa L. Rev.* 79 (1993): 313.

Muhammad, Khalil Gibran. *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*. Harvard University Press, 2010.

Murphy, Jeffrie G. *Retribution Reconsidered: More Essays in the Philosophy of Law*. Kluwer Academic Publishers, 1992.

NAACP. "Criminal Justice Fact Sheet." http://www.naacp.org/pages/criminal-justice-fact-sheet.

Oshinsky, David M. *Worse Than Slavery*. Free Press, 2008.

Pager, Devah. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. University of Chicago Press, 2007.

Pangle, Thomas L. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*. University of Chicago Press, 1990.

Patterson, Orlando. *Slavery and Social Death: A Comparative Study*. Harvard University Press, 1982.

Peart, Nicholas. "Why Is the Nypd after Me?" *New York Times*, 2011.

Peled, Einat, and Diane Davis. *Groupwork with Children of Battered Women : A Practitioner's Guide*. Interpersonal Violence : The Practice Series. Thousand Oaks, Calif.: Sage Publications, 1995.

Perkinson, Robert. *Texas Tough: The Rise of America's Prison Empire*. Metropolitan Books, 2010.

Pierce, Glenn L, and Michael L Radelet. "Death Sentencing in East Baton Rouge Parish, 1990-2008." *La. L. Rev.* 71 (2010): 647.

Puar, Jasbir K. *Terrorist Assemblages: Homonationalism in Queer Times*. Duke University Press Books, 2007.

Rayman, Graham. "New Nypd Tapes Introduced in Stop and Frisk." *Village Voice*, 2013.

Reed, Adolph. "Unraveling the Relation of Race and Class in American Politics." *Political Power and Social Theory* 15 (2002): 265-74.

Reiser, Richard. "Medical Model / Social Model." http://www.worldofinclusion.com/medical_social_model.htm.

Rieser, Richard. "The Social Model of Disability."

http://www.worldofinclusion.com/medical_social_model.htm
Rights, Center for Constitutional. "Racial Disparity in Nypd Stops-and-Frisks." Center for Constitutional Rights, 2009.
Robson, Ann; Robson, John, ed. *The Collected Works of John Stuart Mill, Xxv - Newspaper Writings December 1847 - July 1873 Part Iv*. Toronto: University of Toronto Press, 1986.
Shichor, David, and Dale K Sechrest. *Three Strikes and You're Out: Vengeance as Public Policy*. Sage Publications, 1996.
Shklar, Judith N. *Men and Citizens: A Study of Rousseau's Social Theory*. Cambridge University Press, 1985.
Simmons, A John, and John Locke. *The Lockean Theory of Rights*. Cambridge Univ Press, 1992.
Soss, Joe, Richard C Fording, and Sanford F Schram. *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. University of Chicago Press, 2011.
———. *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. University of Chicago Press, 2011.
Specter, Donald. "Making Prisons Safe: Strategies for Reducing Violence." *Wash. UJL & Pol'y* 22 (2006): 125.
staff, Vice. "Inside Norway's Progressive Prison System." http://www.cnn.com/2011/WORLD/europe/08/02/vbs.norwegian.prisons/index.html.
Stevens, John Paul. "Atkins V. Virginia." US Supreme Court, 2002.
Streib, Victor, and Victor L Streib. "Death Penalty for Female Offenders, January 1, 1973, through October 31, 2010." (2010).
Strickland, Rennard J. "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience." *University of Kansas Law Review* 34, no. 4 (1986): 713-56.
Taylor, Astra. "The Examined Life." 2008.
Templeton, Robin. "Superscapegoating: Teen 'Superpredators' Hype Set Stage for Draconian Legislation." Fairness and Accuracy in Reporting, 1998.
Thompson, Heather Ann. "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History." *The Journal of American History* 97, no. 3 (2010): 703-34.
Thompson, Julius Eric. *Lynchings in Mississippi: A History, 1865-1965*. McFarland & Co Inc Pub, 2007.
Trone, Jennifer. "The New York Police Department's Stop and Frisk Policies
Are They Effective? Fair? Appropriate?: Summary of a Nyc Bar Association Forum March 9, 2010 ": Center on Race, Crime, and Justice - John Jay College, 2010.
Tully, James. "Political Freedom." 517-23: JSTOR, 1990.
Van Wormer, Katherine S., and Diane Rae Davis. *Addiction Treatment : A Strengths Perspective*. Pacific Grove, CA: Brooks/Cole--Thomson Learning, 2003.
———. *Addiction Treatment : A Strengths Perspective*. 2nd ed. Australia ; United States: Thomson--Brooks/Cole, 2008.
———. *Addiction Treatment : A Strengths Perspective*. 3rd ed. Belmont, CA:

Brooks/Cole, Cengage Learning, 2013.
Wacquant, Loïc. *Punishing the Poor: The Neoliberal Government of Social Insecurity.* Duke University Press Books, 2009.
Weaver, Vesla M, and Amy E Lerman. "Political Consequences of the Carceral State." *American Political Science Review* 104, no. 4 (2010): 817-33.
Western, Bruce, Meredith Kleykamp, and Jake Rosenfeld. "Crime, Punishment, and American Inequality." *Social inequality* (2004): 771-96.
Wilson, William Julius. "The Declining Significance of Race." *Society* 15, no. 5 (1978): 11-11.
———. "The Declining Significance of Race." *Society* 15, no. 5 (1978): 11-11.
Wolff, Nancy, Cynthia L Blitz, Jing Shi, Jane Siegel, and Ronet Bachman. "Physical Violence inside Prisons Rates of Victimization." *Criminal Justice and Behavior* 34, no. 5 (2007): 588-99.
Wright, Richard. *The Outsider.* New York,: Harper & Row, 1969.
———. *The Outsider.* 1st ed. New York,: Harper, 1953.
———. *The Outsider.* New York: Perennial, 2003.
———. *Richard Wright Reader.* 1st ed. New York: Harper & Row, 1978.
———. *[Works]*. The Library of America. 2 vols New York, N.Y.: Library of America : Distributed in the U.S. and Canada by Viking Press, 1991.
Zeitlin, Maurice. "Political Power and Social Theory." v. Amsterdam, Boston etc.: Elsevier etc.
Zimring, Franklin. "The City That Became Safe: New York and the Future of Crime Control."
Zimring, Franklin, and Gordon Hawkins. *Incapacitation: Penal Confinement and the Restraint of Crime*. Oxford University Press, USA, 1997.