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**ON THE OCCASION OF THE 50TH ANNIVERSARY
OF THE CIVIL RIGHTS ACT OF 1964:
PERSISTENT WHITE SUPREMACY, RELENTLESS
ANTI-BLACKNESS, AND THE LIMITS OF THE LAW**

*Nancy A. Heitzeg, Ph.D.*¹

PART I. INTRODUCTION

White supremacy - once writ large in the law via slavery and Jim Crow segregation – was removed from its legalized pedestal with the Civil Rights Act of 1964, The Voting Rights Act of 1965 and finally, The Fair Housing Act of 1968.² The law became “race-neutral” and it now suddenly was illegal to discriminate on the basis on race – in housing, employment, public accommodations and access to the franchise. Advocates hoped that this legislation would finally bring to fruition the overdue promise of the Civil War Amendments, long subverted via both legislation and judicial interpretation.³

These strokes of the pen, of course, could not remove bigotry long steeped in racist archetypes; nor could this legislation remove

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² JOE FEAGIN, *RACIST AMERICA: ROOTS, REALITIES, AND FUTURE REPARATIONS* (2nd ed. 2010) [hereinafter FEAGIN, *RACIST AMERICA*]; JOE FEAGIN, *THE WHITE RACIAL FRAME: CENTURIES OF RACIAL FRAMING AND COUNTER-FRAMING* (2nd Ed. 2013) [hereinafter FEAGIN, *THE WHITE RACIAL FRAME*].

³ DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)

the structural barriers of nearly 400 years of white racial preference and cumulative advantage in the accumulation of wealth and property, access to education and housing, health and well-being, and all matter of social opportunities.⁴ Racism, as both white supremacist/anti-black ideology and institutionalized arrangement, remains merely transformed with its systemic foundations intact. Segregation in housing and education persists at levels beyond that noted in *Brown v. Board of Education*, racial wealth gaps grow, and racial disparities in criminal injustice proliferate at a pace that has led to the label “The New Jim Crow”.⁵

In tragic irony, the Civil Rights Act’s requirement of race-neutrality has perhaps ushered in an era of more insidious de facto discrimination that is now denied through “color-blind” rhetoric. A large body of research documents the paradigmatic shift from overt essentialist racism to color-blindness.⁶ This style of racism relies heavily on ideological frames and linguistic shifts which allow whites to assert they “do not see race,” deny structural racism, claim a level playing field that now victimizes them with “reverse discrimination” and appeals to the “race card,” and argue that any discussion of race/racism is, in fact, racist and only serves to foment divisions rather than reflect/redress societal realities. “Color-blind racism” also creates a set of code terms that implicitly indict people of color without ever mentioning race.⁷

In the Post-Civil Rights Era, the color-blind paradigm has become deeply ensconced in law and politics. Continued movement towards “race-neutrality” is the hallmark of a series of Supreme Court decisions that deny the role of institutionalized racism and increasingly limit the role of race in constitutional remedies for inequality in matters of affirmative action and educational access,

⁴ DERRICK BELL, *SILENT COVENANTS: BROWN V THE BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM*. (2004).

⁵ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (3rd ed. 2013); EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* (2001).

⁶ *Id.*

⁷ *Id.*

voting rights, and all matters of criminal injustice.⁸ Criminal justice – as it did post- Reconstruction – continues to play a central role in the continued subjugation of Blacks, in particular, and will serve as the central example of both past and current patterns of discrimination.

On the occasion of the 50th Anniversary of the passage of the Civil Rights Act, we must again raise questions about its ultimate impact on racial justice. While this legislation made a substantial contribution to effectively dislodging white supremacy from the law, the call instead to race-neutrality left anti-blackness unchallenged. The result, buttressed by judicial interpretations that further limit the consideration of race and the proliferation of color-blind rhetoric throughout popular and political discourse, has resulted in a situation of continued subjugation, particularly through the criminal justice system. One must ask – given Constitutional history, Supreme Court rulings that grind at a snail’s pace from the legitimation of slavery and exclusion to segregation to no consideration, and legislative lethargy – what are the pathways towards racial redress and equal protection of the law?

PART II. THE CIVIL RIGHTS ACT IN HISTORICAL AND LEGAL CONTEXT

An analysis of the “success” of the Civil Rights Act of 1964 must be centered in a larger discussion of the role of law generally in shaping our constructions of race. The theoretical perspective of Critical Race Theory (CRT), supplemented with the data of the social sciences, guides the analysis here. CRT, from the outset, raised crucial questions as to the ability of law to produce racial equality. In fact, CRT is grounded in “an analysis of how law helped constitute the very racial structure that antidiscrimination law aimed to

⁸ Univ. Of Cal. Regents v. Bakke, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U. S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Texas at Austin*, 133 S.Ct. 2411 (2013); *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013); *McClesky v. Kemp*, 481 U.S. 279 (1987).

regulate.”⁹ CRT proceeds from the premise that racial privilege and related oppression is deeply rooted in both our history and law, thus making as racism a “normal and ingrained feature of our landscape”;¹⁰ CRT further offers a critique of Civil Rights legal reforms in specific, by noting that these have failed to fundamentally challenge racial inequality. As Bell observes, “the subordination of blacks seems to reassure whites of an unspoken, but no less certain, property right in their whiteness.”¹¹

While all communities of color suffer from racism in general and its manifestation in criminal justice in particular, “Black” has been the literal and figurative counterpart of “white”. Anti-black racism is arguably at the very foundation of white supremacy; the two constitute the foundational book-ends for the legal, political and every day constructions of race in the United States.¹² For this reason, in combination with the excessive over-representation of African Americans in the criminal justice system and the prison industrial complex, this analysis will largely focus on the ways in which the law has been a tool for the oppression of African Americans via the furtherance of white supremacy and anti-blackness in both law and practice.

While race has never reflected any biological reality, it is indeed a powerful social and political construct. In the U.S. and elsewhere, it has served to delineate “whiteness” as the “unraced” norm – the “unmarked marker” – while hierarchically devaluing “other” racial/ethnic categories with Blackness always as the anti-thesis.¹³ The socio-political construction of race coincides with the age of exploration, the rise of “scientific” classification schemes, and perhaps most significantly capitalism. In the United States, the solidification of racial hierarchies cannot be disentangled from the

⁹ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 5 (2011).

¹⁰ Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch* in CRITICAL RACE THEORY: THE CUTTING EDGE 2-8 (R. Delgado & J. Stefanic, eds., 2000).

¹¹ *Id.*

¹² FEAGIN, THE WHITE RACIAL FRAME, *supra* note 2.

¹³ RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS (1992).

capitalist demands for “unfree” labor and expanded private property. By the late 1600s, race had been a marker for either free citizens or slave property, and colonial laws had reified this decades before the Revolutionary War.¹⁴ The question of slavery was at the center of debates in the creation of the United States and is referenced no less than ten times.¹⁵ By the time of the Constitutional Convention of 1787, the racial lines defining slave and free had already been rigidly drawn – white was “free” and black was “slave” – and the result according to Douglass was this: “assume the Constitution to be what we have briefly attempted to prove it to be, radically and essentially pro-slavery”.¹⁶ The Three-Fifths Clause, the restriction on future bans of the slave trade and limits on the possibility of emancipation through escape were all clear indications of the significance of slavery to the Founders. The legal enunciation of slavery in the Constitution is one of the first of many “racial sacrifice covenants” to come, where the interests of Blacks were sacrificed for the nation.¹⁷

The social and constitutional construction of white as free and Black as slave has on-going political and economic ramifications. According to Harris, whiteness not only allows access to property, may be conceived of per se as “whiteness as property”.¹⁸ These property rights produce both tangible and intangible value to those who possess it; whiteness as property includes the right to profit and to exclude, even the perceived right to kill in defense of the borders of whiteness.¹⁹ As Harris notes:

The concept of whiteness was premised on white supremacy rather than mere difference. “White” was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as

¹⁴ FEAGIN, *THE WHITE RACIAL FRAME*, *supra* note 2, at 32-33.

¹⁵ Bell, *supra* note 3, at 4.

¹⁶ FREDERICK DOUGLASS, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: VOLUME 4, RECONSTRUCTION AND AFTER* (Philip S. Foner ed., 1955).

¹⁷ Bell, *supra* note 4, at 6.

¹⁸ Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 8, 1707-91 (1993).

¹⁹ *Id.*

whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.²⁰

Conversely, Blackness is defined as outside of the margins of humanity as chattel rather than persons, and defined outside of the margins of civil society. Frank Wilderson, in “The Prison Slave as Hegemony’s (Silent) Scandal,” describes it like this: “Blackness in America generates no categories for the chromosome of history, and no data for the categories of immigration or sovereignty. It is an experience without analog — a past without a heritage.”²¹ Directly condemned by the Constitution in ways that other once excluded groups (American Indians, women, immigrants, LGBTQ) were not, Blackness as marked by slavery— as property not person - creates an outsider status that makes future inclusion a daunting challenge.²²

Any doubts as to the centrality of white supremacy built on anti-blackness were erased in the case of *Scott v. Sanford* (1857), where a majority of the Supreme Court denied the citizenship claims of Dred Scott and went further to declare that The Missouri Compromise requirement of balance between free and slave states in the expanding United States was a violation of the due process rights of slave holders.²³ Referring to the legal status of African Americans, Justice Taney’s opinion for the majority makes it painfully clear,

²⁰ *Id.*

²¹ Frank Wilderson. *The Prison Slave as Hegemony’s (Silent) Scandal*, 30 SOCIAL JUSTICE 2 (2003).

²² *Id.*; KHAHIL G. MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010); SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* (2007).

²³ *Scott v. Sandford*, 60 U.S. 393 (1857).

They are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them..²⁴

Given the harsh judicial pronouncements here – never overruled – the legal status of African Americans remains in many respects, the after-life of the slave, still subject to stiff neo-slave forms of total legal social control, i.e. convict lease and the prison industrial complex,, despite Constitutional Amendments, Federal Civil Rights legislation, and executive measures.

PART III. WHITE SUPREMACY, ANTI-BLACKNESS AND THE AFTERLIFE OF SLAVERY IN THE LAW

In the post -bellum era, the stain of slavery has been impossible to remove. Constitutional Amendments, Supreme Court rulings, and legislation notwithstanding, the exploitation of captive/caged Black labor continues, largely uninterrupted. As Dillon observes:

Slavery’s production of social and biological death did not end with emancipation, did not cease with the end of segregation, and refused to heed under civil rights legislation. Its logic and power

²⁴ *Id.*

exceeds the realm of law. The past comes back not just to haunt, but to structure and drive the contemporary operations of power.²⁵

The primary mechanism for the perpetual denial of full citizenship has been the criminal law, with its attendant systems of policing and punishment. As Frederick Douglas observed nearly 150 years ago, there is no escaping “the general disposition in this country to impute crime to color.”²⁶ Post slavery, the criminalizing narrative has been a central cultural feature of on-going efforts at oppression; from convict lease/plantain prison farms to the contemporary prison industrial complex, the control of black bodies_for profit has been furthered by the criminal justice system.

A substantial body of work documents the post -bellum transformation of Black Codes into Slave Codes, slave patrols into police forces, plantations into prisons, and, in to post-Civil Rights era, into the contemporary prison industrial complex.²⁷ At no point was the law able to stop this; to the contrary, the law and its enforcement apparatus remain consistent, albeit shifting, centerpieces of white supremacy and anti-Blackness.

A. THE POST -BELLUM ERA: CONVICT LEASE AND PLANATION PRISONS

In the aftermath of the Civil War, the passage of the 13th, 14th, and 15th Amendments seemed to promise an end the abolition of slavery, due process and equal protection at both state and federal levels, and full citizenship via the franchise (at least for Black men).

Angela Y. Davis, in *Are Prisons Obsolete?*, traces the initial rise of the penitentiary system to the abolition of slavery; “[I]n the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the

²⁵ Stephen Dillon, *Possessed by Death: The Neoliberal- Carceral State, Black Feminism, and the Afterlife of Slavery*, 112 RADICAL HIST. REV. 113 (2012).

²⁶ Douglass, *supra* note 16.

²⁷ ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003); Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998).

possibilities of freedom for the newly released slaves.”²⁸ There was a subsequent transformation of the Slave Codes into the Black Codes and the plantations into prisons. Southern states quickly passed laws that echoed the restrictions associated with slavery, re-inscribed the property interests of “whiteness,” and criminalized a range of activities of the perpetrator was black.²⁹ These laws were enforced by former slave patrols turned police agencies, with the assistance of extra-legal militias, and the white citizenry in general, who are merely protected by these same police, but per Wilderson “not simply “protected” by the police, they *are* — in their very corporeality — the police.”³⁰

All this becomes possible because the 13th Amendment — “Neither slavery nor involuntary servitude shall exist in the United States” — contained a dangerous loophole- “*except as a punishment for crime.*” This allowed for the conversion of the old plantations to penitentiaries — the 18,000 acre Louisiana Penitentiary at Angola is a case in point — and the creation of prison “farms” such as Parchman in Mississippi and the infamous Tucker Prison Farm and Cummins Prison Farm in Arkansas.³¹ Sheriffs, jailors and wardens leased out entire prisons to private contractors who literally worked thousands of prisoners to death in labor camps, on chain gangs, and in prison farms. These prisoners were largely black; in the post-Civil War South the racial composition of prison and jail populations shifted dramatically from majority White to majority Black, and in many states increased ten-fold.³² As Davis notes, “the expansion of the convict lease system and the county chain gang meant that the antebellum criminal justice system, defined criminal justice largely as a means for controlling black labor.”³³

²⁸ Davis, *supra* note 27; W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA 1638 – 1870* (1896).

²⁹ *Id.*

³⁰ Wilderson, *supra* note 21.

³¹ DOUGLAS BLACKMUN, *SLAVERY BY ANOTHER NAME, THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008).

³² *Id.*

³³ DAVIS, *supra* note 27.

The re-institutionalization of slavery via the criminal legal system also served to effectively undo the newly acquired 15th Amendment right to vote. This was legislatively curtailed by the tailoring of felony disenfranchisement laws to include crimes that were supposedly more frequently committed by blacks. In the post-Civil War period, existing felony disenfranchisement laws were expanded dramatically, especially in the South, and modified to include even minor offenses. This legislation, in combination with literacy tests, poll taxes, grandfather clauses and ultimately, the threat of white terror, essentially denied Blacks the right to vote until the mid-twentieth century.

The 14th Amendment's promise of due process and equal protection was insufficient to override this continued economic exploitation and civic exclusion. This was due to a series of Supreme Court rulings that interpreted the 14th in support of state's rights, white supremacy, and against Black inclusion. In *United States v. Cruikshank* (1876), the Supreme Court ruled that that "The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another."³⁴ This decision, in a case involving the bloody Colfax Massacre, forbade the Federal Government from relying on the Enforcement Act of 1870 to prosecute actions by white paramilitary groups that had been violently suppressing the Black vote.³⁵ This decision paved the way for nearly a century of unchecked white extra-legal violence and lynching that served to enforce white supremacy in both law and practice.

On matters of racial equality, the most famous Supreme Court ruling of the era was *Plessy v. Ferguson* (1896).³⁶ Post slavery, white supremacy in the law was accomplished by the introduction of a series of segregationist Jim Crow laws that mandated Black exclusion from white spaces, even in public accommodations. In a challenge to legalized segregation of public transportation in the state

³⁴ *United States v. Cruikshank*, 92 U.S. 542 (1876).

³⁵ *Id.*

³⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

of Louisiana, Plessy argues that these laws have denied him equality before the law. The majority disagrees and sets forth the principle of “separate but equal.” Justice Brown (1896) writes for the majority,

It is claimed by the plaintiff in error that, in an mixed community, the reputation of belonging to the dominant race, in this instance the white race, is ‘property,’ in the same sense that a right of action or of inheritance is property. . . We are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called ‘property.’ Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.³⁷

The sole dissenter in *Plessy* sets up the juxtaposition between Jim Crow and color-blindness that frames the contemporary debate on race today. Justice Harlan, while acknowledging the reality of white supremacy, decries its support with the law, but with cold comfort:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our constitution is color-blind, and neither knows nor tolerates classes*

³⁷ *Id.*

*among citizens. In respect of civil rights, all citizens are equal before the law.*³⁸

Even post-Emancipation, Blacks had no claim to the property rights of whiteness, nor full and equal access to rights of citizenship that entailed. White supremacy and anti-Blackness persisted in law, even in the face of Amendments to the Constitution, which purported to undo the same.

B. THE POST-CIVIL RIGHTS ERA, MASS INCARCERATION AND “COLOR-BLINDNESS

The Supreme Court ruling in *Brown v. the Board of Education of Topeka, Kansas* (1954) is often used as the benchmark for chronicling the start of the Civil Rights Movement of the 1950s and 1960s.³⁹ The Court’s unanimous rejection of *Plessy’s* “separate but equal” provided a new Federal framework with which to challenge Jim Crow segregation on the state and local levels. It offered the back drop for the Montgomery bus boycott, the resistance in Birmingham, Bloody Sunday, the voter registration drives of Freedom Summer, and ultimately, passage of the Civil Rights Act of 1964, The Voting Right Act of 1965, the Fair Housing Act of 1968, and the 24th Amendment to the Constitution.⁴⁰

While there was hope again that the law itself could be pressed into the service of racial equality, those victories now seem bittersweet. Bell argues that the *Brown* decision and the ensuing Federal legislation were “silent covenants” of interest-convergence, where “perceived self-interest of whites rather than the racial injustices suffered by Blacks have been the major motivation in racial-remediation policies.”⁴¹ Judge Robert L. Carter, one of the attorneys who argued *Brown* goes further, “. . .the fundamental vice was not legally enforced racial segregation itself; this was a mere by-

³⁸ *Id.*

³⁹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁴⁰ Bell, *supra* note 4.

⁴¹ *Id.*

product, a symptom of the greater and more pernicious disease - white supremacy.”⁴² Legally supported segregation was uprooted without dislodging either white supremacy or anti-Blackness, now cloaked in race-neutral rhetoric of “color-blindness”.

The “color-blind” Constitution and the race-neutral requirement of Federal Civil Rights legislation now serves as convenient cover for the persistence of institutionalized racism. Racially coded but race-neutral rhetoric is widely used in debates over welfare reform, affirmative action, and particularly “law and order” criminal justice policy;⁴³ in all these cases, the coded racial sub-text reads clearly, and the resultant policies, while purportedly “race neutral,” have resulted in disproportionate harm to people of color, especially African Americans. While race is now widely the text/subtext of political debate, systemic racism still remains largely absent from either political discourse or policy debates of all sorts, including those related to criminal injustice.

In the Post-Civil Rights Era, there has been a corresponding shift from de jure racism codified explicitly into the law and legal systems to a de facto racism where people of color, especially African Americans, are subject to unequal protection of the laws, excessive surveillance, police terror, extreme segregation, a brutal and biased death penalty, and neo-slave labor via incarceration all in the name of “crime control.”⁴⁴ “Law and order” criminal justice policies are all guided by thinly coded appeals to white fears of high crime neighborhoods, “crack epidemics,” gang proliferation,

⁴² MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2005).

⁴³ See generally, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *COLUM. HUM. RTS. L. REV.* 261 (2007); KATHRYN RUSSELL-BROWN, *THE COLOR OF CRIME* (2d ed. 2009); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (Vintage Books 1997); ANGELA DAVIS, *THE ANGELA Y. DAVIS READER* 61-73 (J. James ed., Blackwell 1998); LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke Univ. Press 2009).

⁴⁴ ROBERTS, *supra* note 43; RUSSELL-BROWN, *supra* note 43; DAVIS, *supra* note 43.

juvenile super – predators, urban unrest, school violence, and more. In all these case, the sub-text reads clearly — fear of brown and especially Black people.

As before, law, policing and punishment are central to the on-going exclusion of Blacks from civic life. Post slavery, the criminalizing narrative was a cultural feature of on-going efforts at oppression; from convict lease/plantain prison farms to the contemporary prison industrial complex the control of black bodies for profit has been furthered by the criminal justice system.⁴⁵ “Slave Codes” become Black Codes and now Black Codes become gang legislation, three-strikes and the War on Drugs in the persistent condemnation of Blackness.⁴⁶ As before, the criminal legal system is the primary mechanism for undoing the promised protections of Federal Civil Rights legislation and constitutes again, the major affront to the fulfillment of the 13th, 14th and 25th Amendments.

The United States has the highest incarceration rate in the world, with a population of 2.3 million behind bars that constitutes 25% of the world’s prisoners.⁴⁷ The increased rate of incarceration can be traced to the War on Drugs and the rise of lengthy mandatory minimum prison sentences for drug crimes and other felonies. These policies have proliferated, not in response to crime rate or any empirical data that indicates their effectiveness, due to newfound sources of profit for prisons.⁴⁸ As Brewer and Heitzeg (2008) observe:

The prison industrial complex is a self-perpetuating machine where the vast profits (e.g. cheap labor, private and public supply and construction contracts,

⁴⁵ Davis, *supra* note 27.

⁴⁶ SAMUEL WALKER, C. SPOHN, & M. DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* (5th ed. 2012); KHAHIL G. MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (Harvard Univ. Press 2010), available at <http://www.prisonpolicy.org/reports/pie.html>.

⁴⁷ Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (2014).

⁴⁸ Wagner, *supra* note 47.

job creation, continued media profits from exaggerated crime reporting and crime/punishment as entertainment) and perceived political benefits (e.g. reduced unemployment rates, “get tough on crime” and public safety rhetoric, funding increases for police, and criminal justice system agencies and professionals) lead to policies that are additionally designed to insure an endless supply of “clients” for the criminal justice system (e.g. enhanced police presence in poor neighborhoods and communities of color; racial profiling; decreased funding for public education combined with zero-tolerance policies and increased rates of expulsion for students of color; increased rates of adult certification for juvenile offenders; mandatory minimum and “three-strikes” sentencing; draconian conditions of incarceration and a reduction of prison services that contribute to the likelihood of “recidivism”; “collateral consequences”-such as felony disenfranchisement, prohibitions on welfare receipt, public housing, gun ownership, voting and political participation, employment- that nearly guarantee continued participation in “crime” and return to the prison industrial complex following initial release.)⁴⁹

The 13th Amendment claim of abolition remains unfulfilled, as the neo- slavery of the prison industrial complex becomes the current vehicle for controlling Black bodies for political and economic gain. The trend towards mass incarceration is marred by racial disparity. While 1 in 35 adults is under correctional supervision and 1 in every 100 adults is in prison, 1 in every 36 Latino adults , 1 in every 15 black men, 1 in every 100 black women, and 1 in 9 black

⁴⁹ Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal-Justice, Color-blind Racism and the Political Economy of the Prison Industrial Complex*, 51 AMERICAN BEHAVIORAL SCIENTIST 625, (Dec. 12, 2007), available at <http://abs.sagepub.com/content/51/5/625>.

men ages 20 to 34 are incarcerated.⁵⁰ Despite no statistical differences in rates of offending, approximately 50% of all prisoners are black, 30% are white, and 20% are Latino;⁵¹ These disparities are indicative of differential enforcement practices rather than any differences in criminal participation. This is particularly true of drug crimes, which account for the bulk of the increased prison population. Even though Blacks and whites use and sell drugs at comparable rates, African Americans are anywhere from 3 to 10 times more likely to be arrested, and additionally likely to receive harsher sentences than their white counterparts.⁵²

It is no mistake that the subtitle of Michelle Alexander's epic indictment of *The New Jim Crow* is this: *Mass Incarceration in the Age of Color-blindness*.⁵³ The Drug War, from start to finish, has always been racist: draconian sentences, crack versus powder disparities, police patrol patterns, stop/frisk practices, racial profiling and death at the hands of law enforcement, arrests, convictions, sentencing including death and incarceration, and collateral consequences that include bans on voting, bars to employment, education, housing and economic assistance, and the diminishment of parental rights, all fall heaviest on Blacks.⁵⁴ This racial disparity is by design. As Alexander observes criminal justice policies serve to regulate and segregate communities of color in the Post-Civil Rights era:

⁵⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* (The Free Press 2010); WALKER, *supra* note 46; Wagner, *supra* note 46.

⁵¹ *Id.*

⁵² *The Persistence of Racial and Ethnic Profiling in the United States*, AM. CIVIL LIBERTIES UNION, (June 29, 2009), https://www.aclu.org/human-rights_racial-justice/persistence-racial-and-ethnic-profiling-united-states; *The War on Marijuana in Black and White* AMERICAN CIVIL LIBERTIES UNION, (June 3, 2013), <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report>.

⁵³ ALEXANDER, *supra* note 50.

⁵⁴ Steve Martinot & Jared Sexton, *The Avant-garde of White Supremacy*, 9 SOC. IDENTITIES: J. STUDY RACE, NATION & CULTURE 92, (2003); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer et al. eds, 2002); WALKER, *supra* note 46; Wagner, *supra* note 46.

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.⁵⁵

We are still not saved by the 14th Amendment. In the Post-Civil Rights Era, the Supreme Court has followed the color-blind logic of the sole dissenter in *Plessy* and solidified the race-neutral implications of Federal Civil Rights legislation. Color-blindness as the new legal doctrine begins to emerge – despite judicial dissent – in cases involving affirmative action and other remedies to centuries of racial inequality. The Supreme Court adopts the color-blind model in *The Board of Regents, University of California v. Bakke* (1978), where the ruling is in favor of a white student who claimed racial discrimination in his denial of admission to medical school.⁵⁶ If the Constitution is to be color-blind, race can only be considered with "strict scrutiny," even as a remedy for past discrimination. Justices Brennan and Marshall, in separate dissents, point out the flaws of this approach. Brennan observes,

⁵⁵ ALEXANDER, *supra* note 50.

⁵⁶ *Univ. Of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

Claims that law must be “color-blind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many “created equal” have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”⁵⁷

Justice Marshall’s dissent echoes the warning, one that has now come to pass;

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.⁵⁸

McCleskey v. Kemp (1987) is perhaps the most significant case of the Post-Civil Rights era with respect to the application of the 14th Amendment as to matter of race.⁵⁹ It is here that potential for an interpretation that would allow for real remedies for institutionalized discrimination is presented and denied. The racial disparity that characterizes all criminal justice has been most obvious and contested in the application of capital punishment, especially in the South, where the “killing state” stepped to do what was once the work of extra-legal lynch mobs.⁶⁰ After a series of death penalty cases

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *McCleskey v. Kemp*, 482 U.S. 279 (1987).

⁶⁰ FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles Ogletree, Jr. et al. eds., N. Y. Univ. Press. 2006).

where the Court ruled that racial discrimination in the application of the criminal laws' ultimate penalty must be addressed, it is here that the Supreme Court in a 5-4 decision clearly defines discrimination as individual not institutionalized. Citing statistical evidence from the now famous Baldus study, McCleskey argued that the application of the death penalty in Georgia was fraught with systemic patterns of racism that transcended but tainted any particular case. Defendants charged with killing white victims were more likely to receive the death penalty, and, in fact, cases involving black defendants and white victims were more likely to result in a sentence of death than cases involving any other racial combination.⁶¹ The majority did not dispute the statistical evidence, but feared the consequences. If the Court accepted McCleskey's claim, then the Equal Protection Clause of the 14th Amendment would apply to patterns of discrimination, to institutionalized racism and sexism, to questions of structured inequality. It could, in fact, be used to challenge the very foundations of the criminal justice system itself, start to finish: laws with disproportionate racial impact, racial profiling and racial bias in police use of force, and prosecutorial discretion. These fears are expressed in Powell's opinion for the majority,

“First, McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that

⁶¹ McCleskey, *supra* note 59.

correlate to membership in other minority groups, and even to gender.⁶²

In the majority's view, equal protection of the laws was for individuals, not oppressed groups, and discrimination must be intentional and similarly individual. *McCleskey* closed off the last best avenue for remedying structural inequality with the law itself, and preserved the color-blind veneer at the expense of racial remedy. Justice Brennan's impassioned dissent makes the implications of this decision clear:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black. While, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result

⁶² *Id.* at 315-17 (citations omitted).

in a death sentence than cases featuring any other racial combination of defendant and victim. *Ibid.* The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died. . .

At the time our Constitution was framed 200 years ago this year, blacks had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect. Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. *Ibid.* A mere three generations ago, this Court sanctioned racial segregation, stating that “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.” *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court’s first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that, in three decades, we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, *we ignore him at our peril*,

*for we remain imprisoned by the past as long as we deny its influence in the present.*⁶³

Well into the 21st Century, Supreme Court decisions continue to erode Federal Civil Rights legal gains and the ability of the Civil War Amendments to provide racial redress. The doctrine of strict scrutiny itself continues to be eroded further as the current Supreme Court limits its application and as a series of subsequent cases from *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003) to *Fisher v. University of Texas at Austin* (2014) and *Shelby County v. Holder* (2012) have shown, the Constitution has indeed erected a legal barrier with claims of colorblindness.⁶⁴ Worse still, as Crenshaw notes, the shift even beyond color-blindness towards claims of “post-racial pragmatism,”

This pragmatism jettisons the liberal ambivalence about race consciousness to embrace a colorblind stance even as it foregrounds and celebrates the achievement of particular racial outcomes. In the new post-racial moment, the pragmatist may be agnostic about the conservative erasure of race as a contemporary phenomenon but may still march under the same premise that significant progress can be made without race consciousness. . . .

Colorblindness as doctrine not only undermines litigation strategies that rely on race-conscious remediation, but it also soothes social anxiety about whether deeper levels of social criticism, remediation, and reconstruction might be warranted. While colorblindness declared racism as a closed chapter in our history, post-racialism now provides reassurance to those who weren't fully

⁶³ *Id.* (citations omitted).

⁶⁴ *Grutter v. Bollinger*, 539 U. S. 306 (2003); *Gratz v. Bollinger*, 536 U.S. 244 (2003); *Fisher v. University of Texas at Austin*, No. 09–50822(2014); *Shelby Cnty. v. Holder*, No. 12–96 (2012); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books 1992); BROWN, *supra* note 42.

convinced that this history had ceased to cast its long shadow over contemporary affairs. Post-racialism offers a gentler escape, an appeal to the possibility that racial power can be side stepped, finessed and ultimately overcome by regarding dominance as merely circumstance that need not get in the way of social progress.

As post-racialism becomes the vehicle for a colorblind agenda, the material consequences of racial exploitation and social violence—including the persistence of educational inequity, the disproportionate racial patterns of criminalization and incarceration, and the deepening patterns of economic stratification—slide further into obscurity.⁶⁵

More than a century after the Civil War Amendments, 60 years since *Brown*, 50 years since the Civil Rights Act of 1964, and we are here, with white supremacy and anti-Blackness intact, but now masked, and with slavery (unwilling to die) transformed yet again. Still, the law, unwilling and unable to offer relief, but worse still, at the center of this exclusionary endeavor, from the outset to the present, remains the definer and purveyor of Black social, civil and literal death.

PART VI. REMEDIES?

Despite centuries of death-defying movements and oft well-intended legislation, the essential story line and structural reality of white supremacy/anti-Blackness remains foundationally intact. While there has been progress for some, enough to reinforce the claims of a post-racial era, the mainstay, the historical sway of a slavery rooted in both racism and profit, lingers, transformed over and again from “the prison of slavery to the slavery of prison.”⁶⁶ This same phenomena is called by many names. All the powers of the law - Constitutional amendments, Federal Civil Rights legislation, Supreme Court rulings - have failed to stymie this trend, and as we have seen, have often allowed and re-enforced the same.

⁶⁵ Crenshaw, *supra* note 9.

⁶⁶ ANGELA DAVIS, *THE ANGELA Y. DAVIS READER* 61-73 (J. James ed., Blackwell 1998).

In the Post-Civil Rights era, efforts to resist are complicated by the insidious cover story created by the paradigm of “color-blind” racism and its corresponding entrenchment in now “race-neutral” law. All matter of inequality is masked by claims of legal equality, but nowhere more so than with regard to the extensive and excessive reliance on mass incarceration.⁶⁷ Criminality has become conflated nearly entirely with Blackness, and the entire machinery of it rests on an unspoken understanding that the property rights of “whiteness” rest now (as always) on the exclusion, the caging, and the execution of Black bodies. The law supports this, still.

In light of this, what remedies then remain? The usual calls for still more legal reform, perhaps for reparations, the hope for a more radical future Supreme Court reading of *McCleskey* seem too distant, too abstract, and perhaps too, destined to fail at addressing the deep roots of the possessive investment in slavery.⁶⁸ Perhaps the most fruitful approach is evidenced in the prison abolition movement, which explicitly recognizes the contemporary prison industrial complex as an extension of slavery and later, convict lease.⁶⁹ As such, the call now, as then, must be for abolition. Angela Davis describes the movement as follows:

Prison abolition, like the abolition of slavery, is a long-range goal and the handbook argues that an abolitionist approach requires an analysis of “crime” that links it with social structures, as opposed to individual pathology, as well as “anticrime” strategies that focus on the provision of social resources. Of course, there are many versions of prison abolitionism—including those that propose to abolish punishment altogether and replace it with

⁶⁷ *Id.*

⁶⁸ FEAGIN, RACIST AMERICA, *supra* note 2;; Dorothy E. Roberts. *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *COLUM. HUM. RTS. L. REV.* 261, (2007).

⁶⁹ Davis, *supra* note 33; *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, (2014), <http://criticalresistance.org/about/not-so-common-language/>.

reconciliatory responses to criminal acts. In my opinion, the most powerful relevance of abolitionist theory and practice today resides in the fact that without a radical position vis-a-vis the rapidly expanding prison system, prison architecture, prison surveillance, and prison system corporatization, prison culture, with all its racist and totalitarian implications, will continue not only to claim ever increasing numbers of people of color, but also to shape social relations more generally in our society. Prison needs to be abolished as the dominant mode of addressing social problems that are better solved by other institutions and other means. The call for prison abolition urges us to imagine and strive for a very different social landscape.⁷⁰

Even here, there is the danger that the prison abolition movement will attend to the dismantling of an essential structure of white supremacy without fully grappling at root with the anti-Blackness that serves as corollary. At the time of this writing, the nation is divided again for the most recent in an ongoing spate of “new 21st century version of lynchings”.⁷¹ Police and vigilante killings of unarmed Blacks, now occur at the rate of 1 every 28 hours.⁷² New research verifies what some have already known with their lives, that Black children are seen, by police and others, as older

⁷⁰ Angela Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, HISTORY IS A WEAPON, (2004), <http://www.historyisaweapon.com/defcon1/davisinterview.html>.

⁷¹ Noel A. Cazenave, *Understanding Our Many Fergusons: Kill Lines - the Will, the Right and the Need to Kill*, TRUTHOUT, (September 29, 2014), <http://truthout.org/opinion/item/26484-understanding-our-many-fergusons-kill-lines-the-will-the-right-and-the-need-to-kill>.

⁷² *Operation Ghetto Storm: 2012 Annual Report on the Extrajudicial Killings of 313 Black People by Police, Security Guards, and Vigilantes*, MALCOM X GRASSROOTS GROUP, (Aug. 2012), http://mxgm.org/wp-content/uploads/2013/04/operation_ghetto_storm_updated_october_2013.pdf.

by far— in fact not seen as children as all.⁷³ New research too suggests that white Americans are more comfortable with punitive and harsh policing and sentencing when they imagine that the people being policed and put in prison are black. This is mediated by fear; the idea of black criminals inspires higher anxiety than that of white criminals, pressing white people to want stronger law enforcement.⁷⁴ While these sentiments and actions are rooted in the desire to protect the property of “whiteness,” this is always over and against the perceived intrusion of excluded Blackness.

In the final analysis, it is the long shadow of anti-Blackness that must be confronted. All legal, political, and social movement efforts to dismantle white supremacist institutions will fail in lieu of this. These will be half measures until, at last, there is acknowledgement and embrace of the “Black specter waiting in the wings. . . .that cannot be satisfied (via reform or reparation), but must nonetheless be pursued to the death.”⁷⁵

⁷³ Phillip Atiba et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, J. PERSONALITY & SOC. PSYCHOLOGY (Feb. 24, 2014).

⁷⁴ Rebecca Hetey & Jennifer Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, PSYCHOLOGICAL SCI. (Aug. 5, 2014).

⁷⁵ Wilderson, *supra* note 21.