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Transformative Justice and the Dismantling of Slavery's Legacy in Post-Modern America

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[Chapter 13]

Introduction

Slavery was technically abolished in the United States 150 years ago, but the legacy of that atrocity persists at the beginning of the twenty-first century in a "war on crime" that has resulted in the mass incarceration of young American black men, a phenomenon that has been described as the "new Jim Crow" (Scotti and Kronenberg 2001; Classer 2006). In the United States we have only 5 percent of the world's population but 25 percent of the globe's prisoners. Our country incarcerates two million people a year, half of whom are African American. A young white male in this nation has a one-in-fifteen chance of being incarcerated; a Latino, one-in-ten; a black, one-in-three (Oliver 2001; Pattillo, Weiman, and Western 2004, 1-7; Robinson 2004, 2). This apartheid system is the scourge of a society that promises equal opportunity for all.

How did we allow this shameful situation to develop? I suggest that one critical factor in this complex equation is our failure as a country to deal honestly with the crimes of slavery and racial prejudice and our unwillingness as a society to confront these evils directly. Our desire to be shielded from this reality enables us to avoid the painful process of probing deeply into the multiple wounds that slavery and racial inequality have inflicted on us as a people, to cleanse our injuries, to repair the harm we have caused by making reparations, and to allow for true healing for both whites and blacks. Until that transformative type of restorative justice is accomplished, I do not think that we will be equipped to understand fully

or reform a criminal justice policy that has the effect of denying a large proportion of black men the freedom they obtained 150 years ago. Unless that recognition and acknowledgment occur, we will continue to allow those who resist true equality for African Americans to exploit the racialized fear of white America and to convince the majority of people that our public safety requires the mass incarceration of black men.

As such, a transformative justice project is unlikely to be embraced by the majority of Americans in the near future. However, we must develop more immediate strategies for changing our criminal justice policies and beginning to dismantle this postmodern Jim Crow taint on our society.

A Century of Apartheid

If after the Civil War the United States had properly reconstructed its white privileged society, if the Freedman's Bureau had done the job for which it was intended, if "40 acres and a mule" had become a reality (Foner 1988, 50, 51, 68–71, 158–64)—in short, if former slaves had been granted economic and social freedom as well as physical freedom—the gaping wound in our history that slavery inflicted might have begun to heal. Instead, we placed a dirty bandage on it and congratulated ourselves for our good deed in emancipating the slaves. The Supreme Court justified this approach by ruling that the Constitution did not protect African Americans from private discrimination (Oshinsky 1997) and gave free rein to states to systematically codify the subordinate position of black people in the United States (Oshinsky 1997, 9). Over the next hundred years, we maintained a caste system known as Jim Crow that allowed that covered wound to fester.

The roots of this apartheid system were deep and varied: "For the planter, emancipation meant the loss of human property and the disruption of his labor supply. For the poor white farmer, it had . . . erased one of the two 'great distinctions' between himself and the Negro. The farmer was white and free; the Negro was black—but also free. How best to preserve the remaining distinction—white supremacy—would become an obsession" (Oshinsky 1997, 9). The enormous hostility against African American men was particularly evident in states in which blacks outnumbered whites and true political and economic freedom for African American men had the potential for dismantling white supremacy (Oshinsky 1997, 9).

In analyzing the new Jim Crow, the darker psychological undergirding of the old Jim Crow is of particular significance. In the minds of many Americans, the segregation of black men was justified by the "national obsession with the violent rape of white women by black men"; indeed, "revolt and rape by dehumanized black hordes was a classic white male nightmare" (Brownmiller 1975, 217). The myth of the "black rapist oversexualized black men and, by equating their sexuality with bestiality, stripped them of humanness" and "justified . . . [their] repression, segregation, and disenfranchisement" (Helg 2000, 588, 594). Such a stereotype was even used "to justify lynching and terrorize African Americans into conformity with Jim Crow and the racial etiquette"; indeed, four thousand lynchings of African Americans occurred between 1889 and 1930 (Helg 2000; Davis n.d.).

For those who doubt that this myth is still deeply embedded in the American consciousness today, a review of websites and blogs provides potent evidence of its tenacity (Gaede 2004; Hutchinson 2004).

The War on Crime: Jim Crow's Newest Incarnation

Our Refusal to Acknowledge Legacies of Slavery and
Jim Crow Allow Perpetuation of Discrimination
in the Criminal Justice System

With the international embarrassment of a racially segregated American military during World War II, the end to legally imposed separation in the public schools in the 1950s, and the civil rights movement of the 1960s and 1970s, it appeared that some measure of real equality for African Americans was finally at hand in the second half of the twentieth century. Because overtly white supremacist views had been rejected by most of American society, many people assumed that we could progress seamlessly toward a more just country without directly confronting the severity of the original wound of slavery or the ensuing infection of apartheid. A careful review of the attitudes of many white Americans in the 1960s, however, shows a more disquieting view. Even as the legal scarfolding of the old Jim Crow system was being dismantled, the majority of white Americans seemed incapable of acknowledging the effects of that apartheid system. In a 1963 poll, two-thirds of whites said they believed that blacks did not suffer from any discrimination in their communities

(*Newsweek* 1963; The Gallup Organization 1964). In 1969, 42 percent of whites told *Newsweek* that blacks had a better chance at a high-paying job than they themselves had, and 70 percent of whites held the view that blacks could improve conditions in slum housing if they had the desire to do so. Defying logic, this same poll also found that while whites insisted that African Americans were no longer the victims of discrimination, three-fourths of them felt that "the Negro is moving too fast" in his demands for equality (The Gallup Organization 2001; The Gallup Organization 1968).

By the late 1970s and early 1980s, the white attitude that "the Negro is moving too fast" in his quest for true equality achieved even greater traction. Just as Reconstruction efforts to provide some measure of both freedom and equality to former slaves after the Civil War were sabotaged, so too were those same prejudices at work a century later. In present-day America, however, the "new Jim Crow" has been cleverly camouflaged in a discourse about public safety and morality.

Is it merely coincidence that just at that critical point when true equality for blacks was in sight the numbers of incarcerated blacks began to rise? That we inaugurated a war on drugs and began building more prisons just as African Americans were beginning to obtain the rights that had been denied to them for centuries? Is it a mere coincidence that before the civil rights movement the vast majority of those incarcerated were white, while at the turn of this new century, half are black (Oliver 2001)? Why is it that the civil rights movement did not insure a continued progress toward social justice for African Americans?

In my view, a focus on our failure to confront and repair the wounds of slavery's legacy helps answer some of these questions. Having suffered from historical amnesia (or, rather, blind spots) we are bound to repeat the mistakes of the past. A nation that is largely unaware of the role of white privilege in its society is incapable of discerning its effects. Instead, our national cognitive dissonance on racial issues leads us to search for any explanation other than race to explain this mass incarceration of young African American men. One such explanation is that this new Jim Crow is simply the result of politics and capitalism. Certainly that is part of the equation, particularly in states such as California in which a partnership of uncommon bedfellows—the prison building industry, poor cities searching for jobs and a tax base, and the correctional officers' union—have jointly exploited and financed a Victims' Rights Movement

for their own financial and political gain (Rosenblatt 1996; Beckett 1997; Parent 2000; Sandy 2003; Samara n.d.). A second explanation is that the moral core of our nation is threatened by skyrocketing drug use, so we have simply enhanced our punishment for drug crimes in response. There is also some validity to this argument. Beginning with President Richard Nixon's war on drugs, the American drug policy has focused on drug use not as a medical or social problem but as a criminal one. Mandatory minimum sentences, asset forfeiture, and broadly drawn conspiracy laws have all contributed to a burgeoning prison population (Scotti and Kronenberg 2003; Roberts 2004, 1302). A final explanation—one not usually voiced but often harbored—is that African Americans simply commit more crime.

These rationales may seem sufficient to those who suffer from the malady of colorblindness. A closer and fuller examination, however, belies these assertions. The fact is that our prisons are populated primarily by nonviolent drug users. All the academic studies have shown that the drug use of blacks and whites is comparable. African Americans account for only about 14 percent of America's nonviolent drug offenses, yet they constitute 35 percent of the arrests, 55 percent of the convictions, and 75 percent of the prison admissions. Study after study has demonstrated that racial bias taints our entire criminal justice system (Human Rights Watch 2000). Moreover, the fact is that the public support for a drug and crime policy is based primarily on a misapprehension that criminal activity is blossoming in this country and that only strict and retributive consequences can stem the rising tide of violence. Yet the reality is that crime has been on the decline for decades (Roberts 2004, 1275, n. 16; Justice Policy Institute 2000, 3). We should be asking ourselves why it is that the public has been so easily misled by misinformation.

Our Reluctance to Confront Wounds of Slavery and Jim Crow Also Affects Opportunities and Attitudes of Young African American Men

Our failure to heal the wounds of apartheid has also allowed a culture of crime to develop in poor areas of major metropolitan regions where jobs are virtually nonexistent (Cashin 2004, 237–48). The poverty rate for blacks is much higher than for whites; indeed, the average net

worth of the white family is more than seven times that of the average African American family (Conley 2001). This economic caste system—a direct result of our unwillingness to provide (monetary) reparations along with many governmental policies with thinly disguised racial motivation—has resulted in desperately poor inner cities populated largely by people of color. In many such areas, the job of meeting the drug demands of middle- and upper-class white America is the best employment available (Cashin 2004, 245, n. 19).

There is another devastating consequence of our society's failure to repair the wounds of slavery and racial prejudice. Prominent African American scholars have documented a culture of despair among many young African American men that can lead to the "self-hate" about which Randall Robinson writes so eloquently. Recounting an encounter with a young black man, Robinson inquired, "How can somebody just take a gun, put it to someone's head, and pull the trigger without remorse?" The young man replied, "I thought you understood, but you do not understand at all. When you are where I am, it doesn't make any difference which way the gun is pointed. How can I value another life more than I do my own?" (Robinson 2004, 5, n. 2). Robinson attributes much of this despair to a lack of historical connection: "There is no greater crime that you can commit against a people than to strip them of their story of themselves" (Robinson 2004, 6).

Dismantling the New Jim Crow by Changing the Public Discourse on Crime and Race

In my judgment the best mechanism for confronting the legacies of slavery and Jim Crow and for healing the wounds that those practices inflicted is a transformative justice project that includes a significant educational and historical component and a reparations fund. Yet, in this day and age, most white Americans and even some black Americans are reluctant to directly confront issues of race. Until more people are able to recognize and accept white privilege and "unconscious racism" (Lawrence 1987), how do we have a discussion about racial prejudice in our criminal justice policy? How do we begin to change the public discourse so that the majority of people who might reject the concept of the "war on crime" as the new Jim Crow can nevertheless be persuaded to consider alternatives to the mass incarceration of black men? How can we plant the seeds?

Changing Crime Reporting: Converting Racialized and Simplistic Approaches

At the Thelton E. Henderson Center for Social Justice at Boalt Hall School of Law at the University of California, Berkeley, we are taking some initial steps in that direction. Our work is based on the premise that fear, particularly racialized fear of violence, governs most of our criminal justice policy and that public policy will not change until a vibrant constituency demands change. There are two prerequisites for this change. First, the public must be provided with information that encourages it to view the issue of crime through a less racialized and more accurate lens. Second, people must be informed about the successful alternatives to incarceration and be provided access to the tools necessary to develop such programs in their communities. An obvious place to provide this new lens is the media. For this reason, we have developed a project called "Communities in Justice," in partnership with the U.C. Berkeley School of Journalism and the *Oakland Tribune*, to develop models for changing the way that crime is reported.

The research demonstrates that people's views about crime are profoundly affected by what they read in the newspaper and see on television (Iyengar 1991; Graber 1984; Zillman and Brosnes 2000; Sherizen 1978). Those views then result in a criminal justice policy that perpetuates the fears and stereotypes that were developed to justify both the old and new Jim Crow. The studies show that the media can report on crime in a way that will change public perception. First, the empirical research shows that "news organizations report violent crime in a way that scares readers and viewers" (Stevens and Dorfman 2001, 7). Second, this research also demonstrates that "readers and viewers feel helpless about reducing violence in their communities" (Stevens and Dorfman 2001, 7). Hence, the challenge is to report on crime in a more accurate manner that reduces both the fear and the sense of helplessness.

The first problem with current crime reporting involves the cumulative choices of what is included in the news. Four clear patterns have evolved in the research. First, violent crime is emphasized. Second, the more unusual the crime, the greater the chances of its being reported. To be more specific, newspaper and television journalists report a small percentage of individual violent incidents at great length and with great precision. Unfortunately, this approach gives readers and viewers an inaccurate picture of both the crime in their communities and how violence affects them

economically and emotionally. If the media were reporting accurately, the public would know, for example, that the number one violent felony arrest in California is domestic violence; indeed, this is one type of violence that is not on the decline (Stevens and Dorfman 2001, 13, 33; Meyers 1997). Third, even when real crime rates are declining, the coverage of crime remains constant or actually increases. Hence, even though crime in fact has decreased since 1993, almost 70 percent of people are sure that it is rising and identify the media's coverage of violent crime as increasing their personal fear of being a victim. Youth fare worse than their elders in news portrayals, so although violent crime by youth in 1998 was at its lowest point in the twenty-five year history of the National Crime Victimization Survey, 62 percent of those polled insisted that juvenile crime was the rise (Stevens and Dorfman 2001, 14, n. 26; Blackwell, Kwoh, and Pastor 2002, 180).

Last, and most disturbing, a disproportionate number of perpetrators on the news are people of color, especially African Americans, people of color are underrepresented as victims, and interracial crime is covered disproportionately (Blackwell, Glover, Kwoh, and Pastor 2002, 13; Dorfman and Schiraldi 2001). All of these factors enhance, rather than dispel, the violent stereotype of the African American man.

Another set of difficulties with the way that crime is reported is that reporters continue to cover crime and violence by talking only to law enforcement and criminal justice officials and experts. Moreover, they report a crime as a single event. Research shows that when crime is reported as a singular discrete event—the way most crime is reported—the reader or viewer will place all the blame on the perpetrator and occasionally on the victim. When the crime is reported in context and in depth, the reader tends to blame environmental factors, other people, and other situations. Readers develop not only a much more sophisticated and nuanced view of crime, but also a sense that there are a myriad of ways to prevent it (McManus and Dorfman 2003; Brooks, Schiraldi, and Ziedenberg 2000; McManus and Dorfman 2000).

Empowering Communities to Prevent Crime with a Public Health Approach

In addition to reducing the public's fear of crime, the media needs to communicate and demonstrate that ordinary citizens can both prevent crime

and develop responses to crime that are more successful than incarceration. Most people understand that the criminal justice system is broken; they just believe they lack the expertise or the power to fix the problem. They assume that only courts and law enforcement agencies have the means and knowledge to make changes. Yet the reality is that there are many very successful violence prevention and restorative justice programs throughout the United States that incorporate regular (lay) people. Many in the media tend to ignore the fact that people are developing predictable, effective ways to reduce and prevent crime, and thus fail to provide the information that could make their readers and viewers feel less helpless. By reporting on such programs and telling the success stories, the media can encourage their patrons to try such approaches in their own communities.

For example, the media should report that since the late 1970s a new medical/scientific field has emerged that studies violence as a public health epidemic (Winett 1998). Like doctors who study heart disease or lung cancer, these specialists analyze the interactions among the victim, the agent of injury, and the environment, and then define the risk factors. Epidemiologists have identified the risk factors for violence as the ready availability of firearms and alcohol, racial discrimination, unemployment, violence in the media, lack of education, abuse as a child, witnessing violent acts in the home, isolation of the nuclear family, and belief in male dominance over women and girls. The U.S. Centers for Disease Control and Prevention initiated a program on violence prevention as early as 1983, and, in 1984, the U.S. Surgeon General declared that violence was a public health epidemic. Yet, the media's coverage of violent crime is largely devoid of this information (Stevens and Dorfman 2001, 8, n. 24, and 11–12).

Some comparisons will illustrate the point. Until the 1960s, traffic deaths and injuries were blamed on crazy or careless drivers and the media covered the issue with a focus on those bad actors. Then public health experts and injury control scientists studied the issue scientifically and advocated for changes: collapsible steering columns, seat belts, shoulder harnesses, roll bars, airbags, and safety glass. Engineers focused on ways to build roads that were safer. Legislators passed laws requiring seatbelts and imposed stiffer penalties for drunk drivers. As a result, when the media covers automobile accidents today, they report about use of seatbelts, alcohol use, and environmental conditions. Public attitudes about tobacco use have experienced similar changes. Historically it was the smoker who

was blamed for having lung cancer. The stories that identified the connections between smoking and lung or heart disease consistently quoted researchers from the Tobacco Research Institute that refuted such links. Today the news reports that tobacco companies share in the responsibility for the illness and death resulting from smoking by manufacturing, marketing, and selling a product they know to be harmful and addictive (Stevens and Dorfman 2001, 11).

Similarly, if the media reported about environmental and other risk factors when it covered violent crime, the public would develop a more sophisticated view of the issue and could pinpoint the risk factors in their communities that they could work to eliminate.

Pursuing Restorative Justice Alternatives to Incarceration

A third way in which the media could change the public discourse about crime would be to provide information about the successful restorative justice programs and other alternatives to incarceration that enable individuals and communities to actively participate in responding to unlawful behavior and in repairing the harm caused by crime in their neighborhoods. The purpose of restorative justice—an ancient method of resolving disputes that is practiced in indigenous communities and in many countries around the world—is both to encourage accountability by the offender and to heal the wounds to victims, the community, and even the offender resulting from the crime (Van Ness and Strong 2000; Braithwaite 1989; Zehr 1990). Crime itself is viewed not as a transgression against the government or the state but as a violation against people and relationships, a tear in the fabric of our society. Indeed, for most of human history, the response to what are now called “crimes” was restorative justice because people understood that crime results in injuries to victims, neighborhoods, even the offenders themselves. A restorative justice model provides for participation by all the parties affected by the crime in the resolution of the problem and the repair of the damage so that true healing can occur (Van Ness and Strong 2000; Braithwaite 1989; Zehr 1990). In our modern society we have lost sight of the importance of such participation and have allowed ourselves to believe that only the criminal justice system has the expertise to solve these problems.

By focusing on the assumption of responsibilities by the offender, the examination of the needs of both the offender and the victim, and the

healing of relationships, restorative justice is subject to objective and substantive evaluation. The success of a restorative justice project is measured not only by procedure, but also, more importantly, by outcome—whether the offender took responsibility, whether the harm has been repaired, whether the community is safer, whether the parties were empowered to be sufficiently constructive to avoid similar problems in the future. Restorative justice practitioners point out that once a crime has occurred, there is both a danger and an opportunity. The danger is that the community, the victim, and the offender will emerge from the criminal justice process further alienated, damaged, and disrespected and feeling both less safe and less cooperative. Too often this is what happens in our current criminal justice system. The opportunity is that injustice is recognized, equity is restored through restitution, and participants feel safer, more respected, and more empowered (Schwartz, Hennessey, and Levitas 2003). Hundreds of small restorative justice programs throughout the country are providing this opportunity. Unfortunately, most of the public is not aware of these programs and too often their reach and influence are limited. By enhancing the visibility of such successful programs, we can encourage the development of similar restorative justice models that can both reduce the incarceration rates and repair the damage to communities.

Unfortunately, there is a dearth of rigorous research on the effectiveness of restorative justice programs to reduce the disproportionate incarceration of people of color. Hence, the Henderson Center for Social Justice is beginning to work with schools, juvenile justice authorities, and community organizations in Bay Area counties to research and develop restorative justice best practices and to assess their efficacy using both quantitative and qualitative measures. This research dovetails with efforts that counties are required to undertake pursuant to the Juvenile Justice Delinquency Prevention Act to reduce the disproportionate contact of minority juveniles with the juvenile justice system. Because this statute requires recipients of federal aid to determine whether children of color have disproportionate contact with juvenile justice systems, to analyze the reasons for that “DMC” (disproportionate minority contact), and then to develop intervention plans to increase the availability and quality of juvenile diversion and prevention programs, many juvenile justice authorities and educational institutions recognize the importance of working with both academic researchers and community organizations to craft successful approaches.

Coming full circle then, when the media reports crime in a less racialized and more complex manner and also reports about successful violence prevention and restorative justice programs that provide alternatives to incarceration, the public discourse can be profoundly altered. Hence, we are working with editors and reporters at the *Oakland Tribune* to develop interactive web pages that encourage dialogue with the readers. These pages will report crime data that include maps and neighborhoods and will show, for example, how alcohol outlets are risk factors for crime. They will provide information about violence prevention and restorative justice programs in similar communities and will include research on violence epidemiology and price tags for the current levels of crime. Research and case studies of successful restorative justice programs can form the basis of news stories that demonstrate the positive ways the community can become involved in developing both violence prevention programs and successful alternatives to incarceration.

The project is also working with the judges in the local juvenile court to create restorative justice models that will reduce the incarceration of youths of color. By partnering with the local schools to institute restorative justice peer courts that approach issues of crime and violence as opportunities for young offenders to be accountable to their victims, we are hoping to encourage young people to both take responsibility for their actions and receive help for the problems that were the risk factors in their behavior. When young people are given the opportunity not only to repair the harm that they caused but also to identify factors that will reduce the likelihood of future offending, their self-confidence is enhanced. This is a sea change from the current school to juvenile hall pipeline in California that results in high school expulsion rates and juvenile hall referrals for children of color (Insley 2001; Siman 2005; Harvard Civil Rights Project and the Advancement Project 2000).

Conclusion

These are small interdisciplinary beginnings. Yet they have already had effects. The *Oakland Tribune* has already changed the way it reports about crime and its editors are beginning to educate their colleagues in newspapers around the country. Law students and journalism students—the lawyers and journalists of tomorrow—are seeing crime and the criminal

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- justice system with entirely new eyes. The hope is that with our small efforts coupled with the efforts of hundreds of other scholars and activists over the next several years, we can change criminal justice policy, reduce the incarceration rates for people of color, foster healthier communities, and even some day encourage a broader discussion about transformative justice and reparations for the legacy of slavery.