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PUNISHING THE 'OTHER:' RACE, ETHNICITY, AND THE AMERICAN JUSTICE SYSTEM

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A Thesis Approved on

24 March 2006

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DEDICATION

This thesis is dedicated to all of those who have been touched by the criminal justice system. May it in some way promote the promise of justice for all.

This thesis is also dedicated to the memory of Anne Braden who remained one of the guiding lights in the movement for social justice long after its popularity had waned. She will be sorely missed.

ACKNOWLEDGEMENTS

ABSTRACT

PUNISHING THE 'OTHER:' RACE, ETHNICITY, AND THE AMERICAN JUSTICE
SYSTEM

by Kristen Valentine

24 March 2006

This thesis is an examination of the relationship between race and ethnicity and the

American justice system. It is a comparative case study of the racial dimensions of the

War on Drugs in the domestic criminal justice system and the ethnic dimensions of the

War on Terror through an examination of the prison and prisoners at Guantanamo Bay.

This thesis is about building bridges between domestic and international conceptions of

justice with a focus on human rights. Central to this project is an exploration of similar

process of white fear, racialization, and dehumanization black and Arab/Muslim men

experience under the American justice system. Finally, this thesis explores the political

ramifications of wars on ideas (the War on Drugs and the War on Terror) and how that

effects punishment.

TABLE OF CONTENTS

INTRODUCTION

For the last 30 years the United States has experienced unprecedented growth in its prison system. At the same time, it has also been playing an ever expanding role in punishing individuals and nations world wide; the culmination of which is US involvement in the War on Terror launched after the events of September 11th. A recurrent theme in these struggles for the proper administration of justice is that those who languish in American penal institutions are disproportionately poor people of color. Why is it that the West is so ready and willing to punish these people, often to the point of torture? Why does the American public gasp, then shrug off images of torture in US military prisons and black men being shot in the back by police? Why are these same things not happening to white people? Though many scholars have considered the experiences of black men in the domestic criminal justice system in the War on Drugs, or Arab and Muslim experiences of punishment in the War on Terror, few if any have drawn connections between the two. It is the intent of this study to look into this relationship between race, ethnicity and punishment under the American justice system.

Since slavery, black men in American have had to negotiate public perceptions of black male deviance. Often, the prevalent image of the black man has been one of a criminal; someone incapable of taming his desires for property and sexual relationships

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with white women. He is construed as being wild, unintelligent, aggressive and, perhaps most importantly, someone to be feared.[1]

In much the same vein, since the attacks on the World Trade Center and Pentagon on September 11, 2001, Arab/Muslim men have come to occupy a similar social space. They are constructed as rabid terrorists bent on the destruction of America. They are thought to be untrustworthy and capable of committing horrific acts beyond the scope of the white imagination.[2]

In both instances, images passed down from the government and perpetuated in the media have created a frenzy of fear in the American public of black and Arab/Muslim men. This in turn fosters a sense of otherness, or lack of humanity implicit in these definitions of extreme criminality. In the interest of personal safety and national security, a system of punishment has been developed that disproportionately effects black and Arab/Muslim men and is characterized by excess. Through employment of wars on ideas, the War on Drugs and the War on Terror, the government has allowed executive power to become increasingly limitless. This paradigm of punishment has created a space for unprecedented growth in the domestic prison system, indefinite detention, and torture in multiple locations, i.e. the military base at Guantanamo Bay, Cuba.

This study examines the process of white fear, racialization, criminalization, dehumanization and the resultant excessive punishment experienced by black and Arab/Muslim men in the United States and Guantanamo Bay. It seeks to understand the parallels in experience between black men in the domestic criminal justices system, and

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[1] Pilgrim, David. *Ferris State University Jim Crow Museum of Racist Memorabilia.* November 2000.
    Online 6 February 2006. http://www.ferris.edu/htmls/news/jimcrow/menu.htm
[2] Équipe de Recherche sur le Terrorisme et l'Antiterrorisme au Canada (Terrorism and Counterterrorism
    Research Group, Canada). *Guantanamo Bay and its Detainees.* Online 2 February 2006.
    http://www.erta-tcrg.org/cri6224/guantanamo_politics.htm

Arab men in the military justice system by examining the intersections of racism which target these populations.

Underpinning the experience of black and Arab/Muslim men in the US justice system are wars on ideas. The War on Drugs has been a major factor facilitating the unprecedented growth in the US prison population over the last three decades as well as the racial disparities that have accompanied that growth. Similarly, the War on Terror has been the primary means through which Arab and Muslim men have found themselves detained and/or incarcerated by the US. The second part of this study will consider the implications of wars on ideas (drugs and terrorism). The War on Drug and the War on Terror mark a unique approach to social problems wherein a solution is sought through a militarized strategy and ideology.

Analysis of the data will take place on two levels. The first will examine the self-affirming relationship between fear, dehumanization and punishment in both the ideological and physical realm. It will consider the role of the punished as well as the punisher. The second level will look at the implications of wars on ideas and how they effect the cycle of dehumanization. The point of departure for the analysis is comparative approach to the experiences of black and Arab/Muslim men.

Themes of race, fear, dehumanization and punishment weave together to create a social fabric in which vast numbers of people disappear, both metaphorically and practically, into spaces of detention. Understanding how this process works is critical to correcting it so that the justice system can operate in a manner that promotes equality.

CHAPTER 1

REVIEW OF LITERATURE AND METHODOLOGICAL FRAMEWORK

Human Rights and Punishment

The goal of this study is not only to understand the intersections of black and Arab/Muslim experiences of punishment in the contemporary US in terms of sociopolitical structures, but also the ways they intersect with the wider discourse on human rights. Arab/Muslim and black men are both minority groups who have had unique racially and ethnically defined experiences with the American justice system. The purpose of this study is to examine those experiences within the context of human rights.

Human rights are "the rights that one has simply because one is a human being."[3] They are inalienable and universal. Thus, human rights are applicable in the same way to all people all of the time. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides the basis for what has been internationally agreed to constitute human rights.[4] With two World Wars and the increasing global conflict of the first half of the 20th century, the Universal Declaration was almost unanimously approved as a marker of the international need for a set of humanitarian standards governing the treatment of all people.

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[3] Donnelly, Jack. *Universal Human Rights in Theory and Practice Second Edition*. Ithaca: Cornel U. P., 2003. p. 10.
[4] See *Universal Declaration of Human Rights*. http://www.un.org/Overview/rights.html

In regard to punishment and the legal system the Universal Declaration mandates that all people have the right to be free from torture, "cruel, inhuman or degrading treatment or punishment (Article 5);" the right to recognition as a person before the law (Article 6); equal protection under the law (Article 7); effective legal remedy for violations of his/her rights (Article 8); freedom from arbitrary arrest, detention or exile (Article 9); fair and public hearings conducted by independent, impartial tribunals (Article 10) and; presumption of innocence until proven otherwise (Article 11).

Violations of human rights are ultimately the result of an unequal power dynamic. When one person or group has a greater amount of power than another, whether it is social, political, economic, or physical, a situation is created wherein the weaker group is at some degree of disadvantage while the stronger is at an advantage. In this circumstance, the less powerful must rely on the more powerful to respect their human rights. Embedded in the nature of punishment is that once an individual has come into the US justice system, they are entirely at its mercy. Since a prisoner has little recourse against the prison administration and guards and when mistreatment does occur, the line between what is and is not acceptable is easily and frequently blurred. The punisher has absolute physical power over the punished. According to Hajjar, "Torture refers to purposefully harming someone who is in custody – unfree to fight back or protect himself or herself and imperiled by that incapacitation... what makes torture a 'core international crime' – is violence (physical or psychological) against a person already in the custody of an authority."[5] Torture then is not just about the act but also about the "dimension of custodianship,"[6] or the unequal power differential.

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[5] Hajjar, Lisa. 'Torture and the Future.' *Middle East Report Online*. May 2004. Online. 24 January 2006.
[6] *Ibid.*

Punishment, as a concept, is not inherently inhumane. It only becomes so when a justice system is set up in such a way as to foster cruelty, or the behavior of certain individuals within a system make it so. Unfortunately, the fact that international declarations of human rights even exist speaks to the fact that violations remain a problem. Nonetheless, it is entirely possible to construct a system of punishment that centers on the protections of society at large as well as the human dignity of those under its control.

This study will use the terms torture and excessive punishment to refer to a set of penal practices that go far beyond the stated intentions of punishment and enter into the realm of human rights violations. Though torture is certainly a form of excessive punishment, excessive punishment may not always be torture. According to Human Rights Watch, "The Convention against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...." (Art. 1). It may be "inflicted by or at the instigation of or acquiescence of a public official or other person acting in an official capacity."[7] Implicit then in the definition of torture is first, its intentionality and, second, that it takes place within some sort of institutional framework. It is also significant that freedom from torture is a non-derrogable right, meaning that all states have a responsibility to protect it without exception.

Excessive punishment is the area between punishment and torture where it is questionable whether or not the practices included therein are torture. Ultimately though, the Universal Declaration does not just ban torture, but also cruel, inhumane and/or

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[7] Human Rights Watch. *The Legal Prohibition Against Torture*. Online 6 February 2006.
    http://www.hrw.org/press/2001/11/TortureQandA.htm

6

degrading treatment, all of which are included in the definition of excessive punishment. It follows then that both torture and excessive punishment are human rights violations.

Disturbingly, our society uses the language of human rights when addressing violations on an international level, but often fails to do so in domestic matters. Within US borders we may talk about civil rights and liberties, but couching conversations in these terms alone fails to recognized and uphold international standards by which the US has agreed to abide. The reasons for this rhetorical and ideological phenomenon remain unclear. Implicit though in the concept of human rights is international accountability and without recognition of that, people suffering human rights violations within the US can be quietly swept under the rug.

Despite the fact that many Americans do not like to discuss or even acknowledge it, torture does take place in US prisons. Physical abuse by guards or guards allowing abuse by other inmates, physical and sexual humiliation, and solitary confinement of the mentally ill are just a few examples.[8] No one wants to admit that they are committing acts of torture; aside from being illegal, it is publicly embarrassing. Milam explains, "the denial of torture makes torture more possible. Torture requires two conditions: dehumanization – the refusal of empathy on the part of the torturer – and existential helplessness on the part of the tortured,"[9] Social denial of the existence of torture exemplifies dehumanization. This is particularly true of a state like the US that considers itself an international guardian of human rights. However, "torture is part of a continuum of prohibited conduct that clearly includes more mundane methods – e.g., beatings –

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[8] See: Human Rights Watch. 'U.S. Prisons.' Online 5 July 2005.
    http://www.rw.org/prisons/united_states.html
[9] Milam, Michael C. 'Torture and the American Character.' *The Humanist*. July/August 2004. Vol. 64, Issue 4. pp. 27.

which may inflict physical or mental pain or suffering that is notable but not unbearable. The mistreatment inflicted on inmates in prison as punishment, retaliation, or intimidation falls within the international human rights prohibition against torture and other cruel, inhuman, and degrading treatment or punishment."[10] By ignoring these and other forms of torture, they become routinized in such a way that people no longer consider them such. Normalized violence of this sort is perhaps the marker of a much wider phenomenon of a culture of torture.

Milam suggests that torture is not solely a physical act confined in time and space; it encompasses long-tem psychological repercussions as well. By existential helplessness Milam is referring to the disruption of the "fundamental relationship between the tortured individual's physical and psychological relationship to the world."[11] Typically, when someone is physically violated, they have some avenue of recourse. When torture is involved this is not so. In this way, even after the physical torture is over, the tortured will forever have to live with the scars produced from the experiential knowledge of the possibility of torture. Existential helpless then is about the detriment of separation of the physical from the psychological. In some sense, for those that survive, the lasting effects are worse than the event itself.

Importantly, it should be noted that torture can be more then simply physical abuse. For example, sensory deprivation or threats of being attacked by dogs are forms of torture that do not directly involve physical contact. In this sense, extended time in

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[10] Fellner, Jamie. 'Torture in U.S. Prisons.' In *Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective*. Roth, Kenneth and Worden, Minky, Eds. New York: New Press, 2005. pp.174-175.
[11] Milam. p. 27.

solitary confinement and psychological humiliation, both practices common in US prisons, could be argued to fall under the definition of torture.[12]

Torture, excessive punishment and human rights violations are not things that happen elsewhere. They can and do happen within the domestic criminal justice system. As will be argued later, there are parallels between prisoners incarcerated under the domestic US criminal justice system and those held in the military prison at Guantanamo Bay.[13]

Methodological Framework

This study will use the Critical Race Theory perspective to guide the analysis of the data by focusing on the relationship between race/ethnicity, racism and power. The assumptions of the reality of racism, its structural as well as individual implications, and the concept of intersectionality will guide the line of questioning both at the start of the study and during the process of data analysis. This theoretical framework was selected due to its structural, institutional and individual focus, which will assist in exploring the relationship between punishment and the political system and punishment and the individual. Critical Race Theory's emphasis on intersectionality also creates space for a line of inquiry that allows for consideration of the similar ways various groups experience oppression while still respecting their dynamic characters.

The research approach used is a qualitative comparative case study involving two primary cases: the US criminal justice system and the War on Drugs, and the US military

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[12] See Fellner; Hajjar; and Russell, Katheryn K. *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions.* New York: New York U. P., 1998.

[13] Though an examination of the situation at the prison Abu Ghraib in Iraq would be appropriate, the time limitations of this study have made it impossible to do so.

justice system as exemplified through the prison and prisoners at Guantanamo Bay, Cuba in the War on Terror. Each case will be explored unto itself and will then be compared to the other in an attempt to understand first, the ways fear, race/ethnicity, dehumanization and punishment intersect to carve out space for excessive punishment, and second, the implications of wars on ideas for penal practices.

A qualitative methodology was chosen due to the theoretical nature of the questions involved. The comparative case study allows room for the development of a situated understanding of the fundamental problem of race/ethnicity and punishment while simultaneously letting theoretical concerns emerge. According to Creswell, qualitative approaches can be "emergent rather then tightly prefigured," are "fundamentally interpretive" allowing room for the researcher to situate the data within its context, and encourage a holistic perspective on social phenomena.[14] Similarly, the research question does not lend itself to numerical measurement making a quantitative approach impossible.

To ensure validity, data has been collected from numerous sources that have been checked against one another. An effort has also been made to be as descriptive as possible in the presentation of findings so as to leave little doubt in the reader's mind of their accuracy. Finally, prior to presentation, the findings went through a process of peer debriefing with multiple readers in an attempt to make certain the findings and conclusions resonate with a wider audience than the author alone.[15]

Critical Race Theory

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[14] Creswell, John W. *Research Design: Qualitative, Quantitative and Mixed Methods Approaches (Second Edition)*. Thousand Oaks: Sage, 2003. pp. 181-182.
[15] *Ibid.* p. 196.

The Critical Race Theory (CRT) perspective focuses on the "relationship between race, racism, and power,"[16] in terms of both scholarship and transformation. It seeks not just to understand the ways that race and/or ethnicity operate in a society, but how to approach positive change rooted in social justice through that understanding. Essential to this project is recognition of the centrality of race in determining the dynamics of American political, economic and social life. Though the specifics of CRT differ depending on the concerns of different authors there are two central defining themes. "The first is to understand how a regime of white supremacy and its subordination of people of color have been maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as 'the rule of law' and 'equal protection.' The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it."[17] CRT can then be understood broadly as an intellectual movement concerned with the social responsibility that extends from such scholarship. A further explanation defines "a central project of Critical Race scholarship," as "the use of critical historical method to show that the contemporary structure of civil rights rhetoric is not the natural or inevitable meaning of racial justice but, instead, a collection of strategies and discourses born of and deployed in particular political, cultural, and institutional conflicts and negotiations."[18] Meanings of race and racial justice can, therefore, not be separated from the context in which they occur. The political, social, cultural, and economic dynamics of any given situation push and pull on the meanings ascribed to and associated with race.

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[16] Delgado, Richard and Stefencic, Jean. *Critical Race Theory: An Introduction*. New York: New York U.P., 2001, p. 7.

[17] Crenshaw, Kimberle; Gotanda, Neil; Peller, Gary; and Thomas, Kendall. Eds. *Critical Race Theory: The Key Writings That Formed the Movement*. New York: New Press, 1995. p. xiii.

[18] *Ibid.* p. xvi.

CRT developed in the 1970's out of the frustration of a number of legal scholars with the mainstream idea that law and "legal institutions employ a rational, apolitical, and neutral discourse with which to mediate the exercise of social power."[19] Early Critical Legal Theorists recognized that the organization, definitions, and assumptions of the American legal paradigm were tightly intertwined with politics, so much so that many years had passed without any major dissent within the legal field. At the same time, many were realizing that "the heady advances of the civil rights era of the 1960's had stalled out and, in many respects, were being rolled back."[20] In short, CRT came into being in conjunction with and in response to the Critical Legal Studies Movement and an aging civil rights discourse that was no longer able to effectively speak to issues of race and racism.

The core of CRT contains six basic tenants. The first is that racism is the normal, commonplace way US society operates. It is not limited to specific, individual instances but is structural in nature and therefore built into social institutions. Secondly, racism "advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it."[21] Racism allows powerful whites to accumulate increased amounts of capital with greater ease, by keeping the working class divided. At the same time, it allows poor and working class whites to view themselves as socially superior boosting their self-image and raising them up, however slightly, from the bottom of the social ladder. Third, CRT recognizes race as a social construct. Race has no real biological underpinnings and varies in meaning across time and space. It is therefore a product of social conceptions rather than

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[19] *Ibid.* p. xviii.
[20] Delgado, Richard and Stefancic, Jean. *Critical Race Theory: An Introduction.* p. 4.
[21] *Ibid.* p. 7.

biological or genetic realities. Race failing to be a biological veracity does not negate its social significance. To be sure, many of CRT's opponents attempt to downplay the significance of race pointing to the fact that it is not rooted in scientific truth thereby making it unreal. As CRT argues, its social reality is precisely what makes it significant.

The fourth tenant of CRT deals with "differential racialization and its many consequences."[22] Different minority groups are racialized in different ways, at different times depending on the context in which the racialization occurs. For example, at one time Irish and German immigrants were not considered white and were discriminated against because of the economic competition they posed in terms of employment. Mainstream society racialized them as the 'other' and placing them in 'lesser' social category. Today these same people would not be considered anything other than white. Related to differential racialization is the idea of intersectionality, "no one person has a single, easily stated, unitary identity."[23] Factors such as race, gender, age, sexual orientation, religion and the like place people in unique locations. To understand the social, political, cultural and economic situation of working class black women for example, we must first see the ways race, gender and class intersect to shape their identity. Finally, the sixth tenant of CRT "concerns the notion of a unique voice of color," which, "holds that because of the different histories and experiences with oppression, black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that whites are unlikely to know."[24]

Generally speaking, CRT asks that we consider the ways in which dynamics of power and knowledge are linked together. To begin, one might examine the

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[22] *Ibid.* p. 8.
[23] *Ibid.* p. 9.
[24] *Ibid.* p. 9.

consequences of the black-white binary. The black-white binary refers to the dualistic notion of race in the US as a categorical construct that includes only blacks and whites. This paradigm denies, ignores and silences racial discourses that include Asians, Latino/s and Arabs, to name a few. The differential racialization thesis rejects the black-white binary as an ineffective and incomplete way of conceptualizing race and instead focuses attention on the complexities of race relations in a multi-racial/ethnic society. The failure to recognize and understand the unique ways in which different minority groups are racialized in favor of trying to fit everyone into the current paradigm serves to further marginalize the aforementioned groups. This marginalization can be broken down in several ways. First, "binary thinking, which focuses on just two groups, usually whites and one other, can thus conceal the checkerboard of racial progress and retrenchment and hide the way dominant society often casts minority groups against one another to the detriment of both."[25] Similarly, obfuscating the unique situations of different minority groups can lead to increased white identification among some groups resulting in racial tokenism. Finally, the black-white binary makes it more difficult for different minority groups to form coalitions.[26] For example, many black social justice organizations dealing with racism in the criminal justice system have failed to see the parallels between the detention of black men in the War on Drugs and Arab men in the War on Terror or Latino immigrants.

Though CRT was developed in the context of the US, it applies globally, particularly in terms of the "racial and ethnic character of the massive distributive

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[25] *Ibid.* p. 71.
[26] *Ibid.* pp. 72-73.

transformations that globalization has set in motion."[27] Looking not just within but also beyond the boarders of the US it is clear that there is a distinctly racial character to those who benefit and suffer from the effects of this movement of resources. A CRT-approach would question the power relationships supporting these disparities.

There are a number of ways in which CRT can be instructive when analyzing criminal justice and punishment. Though CRT was born out of legal scholarship, its principals are widely applicable. In seeking to understand the philosophy of punishment, CRT demands an analysis of the racial and ethnic dimensions/implications of that philosophy and would seek to couch it in the political, social and economic context in which it developed. For the purposes of this study, CRT will provide a theoretical lens through which data can be interpreted. It is particularly appropriate because of its recognition of the centrality of race and its ability to move conversations about race beyond the black-white binary.

Constructing Race and Ethnicity

Race and ethnicity, both central themes in American history, culture and popular consciousness, often lack concise definition. Although both are used as a way of naming or describing groups of people, each has a distinct meaning. Sociologists, anthropologists and other social theorists generally agree that racial groups are defined by phenotypic markers. Contrary to popular belief, race is not a genetic fact. To be sure, "The antecedents of contemporary notions of race are found not in the science of race but in

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[27] *Critical Race Theory: The Key Writings That Formed the Movement.* p. xxx.

the theology of heathenism, the saved and the damned."[28] People of different races can actually be genetically closer than people of the same race. For this and other reasons, race cannot be defined in a concrete way. It is born out of a set of social rather than scientific circumstances and holds different meanings in different cultural and social spaces across time. Whereas race is defined by appearance and the social significance attached to it, ethnicity is defined by cultural affinity. Ethnic groups center on a common language, geographic origin, religion, distinct sense of historical experience and, cultural heritage. Although both race and ethnicity are socially defined designations, ethnic groups tend to self identify, at least initially, whereas race is a label imposed on one group of people by another.[29] In this way, a hierarchy has been imposed on constructed differences.

Since neither race nor ethnicity is a biological reality, they are both understood to be purely the product of social forces. Social construction refers to the social processes through which racial and ethnic groups are ascribed their meanings. Baker proposes that, "at every moment in the racial formation process there is a construct of race," meaning "that people experience every day the ways in which categories of race are signified and reified socially, structurally, and culturally (symbolically), in terms that range from the intrapersonal to the supranational."[30] The social construction of race then is a constant process that both results from and influences peoples lives at all levels. These ascribed meanings can potentially be positive or negative, but when speaking of the history of race and ethnicity in America, more often that not they have been used as markers of

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[28] Baker, Lee D. *From Savage to Negro: Anthropology and the Construction of Race 1896-1954*. Berkley: U. of California P., 1998. p. 12.
[29] Lecture presented by Dr. Yvonne Jones at the University of Louisville. 28 August 2002.
[30] *Ibid.* p. 17.

'otherness' or deviations from the white normative standard and carry with them a negative connotation.

Race, ethnicity, racism and ethnocentrism have all played significant and differing roles throughout the history of the US. From the time British settlers set foot on American soil tensions were present between the white newcomers and Native Americans. In 1619 the first Africans arrived in the 'new world' to work as indentured servants, a precursor to slavery. Their arrival marked the beginning of the black-white racial paradigm that persists into the present day. By the beginning of the 20th century the economics of racial and ethnic difference were apparent and, "a variety of ideas regarding racial inferiority served as a unifying ideology to guide the expansion of foreign markets and monopolies, the exploration and exploitation of natural resources, the imposition of American civilization on islands of 'savages,' and the promotion of disenfranchisement of segregation for Negros."[31]

Many would argue that American identity, in all its complexities, has developed against a backdrop of racial and ethnic othering. Salaita states that, "Modern American racism developed as a result of the imagery of Indians and Africans promulgated by White settlers – a process that continues into the present – in addition to foreign intervention and biological determinism. Indeed, the conventional messianism with which early American settlers invested their identity invents and reinvents itself based on deeply encoded notions of racial superiority."[32] Embedded in this historical pattern of racial and ethnic relations is the same white supremacist ideology that propelled and sustained colonialism and many would argue drives present day American foreign policy.

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[31] *Ibid.* p.25.
[32] Salaita, Steven. 'Ethnic Identity and Imperative Patriotism: Arab Americans Before and After 9/11.'
        College Literature. Spring 2005. Vol. 32, Issue 2. p. 157.

Colonial discourse imbued itself with a sense of paternalistic purpose by claiming its mission throughout the world was to 'civilize' and 'modernize' the 'backward' nations of Africa, Asia, Latin American and the Middle East. Implicit in the colonial attitude is the idea that everyone else is in dire need of the white man's help. In reality, colonialism and imperialism were self-serving, exploitative efforts cloaked in a guise of benevolent concern. In her seminal history of the last days of British rule in Kenya and the Kenyan resistance Elkins illustrates that, "For the British, imperialism was not solely about exploitation; in fact, if one believed the official rhetoric of the time, exploitation was hardly a factor at all... With their superior race, Christian values, and economic know-how, the British instead had a duty, a moral obligation, to redeem the 'backward heathens' of the world... This was the 'White Man's Burden.'"[33] Although Elkins is writing specifically of the British, the same ideological underpinnings were evident in the new world and were a critical factor in the development of slavery and patterns of racial subjugations in the US. In much the same vein, slavery, which was clearly antithetical to Christian values, was recast as being of benefit to the slaves who would otherwise be uncivilized and without Christian salvation. Under slavery, they learned how to work and most importantly, were given the gift of Christianity. Not only was this a means through which whites could morally justify their actions to themselves, it also created a beneficial racial hierarchy.

In order for this colonial discourse to operate effectively, people of color had to be constructed as less than whites. On the one hand, African slaves in the US were thought to be childlike, unintelligent, primitive, and unable to control their animalistic

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[33] Elkins, Caroline. *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*. New York: Henry Holt and Company, 2005. pp. 6-7.

desires.[34] Some, like the 'sambo,' were constructed as loyal and subservient, too stupid to think for themselves but the perfect servants for white men.[35] On the other, the 'brute,' was constructed as wily, sneaky, and a dangerous sexual predator. "The brute caricature portrays Black men as innately savage, animalistic, destructive, and criminal -- deserving punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace. Black brutes are depicted as hideous, terrifying predators who target helpless victims, especially White women."[36]

Although these stereotypes were figments of the white imagination, they were integral imageries to justify to themselves and the world their mistreatment of African-descended people; they had a significant and lasting impact on the construction of both black and white identity in the US. For whites, these stereotypical constructions of race instilled in the collective white consciousness a sense of superiority and entitlement and at the same time fear. For blacks they meant, on the one hand, that whites had no true understanding of who they were, and on the other, the psychological damage that comes from consistent degradation and mis-recognition.

The slave trade marked the first Muslim presence in the US, however it was not until the 1960's when the Immigration Reform Act opened the door for larger numbers of people from the Middle East that Arabs and Muslims became an increasing presence on US soil. In a similar vein to the way black identity was framed in public discourse, poplar constructions of Muslim and Arab identity have been driven by attitudes of white

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[34] Davis, David Brion. 'The Problem of Slavery.' *The Gilder Lehrman Center for the Study of Slavery, Resistance and Abolition.* Online 28 February 2006. http://www.yale.org/glc/forum/davis.html

[35] Jones, Yolanda. 'Slavery of Africans in the Americas: Resistance to Enslavement.' *Yale-New Haven Teachers Institute.* Online 28 February 2006. http://www.yale.edu/ynhti/curriculum/units/1998/1/98.01.03.x.html

[36] Pilgrim, David. 'The Brute Caricature.' *Ferris State University Jim Crow Museum of Racist Memorabilia.* November 2000. Online 6 February 2006. http://www.ferris.edu/htmls/news/jimcrow/brute/

superiority, exaggerated fear, and a long history going back to the Crusades of the Muslim as 'others.' Both blacks and Muslims are critically positioned as 'other' that gives definition to what it means to be white, Christian and Western.

Literature and movies in conjunction with sociopolitical forces have constructed an image of Arab and Muslim men as overzealous, religiously fanatical savages driven by a deep-seated desire for vengeance and personal gain. In reality, this caricature is based on misunderstanding and misrepresentation born out of ethnocentrism and ideological supremacy.

Stereotypes do not simply appear; various information outlets must craft, circulate, and reinforce them. Perhaps of greatest importance to the construction of racial and ethnic identities is popular media, including but not limited to television, books, theater, magazines, newspapers, and radio. It is through these different outlets that ideas (and ideologies) reach the general public and are reified in the national consciousness. Stereotypes are not static, they are capable of change or even dissolution over time, but typically they morph to fit changing sociopolitical paradigms. The 'brute' stereotype mentioned earlier, though developed and promoted during slavery, is still present today coded in images of dangerous young black male drug dealers. Through popular entertainment and perhaps over-reporting of black-on-black crime, the media has presented a distorted reality of the character of young black men that has permeated American conceptions of black male identity as a whole.[37] As a result, American society tends to see black men as untrustworthy and as potential threats. No where is this phenomenon more evident than in racial profiling of blacks which ranges from being

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[37] Glassner, Barry. *The Culture of Fear*. New York: Basic, 1999. p. 109.

followed by security guards in retail stores to over-policing and undue harassment by law enforcement officials.[38]

Although race and ethnicity denote different points of social group boundary demarcations and history, in the context of US social and political situations they are also both signifiers of marginalized minority groups. The Arab/Muslim experience is more aptly described as discriminatory while blacks face economic oppression as well. Race and ethnicity are not interchangeable concepts, but because this study focuses on the similarities of experience between a racial and ethnic group, it will use the terms in a parallel way. Similarly, racialization refers to the process through which racial groups are ascribed their meanings. Because Arabs and Muslims constitute an ethnic rather than racial group, applying the term 'racialization' to their public identity construction is the extension of a racial dynamic onto an ethnic one. Though in this specific case the experiences are similar enough to warrant the extended use of the term, this is not necessarily always so. In instances where there is reason to elaborate on the differences, it will be so noted.

The Psychosocial Dimensions of Dehumanization

Any discussion of punishment, especially one of excessive punishment, must address the relationship between the punished and the punisher. Excessive punishment does not happen in a vacuum, there are certain socio-cultural and political circumstances in which it is more likely to occur.[39] Both on the macro-level, society at large, as well as

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[38] See: Cole, David. *No Equal Justice: Race and Class in the American Criminal Justice System.* New York: New Press, 2000.

[39] Miller, Arthur. 'Harming Other People: Perspectives on Evil and Violence.' *Personality and Social Psychology Review.* 1999, Vol. 3, No. 3. pp. 176-178.

the micro-level, the direct interaction between involved parties are implicated. Part and parcel of excessive punishment is what Bandura has termed moral disengagement.[40] Operating under the assumption that the people who perpetrate or support excessive punishment are, for the most part, not morally depraved, then at some point along the line a disconnect happens between what moral agency would typically stop them from doing or supporting and their actual actions.

Bandura outlines the process of moral disengagement through seven mechanisms. First, *moral justification* takes place when "detrimental conduct is made personally and socially acceptable by portraying it as serving socially worthy or moral purposes."[41] An appropriate example would be morally justifying the torture of one individual in light of the fact that they may possess information that could save many lives. Second, *euphemistic labeling* is the renaming of something to make it appear more benign than it is, such as referring to civilians killed in times of war as 'collateral damage.' Third, since actions and behaviors are judged against their counterparts, *advantageous comparison* draws inappropriate comparisons in an effort to justify harmful behavior. An example would be justifying the use of torture by comparing it to the number of lives potentially saved from the information extracted in the process. Fourth, *displacement of responsibility* allows individuals to view their behavior as the responsibility of those situated above them in the hierarchy. In this manner they are able to separate themselves from their actions and thus, any sense of personal responsibility. This form of disengagement becomes particularly tricky in light of the dictates of personal responsibility that came out of the Nuremburg trials. Particularly as it relates to human

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[40] Bandura, Albert. 'Moral Disengagement in the Perpetration of Inhumanities.' *Personality and Social Psychology Review.* 1999. Vol. 3, No. 3, pp. 193-209.
[41] *Ibid.* p. 194.

rights violations, international law has made an attempt to regulate the displacement of responsibility by holding accountable anyone, regardless of their place in the chain of command, who commits human rights violations. Fifth, through division of labor, group decision making and collective action, *diffusion of responsibility* serves to weakens the moral control of individuals by allowing them to disengage responsibility by passing it off onto the groups as a whole. Sixth, separation of the individual through *disregard or distortion of the consequences* of his or her actions further allows them to engage in harmful behavior. "As long as the harmful results of one's conduct are ignored, minimized, distorted or disbelieved, there is little reason for self-censure to be activated."[42] Finally, and perhaps most importantly, *dehumanization* creates a space in which ordinary people can do extremely cruel things.

> The strength of moral self-censure depends partly on how the perpetrators view the people they mistreat... To perceive another in terms of common humanity activates empathetic emotional reactions through perceived similarity and a sense of social obligation... Self-censure for cruel conduct can be disengaged by stripping people of human qualities. Once dehumanized they are no longer viewed as persons with feelings, hopes, and concerns but as subhuman objects... If dispossessing ones foes of humanness does not weaken self-censure, it can be eliminated by attributing demonic or bestial qualities to them.[43]

Dehumanization takes place in a number of ways. Prominent among them though are media representations and official rhetoric, both of which are major outlets informing pubic opinion. As certain individuals or groups of people appear in various and sometimes subtle ways to be departures from the norm and less than human, space is created where they are at a greater risk of mistreatment which can range from something as benign as name calling to things as serious torture and murder. Before the genocide began in Rwanda for example, efforts were made to make the Tutsi appear as less than

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[42] *Ibid.* p. 199.
[43] *Ibid.* p. 200.

human through radio broadcasts referring to them as cockroaches.[44] This instance makes clear that these events take place as part of a continuum. What begins one day as distaste and name calling can, given the right circumstances, escalate into something much more deadly.

Moral disengagement is a process that takes place slowly over the course of long periods of time and it is unlikely that the individual undergoing the change will even recognize it as such.[45] "Initially, they perform milder aggressive acts they can tolerate with some discomfort. After their self-reproof has been diminished through repeated enactments, the level of ruthlessness increases, until eventually acts originally regarded as abhorrent can be performed with little personal anguish or self censure. Inhumane practices become thoughtlessly routinized."[46] The gradual nature of the change renders it invisible making it all the more dangerous.

The overall effect of the process of moral disengagement is to disconnect an individual's sense of moral agency from their actions by making something negative appear to be positive or shifting responsibility away from the individual and placing it somewhere else. The idea is to deceive people's sense of moral agency and thus their mechanisms for self regulation.[47] Implicit in each step of the process is the notion of separation, from the reality of the consequences of inhumane actions, from responsibility for them, and from the victims themselves. It is within this framework that excessive

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[44] See: Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. Princeton: Princeton U. P., 2001.

[45] Dorfman, Ariel. 'The Tyranny of Torture: Is Torture Inevitable in Our Century and Beyond?' In *Torture: A Collection*. Stanford Levinson, Ed. Oxford, Oxford U.P., 2004.

[46] *Ibid.* p. 203.

[47] See: McAlister, Alfred L. 'Moral Disengagement: Measurement and Modification.' *Journal of Peace Research*. January 2001. Vol. 38, No. 1. pp. 87-99.

punishment takes place and where questions of responsibility and accountability become particularly poignant.

A Note on Accountability

A study on race and ethnicity cannot avoid issues of accountability. There is no question that racial and ethnic disparities exist in our society, but who is to be held responsible? Perhaps of even greater significance is intentionality? Do groups of white men (the primary power brokers in our society) get together and plot new ways to exploit minorities, or are they unaware of the detrimental effects some of their decisions have?

The first line of inquiry takes us in a number of different directions. In one sense, government officials, since they make the rules that govern everyone, have a responsibility to wield their power as true public servants, ones concerned primarily with the well being of the public. In another sense the media and producers of popular culture bear part of the responsibility in so far as they shape popular opinion and through their respective mediums can choose to foster equality, tolerance and understanding or racism, ethnocentrism and elitism. In yet another sense, should it not be the responsibility of the public at large to keep themselves informed and think and act in ways that respect the humanity of others? Finally, we must also look at the role minority groups play themselves in ignoring, accepting, or even perpetuating negative stereotypes and oppression.

Racism and ethnocentrism are issues that plague an entire social system and thus, responsibility cannot be laid in any one single place. For substantive change to occur all of the different elements in society will have to work together. However, there are certain

people and groups who have been vested, by choice or otherwise, with greater amounts of money, power and influence than others. With this power and influence comes added responsibility to ensure that it is used in positive ways. These individuals and groups must be held to higher standards of ethics and behavior.

The question of intentionality is a bit trickier. Without the ability to look into someone's heart and mind it is impossible to truly determine their intentions. It is unlikely that there is a small group of heartless men plotting the demise of the less powerful. On the same note, there are probably some who are well aware of the implications of their decisions and, for selfish reasons, don't care about the consequences for others. Most people, however sit somewhere in the middle. As a result of the limitations on the ability to empirically measure human intentions, this study can only concern itself with what people actually do, the decisions they make, the things they say and the ideas they support. It is within this ethical framework that the results of this study will be interpreted and issues of accountability addressed.

CHAPTER 2

THEORETICAL CONCERNS

Punishment is inseparable from power. Power itself is the institutional ability to exercise control over others and to impose upon them. The ability to punish is integral to the formal expression of power and authority. By way of control and authoritative legitimacy, the punisher is in a hierarchical power relationship the punished. Constructions of race/ethnicity and racism are also tied to structures, ideologies and practices of power. Race and ethnicity are not neutral social categories; they have significant effects on opportunities and outcomes both in the United States as well as the international arena. This chapter will explore some of the central theoretical concerns regarding the relationship between power, punishment and race/ethnicity.

Race, Ethnicity and Western Concepts of the 'Other'

Implicit in any concept or idea is that someone somewhere defined it. Who then defines race? What does it mean that some people get to decide while others do not and, what power does the privilege to write definitions confer? Discussions of race and racism often conjure up mental images of people of color and perhaps the effects of oppression, but far less frequently do those same conversations consider the other side of the coin, namely whiteness and white privilege. When deconstructing race and racism, it is helpful to consider the institutional, ideological and structural power dynamics underlying the

concept itself – not just who is harmed but also who benefits. How is it that different groups are raced? What does this mean for the identity of individuals and groups? What of the fluctuating meanings of race and, by what standard is race determined?

To begin, it should be reiterated that race is a fluid concept – it changes over time and with different geopolitical circumstances. An example that students of race in the US often point to is that of Brazil. Though the US and Brazil were once slave-holding societies that imported thousands of people from the African continent, today they have very different cultural schemes of racial categorization. Historically as well as presently, black people in the US have been defined as anyone with any black ancestry. There is no unique designation for people who are of mixed ancestry and genetic heritage, not appearance, is the criteria for classification.[48] Brazilians, on the other hand, are interested only in appearance and have an incredible array of racial categories to describe people of different complexions. "Most accurately, distinctions among people in Brazil are between lighter and darker, not simply between Negro and mulatto or mulatto and white."[49] The specific reasons why and how different definitions developed in the two locations are beyond the scope of this paper, but suffice to say that what emerged resulted from differing conditions, histories and social needs.[50] The important conclusion to draw is that race is a dynamic and ever changing category that has different meanings across time and space. In short, race is a cultural interpretation of color.

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[48] It should be noted here that in recent years, particularly with the 2000 census, people now have the option of classifying themselves as biracial. Though it is too early to tell the true impact, this may be a sign that mainstream US ideas of race are becoming more expansive.

[49] Degler, Carl N. *Neither Black Nor White: Slavery and Race Relations in Brazil and the United States.* New York, Macmillan, 1971. pp. 103-104.

[50] See Degler, Chapters 1, 2 and 5.

Who then is writing the definitions and ascribing the meanings? This is a complex question that can be better approached if broken down into de jure and de facto realities. As for de jure definitions, law makers, judges and attorneys are the ones that write the language that becomes law. In the US, this group of people has historically and, to a somewhat lesser degree in the present, been made up of an elite class largely composed of white, wealthy, landholding males.[51] Over time race has been written into the US legal code in different ways from the slave codes, to Jim Crow laws to *Brown v. the Board of Education*. In all of these instances, the laws and their results reflected, primarily, the interests of those in power.

The de facto realities are somewhat less clear cut because they are born out of social practices and the practical manifestation of laws. Let us turn back to differences between Brazil and the US. Brazilian colonial law was taken directly from the Portuguese crown, which included clear discrimination against African descendant people. However, because it did not fit into the social paradigm of Brazilian life, it was largely ignored in favor of a much less strict racial code. In the US, on the other hand, the laws were relatively similar to those in Brazil, but in the US context they became even more deeply entrenched as a result of social attitudes.[52] The de facto definitions of race are written by those in the majority group, not just those with political and/or economic power, but those with influence. This category could be populated with artists, writers, news desk editors, preachers, labor leaders, and the like. De facto definitions are crafted by those with influence in the social and cultural realm. They are the people who shape how and what others think.

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[51] See: Mills, C. Wright. *The Power Elite*. 1956. Oxford: Oxford U.P., 2000.
[52] Degler. p. 213-223.

It is important to note that neither the de facto or de jure definitions of race come from any one single person. Instead they are the result of group mentality and decision making by the majority, in this case, whites, particularly white males. Sometime this process is visibly collaborative and other times it is not. In either case, definitions of race emerge from social structures as opposed to individual beliefs. Racial classifications are also accompaniments of economic arrangements wherein racial minorities are at the bottom of the economic ladder.

If racialized people in US society are typically thought of as the 'other,' a departure from the norm, then what is the unmarked category against which race is measured and judged? Simply put, the answer is whiteness. It has only been in recent years that substantive scholarship on the racialization of whites has emerged and most of it a branch of or connected to CRT. Part and parcel to membership in the group that defines race is the ability to ignore the racial characteristics of the defining group.[53] In defining the racial 'other,' whether that be black, Arab or otherwise, whiteness becomes the normative standard. It is the point against which everything else is understood and interpreted, but it is never scrutinized in the same way because it is not recognized as race, only the norm. Inseparable from the normalization of whiteness is the privilege that accompanies it. Peggy McIntosh defines white privilege as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious."[54] It is the ability to write the rules and definitions by which

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[53] Wildman, Stephanie M.; with Davis, Adrienne D. 'Making Systems of Privilege Visible.' In *White Privilege: Essential Readings on the Other Side of Racism (Second Edition)*. Paula Rothenberg, Ed. New York: Worth, 2005. p. 98.
[54] McIntosh Peggy. 'White Privilege: Unpacking the Invisible Knapsack.' In *White Privilege: Essential Readings on the Other Side of Racism (Second Edition)*. Paula Rothenberg, Ed. New York: Worth, 2005. p. 109.

everyone else must live. It is hidden behind the guise of normality but is always in operation working silently for the benefit of the privileged group. Though this study is primarily concerned with race and racial privilege, it is critical to note that it is not the only category that is privileged. In the US the categories of males, heterosexuals and Christians are among a handful of unique and overlapping privileged groups that, in different ways, all *benefit* from their privileged status.

Perhaps one of the most provocative theories of othering is Edward Said's concept of Orientalism. Developed as a way of describing the Western/European gaze on the Orient, Orientalism is "a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience. The Orient is not only adjacent to Europe; it is also the place of ...one of its deepest and most recurrent images of the Other... the Orient helped to define Europe (or the West) as its contrasting image, ideas, personality and experience."[55] Said is pointing to the relationship between knowledge and power which is central to the concept of Orientalism. Of particular importance is the truth, or relative truth, of the knowledge being produced. Said tells us that Western conceptions of the Orient are not only racist, but they are also inaccurate, romanticized, and constructed in the vein of self-interest and exploitation. This misrepresentation is further complicated by the domination that did, and many would argue still does, characterize the relationship between the Orient and Occident.

Orientalism is further defined as "a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident.'"[56] Said addresses Orientalism primarily as it has manifested itself in the field

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[55] Said, Edward. *Orientalism*. New York: Vintage, 1978. p. 1.
[56] *Ibid.* p. 2.

of academic scholarship. Western scholars have romanticized, demonized and ultimately dehumanized the people of the Orient as they have defined them from an epistemological stance of superiority.

Said's idea are complex and have far reaching implication for post-colonial theory, but simply put, Orientalism speaks to the Western-constructed Manichean view of the world as being made up of good and evil, safe and exotic, us and them. Said is looking at the way Europe, France and Britain in particular, perceive the Orient, specifically the Arab world, but his ideas are applicable in the US context and in terms of domestic race relations as well as the way the US interprets the present day Arab world. As will be explored in more detail later, racialization of both African-Americans and Arabs and Muslims by American scholars and the media happens along lines much like those described by Said.

While utilizing Said as an overarching theoretical framework is beneficial, it is critical to avoid essentialist constructions of the 'Other.' In reality there is no one 'Other' or single pattern of racialization that can serve as a blanket explanation for every scenario. On the one hand, exploring the similarities in experiences of oppression across different groups can aid in coalition building and support. On the other hand, it can silence already strained voices and diminish authenticity of experience in favor of trying to fit everyone into a single paradigm. It is within this essentialist/anti-essentialist debate that intersectionality is useful. It recognizes common elements of oppression while at the same time highlighting unique experiences.

The State, The Sovereign and the Right to Punish

Before there can be law, there must first be a social order in which the law operates. Likewise, for law to be carried out there has to be some sort of authority to administer it. This is where theories of the role of the state and sovereign become useful in a discussion of crime and punishment. Who is the authority that carries out law and how has that authority been vested in them? Hobbes writing in 1168 and Foucault writing in the 1970's are both political philosophers who, in vastly different ways, lay down a framework in which these questions can be answered.

Beginning with the question of what constitutes sovereign authority, Hobbes tells us that a sovereign is "one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves everyone the author, to the end that he may use the strength and means of them all, as he shall think expedient, for their peace and common defense."[57][58] Thus, the sovereign is so because it was authorized by the people. Its power is, with the exception of certain inalienable rights, absolute, and it retains all rights one possesses in the state of nature. When all else is stripped away, the sovereign is the one who has enforcement power, namely, control of the military and police. The sovereign is created when a group of people come together and, out of a desire to escape the state of nature, authorize sovereign authority. Hobbes characterizes the state of nature, or life outside of a political order, as a state of war wherein everyone is fighting against everyone else for resources. "Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention

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[57] Hobbes, Thomas. *Leviathan.* 1668. Indianapolis: Hackett, 1994. p. 109.
[58] The sovereign does not have to necessarily be one individual human being. Depending on the form of government, the sovereign can be one individual (monarchy), a few people (aristocracy), or all individuals in the state (democracy).

shall furnish them withal. In such condition there is no place for industry..."[59] Since there

is no legal authority in the state of nature, there is also no right, wrong or injustice.

Hobbes explains, "The passions that incline men to peace are fear of death, desire of such

things as are necessary to commodious living, and a hope by their industry to obtain

them. And reason suggesteth convenient articles of peace, upon which men may be

drawn to agreement."[60] Thus, it is out of fear of death and a desire to lead a comfortable

life that people agree to vest authority in a sovereign and enter into a political union.

Once the state or Commonwealth has been constructed, its first and primary

purpose is that of security both from without and within. "For the laws of nature... of

themselves, without the terror of some power to cause them to be observed, are contrary

to our natural passions, that carry us to partiality, pride, revenge, and the like. And

covenants without the sword are but words..."[61] Laws without force behind them are

meaningless. According to Hobbes, people obey the law, not out of the goodness of their

hearts, but because they fear the consequences of failing to do so. The right to carry out

said punishments rests with the sovereign.

Hobbes defines punishment as "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."[62]Fundamental to Hobbes definition of punishment then is that something

good, namely future obedience, is the primary purpose of punishment. To be sure,

Hobbes also states that "all evil which is inflicted without intention or possibility of

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[59] *Ibid.* p. 76.
[60] *Ibid.* p. 78.
[61] *Ibid.* p. 106.
[62] *Ibid.* p. 203.

disposing the delinquent... to obey the laws is not punishment, but an act of hostility...the aim of punishment is not a revenge, but terror..."[63] Punishment is not meant simply to inflict pain but to encourage adherence to the law through fear of the consequences of failing to do so.

Hobbes also asserts that punishment or pain should not be inflicted without a public hearing. In the interim "whatsoever hurt a man is made to suffer by bonds or restraint before his cause be heard, over and above that which is necessary to assure his custody, is against the law of nature."[64] In short, it is necessary that cases be heard by a public authority before any suffering takes place, and the time spent incarcerated before a trial should be no more uncomfortable than what is necessary to assure appearance at that trial. Punishment is broken down into corporal (physical/bodily), capital (death), pecuniary (monetary), ignominy (dishonor), imprisonment, exile or some mixture of these.

The rules that govern punishment fall away when dealing with enemies of the state or rebels. "Harm inflicted upon one that is a declared enemy falls not under the name of punishment... all the harms that can be done them must be taken as acts of hostility."[65] Punishment or pain inflicted under these circumstances takes place under the right of war, not punishment. Those who are not citizens of the state or have revoked that citizenship are not bound to the laws laid down by the sovereign as they have either not made or denounced their contract to that authority. Similarly, the laws of nature dictate that innocent people not be punished but in times of war, that guarantee also falls away. In short, all is fair during war. While Hobbes lays down the foundation for the modern

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[63] *Ibid.* p. 204.
[64] *Ibid.* p. 207.
[65] *Ibid.* p. 205.

state and where the rights of punishment come from, it is also critical to delve deeper into the shifts in historical manifestations of punishment.

Foucault's *Discipline and Punish: The Birth of the Prison* is perhaps one of the most poignant theoretical works of the 20th century on punishment. In this piece Foucault explores, the changing methods of punishment from the public spectacle of torture in the 18th century to the birth of prisons in the late 19th and early 20th centuries. Of particular interest to this paper are the changing ways the body is used as a site of punishment and the social significance of the spectacle of punishment.

Important to Foucault is who bears the burden of the injury caused by crime. In the context of the 18th century Foucault explains, "Besides its immediate victim, the crime attacks the sovereign: it attacks him personally. Since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince."[66] The use of violent punishment served "to make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign. The public execution did not re-establish justice; it reactivated power."[67] This relationship between punishment, the sovereign, and power is quite similar to that of Hobbes. The sovereign has the right to punish and that right is born, not only out a the need to redress injury, but also to maintain authority and ensure future compliance with the law.

The shift in punishment is a result of changing ideas of criminality and corruption within power structures (dysfunction of the sovereign and the courts). For the criminals' part, crime moved from one against the body to one against goods, which coincides with

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[66] Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. 1975. New York: Vintage, 1995. p. 47.
[67] *Ibid*. p. 49.

the increases in production during the Industrial Revolution. As for the state, an extreme concentration of power in the hands of the sovereign as well as corruption throughout the judicial system instigates the people to call for change. With the rise of capitalism the economy of illegality becomes polarized by class, with the bourgeoisie tolerating an illegality of rights (the right of economic expansion) and the proletariat tolerating an illegality of property (that which they do not have). Each group exhibited an increasing acceptance of the kind of illegality that was of benefit to them. Correspondingly the court system is set up in such a way that the differences are reflected in its structure (civil v. criminal court). Under this new paradigm the offender moves from being the enemy of the sovereign to being the enemy of the entire public, thus shifting the burden of the offence from the ruler to the ruled. The people now become invested in the power to punish, and punishment becomes part of the defense of society as a whole, not just sovereign authority.

At the same time, the body became a site of regulation rather than physical punishment moving closer to what Foucault argues are its current manifestations. "Punishment has to make use not of the body, but of representation. Or rather, if it does make use of the body, it is not so much as the subject of a pain as the object of a representation: the memory of pain must prevent a repetition of a crime just as the spectacle... of a physical punishment may prevent the contagion of a crime."[68] For this method to be effective it is critical that punishments are linked with their corresponding crimes, in theory preventing crime by making the drawbacks of the punishment seem worse than the advantages. Therefore, the punishment must fit the crime. What stands out are his thoughts on the limits of punishment. "A penalty that had no end would be

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[68] *Ibid.* p. 94.

contradictory: all the constraints that it imposes on the convict and of which, having become virtuous once more, he would never be able to take advantage, would be little better than torture; and the effort made to reform him would be so much trouble and expense lost by society."[69] Implicit in this definition of punishment is the ultimate goal of reform. So we see here that society benefits not just from further deterrence, but also through the rehabilitation and productive reentrance of one of its members. Thus, what happens during the time of incarceration is of vast importance to the successful operation of the corrections system.

Foucault outlines a number of different models of prisons. In particular he deals with the issue of work (purpose), isolation, and the ability/willingness/intent to reform the prisoner. Two ideas stand out; first, those who are sentenced to life imprisonment lose all hope becoming obsessed with escape and rebellion, investing little concern in the "correction of their morals." Second, solitary confinement acts as a shock to the prisoner allowing him to delve into his spiritual self, emerging as a new and purified man. The first point is connected to possibilities for reform and again, emphasizes the uselessness of life sentences. The second point, describes what, in an ideal state, solitary confinement should be, or possibly what it was originally intended to accomplish.

The power to punish, the relationship between punishment and the body, as well as the relationship between punishment and society at large, are the three main concepts Foucault charts throughout *Discipline and Punish*. As the power to punish shifts from the sovereign to society, society becomes more invested in punishment. As the body moves away from being the site of the infliction of punishment, it instead becomes a trapped and watched object within the space of the prison.

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[69] *Ibid.* p. 107.

Crime, Criminality and Capital

Marx explains that modern notions of crime developed along with capitalism. Essential to that development is the existence of wage labor and a working class to support it. Prior to industrialization, this class of people did not exist and it was up to the emerging bourgeoisie to create it. "The spoliation of the church's property, the fraudulent alienation of the State domains, the robbery of the common lands, the usurpation of feudal and clan property, and its transformation into private property under circumstances of reckless terrorism, were just so many idyllic methods of private accumulation." [70] Thus, by driving people off of the land they had been using and forcing them into a cash economy through taxation, the modern working class was born. It was expected that these people would move to the industrial centers and be absorbed by the burgeoning labor market. However, "The proletariat created by the breaking up of the bands of feudal retainers and by the forcible expropriation of the people from its soil, this 'free' proletariat could not possibly be absorbed by the nascent manufactures as fast as it was thrown upon the world. On the other hand, these men, suddenly dragged from their wonted mode of life, could not as suddenly adapt themselves to the discipline of their new condition."[71] Herein Marx is pointing to issues of absorption into the new social order and adaptation to that order: what do the people who find themselves outside the work force do, and how do people deal with the conditions under which they now live? As a result of these problems people "were turned *en masse* into beggars, robbers,

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[70] Marx, Karl. 'Crime and Primitive Accumulation.' In Greenberg, David F. Ed. *Crime and Capitalism: Readings in Marxist Criminology*. Philadelphia: Temple U.P., 1993. p. 47
[71] *Ibid.* p. 47.

vagabonds, partly from inclination, in most cases from stress of circumstance."[72] In other words, capitalisms inability to first, provide work for those whom it disenfranchises and second, provide those who are working with tolerable living condition, creates a situation where it can only be expected that people will turn to crime. Crime is therefore not the result of any moral ineptitude of individual members of a society, but rather a foreseeable consequence of an economic system that necessarily oppresses and marginalizes large groups of people.

Foucault analyses the relationship between capitalism and crime in terms of the way it shaped the modern justice system and differences in tolerance of crime of different classes.

> The illegality of property was separated from the illegality of rights. This distinction represents a class opposition because, on the one hand, the illegality that was to be most accessible to the lower class was that of property – the violent transfer of ownership – and because, on the other the bourgeoisie was to reserve itself the illegality of rights: the possibility of getting round its own regulations and its own laws, of ensuring for itself an immense sector of economic circulation by a skillful manipulation of gaps in the law – gaps that were foreseen by its silences, or opened up by *de facto* tolerance.[73]

Capitalism serves to split crime and criminality according to the class structure. The foreseeable issue with this model is that the bourgeoisie will most likely be writing the laws and will criminalize more heavily crimes commonly committed by the proletariat, crimes against property. At the same time, they will write loopholes into the law for crimes that work in their favor.

In conclusion, an analysis of crime through the lens of capitalism points to criminality resulting from unevenly distributed resources. In one sense, it is an issue of motivation to commit crime; if one is left with no work and nothing in the way of

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[72] *Ibid.* p. 47.
[73] Foucault. *Discipline and Punish.* P. 87.

material comforts it is likely that they will turn to crime to fulfill their needs. Because of the disproportionate number of people of color living in poverty, this is one way of understanding racial disparities in crime and punishment. Economics, and political economy as well, are inextricably tied to racial and ethnic categorizations. For someone who owns the means of production, they are interested in protecting their property rights as well as amassing more capital, even if that means committing some crimes. In another sense, capitalism splits criminality into bourgeois crime, what could be likened to white collar crime, and working class crime, crimes against property. A Marxist perspective would suggest that an even redistribution of the wealth would render crime unnecessary and therefore obsolete.

The Torture Question

According to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[74] Torture, by this definition, is legally prohibited in the international arena by the Geneva Conventions as well as the Universal Declaration on Human Rights and the Convention Against Torture. This international ban on torture has been almost unanimously agreed upon and is non-derrogable. Likewise,

> Torture is [now] prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in

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[74] United Nations Office of the High Commissioner on Human Rights *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 1. Online. 30 November 2005. http://www.unhchr.ch/html/menu3/b/h_cat39.htm

any form. No exceptional circumstances may be invoked as a justification for torture.[75]

Despite the worldwide legal prohibitions against torture, it remains as a practice that punctuates the realm of punishment in a myriad of different ways. One body of literature on torture, represented by Nietzsche, looks at the meaning or reasons behind torture. Another, represented by Agamben looks at the extralegal space in which it occurs.

For Nietzsche, the idea of torture is tied to human being's learning process and inherent desire toward cruelty. In the first place, torture, physical pain, was the means through which humans where made to have a memory of things, causing them to be more predictable, thus, more social creatures. This necessity is reflected in the severity of penal codes, the more severe the punishment, the more difficult it was to get man to remember not to transgress the law. Perhaps the most disturbing part of Nietzsche's analysis is the idea of torture as a means of debt repayment.

> Throughout the longest period of human history punishment was *never* based on the responsibility of the evil-doer for his action, and was consequently *not* based on the hypothesis that only the guilty should be punished; - on the contrary, punishment was inflicted in those days for the same reason that parents punish their children even nowadays, out of anger at an injury they have suffered, an anger which vents itself mechanically on the author of the injury – but this anger is kept bounds and modified by through the idea that every injury has somewhere or other its *equivalent* price, and can really be paid off, even though it be by means of pain to the author.[76]

Nietzsche has set up a direct relationship between injury and pain. In this case pain, or torture, is nothing more than retribution on the part of an injured party. There existed an economy of pain wherein transgressions of the law or against another person had their equivalent prices in physical suffering. Of particular significance is that the injured party

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[75] US Department of State. *U.S. Department of State Initial Report of the United States of America to the UN Committee Against Torture*. 15 October 1999. Online 30 November 2005. http://www.state.gov/www/global/human_rights/torture_index.html

[76] Nietzsche, Friedrich. *The Genealogy of Morals*. 1913. Mineola: Dover, 2003. p. 39

derives enjoyment from the suffering of others. "...instead of an advantage directly compensatory of his injury, the creditor is guaranteed by way of repayment and compensation a certain *sense of satisfaction* – the satisfaction of being able to vent... his power on one who is powerless... the joy in sheer violence: and this joy will be relished in proportion to the lowness and humbleness of the creditor in the social scale..."[77] Not only is Nietzsche implying that human nature is such that we derive pleasure from the suffering of others, but also that those with the least amount of power will relish in it the most. To be sure, "Thanks to the punishment of the 'ower,' the creditor participates in the rights of the masters."[78] Punishment allows those sitting at the bottom of the social ladder to, at least temporarily, feel the power of the master or sovereign. The infliction of pain and suffering is thus directly related to power and the human desire for it. It is through the human desire for power that torture is justified.

Nietzsche further describes the times when cruelty and suffering ran rampant as much more joyful and festive than the world in which we now live. "...at the time when mankind was not yet ashamed of its cruelty, life in the world was brighter than it is nowadays... The darkening of the heavens over man has always increased in proportion to the growth of man's shame *before man*."[79] This shame grew out of peoples "indignation against... the senselessness of suffering."[80] In response they created gods to vest meaning in suffering and with a greater purpose, in Christendom entrance into the kingdom of Heaven, and it became more tolerable. In the process though, our natural violent tendencies were turned inward, creating a sick species.

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[77] *Ibid.* p. 40.
[78] *Ibid.* p. 40.
[79] *Ibid.* p. 42.
[80] *Ibid.* p. 43.

Nietzsche describes the genesis of the concept of justice as agreements or compulsion toward agreements on the relative 'cost' of actions. "...man soon arrived at the great generalisation (*sic*), 'everything has its price, *all* can be paid for'... Justice in this initial phase is the goodwill among people of about equal power to come to terms with each other... and with regard to the less powerful, to *compel* them to agree among themselves to a settlement."[81] Justice then rests on the idea that everything has a value that can be compensated in the event of damage or loss. Nietzsche is also speaking to the fact that it is the powerful who decide what justice is. They are the ones who set the rules and everyone else is, to one degree or another, coerced into agreeing to abide them or pay the consequences.

Community life is described by Nietzsche in much the same way as it is by Hobbes in terms of the relationship between the individual and the community. The individual receives the protection and relative security of being part of a political order in exchange for abiding by its rules. As communities developed crime became not only an offence against an individual, but also an offence against the social order as a whole. In this sense, "The criminal is an 'ower' who not only fails to repay the advances and advantages that have been given to him, but even sets out to attack his creditor..."[82] Crime in this context is a double offense including debt and the ingratitude of an attack against the creditor. As the community grows in both power and wealth, transgressions of individuals become less and less significant since the community has the strength to weather such attacks with little to no damage. Theoretically then there could exist a community so powerful that it would no longer even need to punish.

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[81] *Ibid.* p. 45.
[82] *Ibid.* p. 46.

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What Nietzsche is exploring is the genesis of punishment first as a result of a breech of contract among individuals and second, as a breech of contract between the individual and the state. Inherent in punishment is the power relationship between the punisher and the punished with the former exercising control and authority over the latter. Human nature dictates that humans derive pleasure from the suffering of others and see it as a worthwhile trade off for some transgression. The state regulates these 'payments' as it begins to become more powerful and play a greater role in everyday life.

As mentioned above, the persistence of torture in the modern world means that it occurs in a space that, given the universal condemnation of torture, sits outside the law. Placing people outside of the law also places them outside of humanity, as beings other than human. One way of theorizing about this space is through a conceptualization of those times when the state deems necessary a suspension of the law. Rousseau describes this as an event that could occur in a state of emergency wherein a temporary dictatorship is instituted until the security of the state can be reestablished. "...if the danger is such that the apparatus of law is itself an obstacle to safety, then a supreme head must be nominated with power to silence all laws and temporarily suspend the sovereign authority. In such a case the general will is indubitable; for it is clear that the prime concern of the people is that the state shall not perish."[83] This extra legal space is what Agamben terms the state of exception.

Agamben's primary concern about the state of exception is its position between law and politics. "... if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds,... then they find themselves in the paradoxical position of being juridical measures that

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[83] Rousseau, Jean-Jacques. *The Social Contract.* 1762. New York: Penguin, 1968. p. 171.

cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have a legal form."[84] In other words, the state of exception is a legal event that, since it is a result of politics, cannot be understood on legal grounds. At the same time, "...if law employs the exception – that is the suspension of law itself – as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to the law."[85] Written into the law itself are the conditions for its suspension. What emerges is that the state of exception is not a temporary condition but rather a paradigm of government. "The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept."[86] In concrete terms, the state of exception is "on the one hand... the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution ..."[87]

This concept has profound implications for questions of political order, necessary means, military power, sovereignty, the rights of the citizen versus the right of the state, and the politics of constitutionality and law. Each of these subjects surrounds the central theme of torture: when and how it is acceptable, the right to torture, public and political perception of torture, and the legality of torture. What the state of exception provides is a justification for the use of any means necessary to get to a stated end. It creates the extralegal space necessary to validate torture.

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[84] Agamben, Giorgio. *State of Exception.* U. of Chicago P.: Chicago, 2005. p. 1.
[85] *Ibid.* p. 1.
[86] *Ibid.* p. 4.
[87] *Ibid.* p. 5.

The final issue we must address is the way fear is used to coerce the public into supporting the state of exception. It is well known that fear is a tactic of social control. As the public panics more power is vested in the authorities and less thought is given to individual liberties, equality or the rule of law. Social control through fear has played a significant role in several eras in US history. Fear of immigration in the late 19th and early 20th centuries fostered virulent racial and ethnic hatred.[88] Fear of Communists during the McCarthy era lead to 'witch hunts' and during the Cold War pushed forward the international arms race with little deterrence from the public at large.[89]

Hannah Arendt defines an ideology as, "the logic of an idea. Its subject matter is history, to which the 'idea' is applied; the result of this application is not a body of statements about something that *is*, but the unfolding of a process which is in constant change."[90] Ideologies color the way in which events are understood and interpreted.

Barry Glassner suggests that Americans are now living in a culture of fear. Issues like crime, disease, violence and drugs, though real and present dangers in society, are often blown far out of proportion, inspiring the public to go to unnecessary lengths to avoid them. One of the more common explanations given for this trend is sensationalism in the media. "We have so many fears, many of them off base, the argument goes, because the media bombard us with sensationalistic stories designed to increase ratings."[91] While this is true, television ratings are only part of the puzzle. "The short

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[88] See: Takaki, Ronald. *A Different Mirror: A History of Multicultural America*. New York: Bay Back Books, 1993.

[89] See: Zinn, Howard. *A People's History of the United States: 1492 – Present*. New York: Harper, 1995.

[90] Arendt, Hannah. *Origins of Totalitarianism*. Orlando: Harvest, 1968. p. 469

[91] Glassner, Barry. *The Culture of Fear: Why Americans Are Afraid of the Wrong Things*. New York: Basic, 1999. p. xx.

answer to why Americans harbor so many misbegotten fears is the immense power and money awaiting those who tap into our moral insecurities and supply us with symbolic substitutes."[92] If we are scared of people breaking into our houses, home security companies stand to profit. If we think that disease is running rampant, pharmaceutical manufactures and medical companies can make a killing. If we are constantly in fear of imminent attack by foreign forces, the military industrial complex expands as do governmental powers. Fears fluctuate with changing political climates and market forces. Our fears change and move as do the needs of those who benefit from them.

If Arendt's definition of ideology is applied to Glassner's theory of fear, then it could be said that an ideology of fear has developed in American culture, driving people to do and condone things they otherwise might not. Fear opens up political and market spaces such that those who exploit them have access to potentially limitless power.

In conclusion, what may at a first glance appear to be disparate subjects, race and ethnicity, crime and punishment, sovereignty and the state, fear and ideology, come together when examining the ways the American judicial system works at home and abroad. The theories outlined above provide a framework in which to understand the role of race and ethnicity in punishment. They address fundamental questions of overarching theoretical perspective, the right to and operation of punishment within the political order, the way concepts such as race and ethnicity develop and manifest themselves in society, the space in which torture is allowed to happen and the ideology that makes it so.

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[92] *Ibid.* p. xxviii.

CHAPTER 3

RACE, PUNISHMENT AND THE AMERICAN CRIMINAL JUSTICE SYSTEM

In the last 30 years, the prison population in the US has increased more than 600%. In 1970 there were less than 200,000 people incarcerated, but by the end of 2004 the number had grown to 2.1 million. The United States now incarcerates more of its citizens per capita than any other country in the world. In 2004, "1 of every 138 Americans was incarcerated in prison or jail."[93] Increases in rates of imprisonment of this sort have never before been seen and they create a number of political, economic and social problems that must be addressed.

Perhaps the most disturbing aspect of this trend is the disparate rates of confinement for blacks, particularly black males. Justice Kennedy reported that, "Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system."[94] Currently every 1 in 3 black men can expect to be incarcerated at some point during his life.[95]

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[93] Sentencing Project, The. *Facts About Prisons and Prisoners*. October 2005. Online, 4 December 2005.
   http://www.sentencingproject.org/pubs-06.cfm

[94] American Bar Association Justice Kennedy Commission. *Summary of Recommendations of the ABA Justice Kennedy Commission*. 2004. Online 4 December 2005.
   http://www.abanet.org/media/jkcrecs.html

[95] African-Americans account for approximately 12% of the population at large.

Trying to understand the exploding prison population as well as disproportionate rates of minority confinement often seems like an insurmountable task. As if scholarly and theoretical disagreement over the causes were not complicated enough, an overwhelming number of variables tangles the web even further. It is the purpose of this chapter to try and simplify some of the major debates and outline central issues to gain a clearer perspective of the problem.

Navigating the politics of crime can be an exceptionally difficult task. 'Tough on crime' policies remain publicly popular and it is sometimes difficult for politicians to support legislation that runs counter to their constituents.[96] One of the first steps in advocating for change is increased public education efforts that emphasize the immense economic and social costs of mass incarceration.

Theoretical Underpinnings

Central to debates over the legitimacy of the current structure of the judicial/penal system is the responsibility for crime. Does it lie with the individual or with societal institutions? In his discussion of the plight of blacks in America Cornel West outlines two ideological camps, the conservative behaviorists and the liberal structuralists.[97] The former place emphasis on the role of the individual, pointing to disintegration of moral values, neglectful parents, and laziness. They call for solutions centered on self-help programs and a rejuvenation of moral values. In contrast, the latter emphasize the role of social structures in the perpetuation of crime and criminality. Their solution would perhaps call for increased funding for educational and social welfare initiatives in

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[96] Lawson, Robert G. 'Difficult Times In Kentucky Corrections – Aftershocks of a "Tough On Crime" Philosophy.' *Kentucky Law Journal.* 2004-2005. Vol. 93, No. 2.

[97] West, Cornel. *Race Matters.* 1993. New York: Vintage, 2001 p. 18.

conjunction with greater overall community resources. In response to these two approaches West first suggests that societal structures and individual behaviors can not be separated, they work in tandem to create the particular location in which people find themselves. Secondly, structures are not just political and economic, they are cultural as well. Just as politics and economics are rooted in the institutions that guide daily life, so too is culture. Finally, he says that "we must delve into the depths where neither liberals nor conservatives dare to tread, into the murky waters of despair and dread that that now flood the streets of black America."[98] What West is calling for then is not simply a melding of the societal and individualistic approaches, he places equal emphasis on the cultural aspects of institutions and stresses the often overlooked psycho-spiritual dimension.

Another critical element in the politics of incarceration is the question of who defines what is criminal and to what extent. There are certain offences, take murder to name a common one, that are punished more severely than others, like pollution. It is up to law makers, both state and federal, to make these distinctions and set up a corresponding structure of penalties. Ostensibly, punishments are designed to redress the damages incurred by crime.[99] Upon the commission of murder, someone has suffered what US jurisprudence deems the ultimate damage, loss of life, and the murderer has done so consciously. In a case where life has been lost, yet it was due to a preventable accident, the penalties for the killer would be less, but would still likely involve extended time in prison. Intent then is a critical factor in sentencing decisions.[100]

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[98] *Ibid.* pp. 17 - 22.
[99] See discussion of Foucault in Chapter 2.
[100] Tonry, Michael. *Malign Neglect: Race, Crime and Punishment in America.* New York: Oxford U. P., 1995. p. 5.

What though if we returned to the case of pollution. What if a company was knowingly polluting the water around a low-income neighborhood with toxins that have been shown to cause cancer and birth defects after extended periods of exposure? If a number of people died, maybe twenty years later as a result of the actions of the company, how is it to be held responsible? Will the CEO be sentenced to death, or extended time in prison? The more likely outcome is that the company will have to pay monetary damages to the families involved. The result of the crime, loss of life, is the same in both cases, but there are two separations that seem to distinguish the crimes. With the murderer, there is direct contact between him/her and the victim, it is a hand to hand crime between two people. The companies murder was indirect, it did not go into peoples homes and kill them directly, it did so through the water they drank. The other separation is one of time. The case involving murder took place relatively quickly. Murder by the corporation took place over an extended period of time. By the time the people figured out what was happening to them, the factory may have moved on or come under new leadership, making it harder to place blame. The corporation is not a single person that can be punished. Its elusive nature has allowed it greater leniency in criminal law, but there is still more to it.

If that same corporation is funneling money and benefits into the coffers of the politicians who make the law regarding such crimes, then it is likely that the corporation is going to face far less in the way of penalties.[101] It is also more likely that lawmakers are going to go easier on crimes commonly committed by people who they can relate to. Take the case of drug and alcohol use. "Both alcohol and illegal drugs cause a great deal

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[101] Winslow, George. 'Capital Crimes: The Corporate Economy of Violence.' In *Prison Nation: The Warehousing of America's Poor.* Herivel, Tara and Wright, Paul, Eds. New York: Routledge, 2003. pp. 41-54.

of harm. Drunk drivers are responsible for an estimated 22,000 deaths annually, while overall alcohol-related deaths total 94,000. Drug-related deaths, overdose, disease, or the violence associated with the drug trade, are estimated at 21,000 annually."[102] It is clear that both alcohol and drug crimes are a significant social problem with the number of deaths resulting from drunk driving totaling more than the number of deaths related to drug use. It is also clear that "drunk drivers are predominantly white males," where as, "persons convicted of drug possession are disproportionately low-income, and African-American or Hispanic."[103] The crime committed most frequently by white men receives misdemeanors, fines and license suspension, while the crimes most often involving poor people of color receive felonies and time in prison. Since the people who get to decide what is and is not a crime, and what punishments should be meted out for them tend to also be predominantly white males, is it any surprise drunk driving is criminalized in a way that "emphasizes keeping the person functional and in society while attempting to stop the dangerous behavior."[104] In short, there is a direct relationship between the power to punish and that which is punished. The crimes that lawmakers can relate to or are committed by their friends are criminalized less often and are punished less severely. The law is not blind.

Prison Industrial Complex

The prison industrial complex is defined as "an interweaving of private business and government interests. Its twofold purpose is profit and social control. Its public

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[102] Sentencing Project, The. *Does the Punishment Fit the Crime? Drug Users and Drunk Drivers, Questions*
        of Race and Class. Online, 4 December 2005. http://www.sentencingproject.org/pubs-06.cfm
[103] *Ibid.*
[104] *Ibid.*

rational is the fight against crime."[105] According to Angels Davis the term "was introduced by activists and scholars to contest prevailing beliefs that increased levels of crime were the root cause of mounting prison populations. Instead, they argue, prison construction and the attendant drive to fill these new structures with human bodies have been driven by ideologies of racism and pursuit of profit."[106] It is related to and overlaps with the military industrial complex, a construct that describes the relationship between the government, warfare, and private defense industry manufactures. Central to the prison industrial complex is the interrelationship of economics, governance, and confinement.

Economically the corrections industry offers corporations a myriad of investment opportunities. Construction companies profit from the building boom that has accompanied the growing prison population. Goods and service must be provided to prisoners during their term of incarceration ranging from phone service, meals and toiletries to metal detectors, restraint systems and computers.[107] Of growing significance are private corrections companies, like Corrections Corporation of America (CCA), that run prisons both in the US and internationally. "Under contract by the government to run jails and prisons, and paid a fixed sum per prisoner, the profit motive mandates that these firms operate as cheaply and efficiently as possible."[108] Part and parcel to the ability to make money under this set up is cutting corners at the expense of prisoners' health and wellbeing.

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[105] Goldberg, Eve and Evans, Linda. *The Prison Industrial Complex and the Global Economy*. Online. 10 May 2005. http://www.prisonactivist.org/crisis/evans-goldberg.html

[106] Davis, Angela. *Are Prisons Obsolete?*. New York: Seven Stories Press, 2003. p. 84.

[107] Dyer, Joel. *The Perpetual Prisoner Machine: How America Profits From Crime*. Boulder: Westview, 2000. pp. 12-20.

[108] Goldberg and Evans. *The Prison Industrial Complex and the Global Economy*. p. 2.

Prison labor is a lucrative venture for corporate interests. It represents the antithesis of everything the labor movement stood for: no unions, no strikes, no fair wages, overtime or holidays. Corporations employ prisoners to do a number of jobs and pay them far below minimum wage. Even though prisoners cannot be required to work for less than minimum wage, many have to because "more and more, prisons are charging inmates for basic necessities from medical care, to toilet paper, to use of the law library. Many states are now charging 'room and board.'"[109] This set up bears striking resemblances to debt peonage and other forms of quasi-slavery.

The genesis of this pattern of prison growth started showing itself in the 1980's during the period of deindustrialization and dismantling of the welfare system. As factory jobs moved overseas greater portions of the population found itself without work. Davis notes that, "The massive prison building project that began in the 1980's created the means of concentrating and managing what the capitalist system had implicitly declared to be human surplus. In the meantime, elected officials and the dominant media justified the new draconian sentencing practices, sending more and more people to prison...by arguing that this was the only way to make our communities safe."[110] In this scheme, the prison controls those portions of the population that ended up outside the job market (low income black and Latino/a men and women) and at the same time provides a new market to corrections industries. Goldberg and Evans explain that, "Like any industry, the prison economy needs raw materials. In this case the raw materials are prisoners. The prison industrial complex can grow only if more people are incarcerated."[111] Once companies have invested in prisons, it is in their interests to ensure continued expansion. Through

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[109] *Ibid.* p. 5.
[110] Davis, Angela. *Are Prisons Obsolete?*. p. 91.
[111] Goldberg and Evans. *The Prison Industrial Complex and the Global Economy.* p. 2.

political and media influence, these companies are part of the push toward 'tough on crime' policies.

The War on Drugs

Politicians, pundits and academics who believe that racial disparities in the criminal justice system are not a problem often point to crime rates as an explanation for the statistical imbalance. Black people are committing more crimes, they argue, and will thus be overrepresented in the prison population. Mauer reports that for property and violent crimes blacks offend at higher rates than other groups, 32% and 43% respectively, and that theses numbers have remained stable over the last two decades.[112] Drug crimes, however, do not follow this pattern. A recent report indicated that, "African Americans represent 12.7% of the US population, 15% of drug users (72% are white), 36.8% of those arrested for a drug-related crime, 48.2% of American adults in state, and federal prisons and local jails and 42.5% of prisoners under sentence of death."[113] According to Human Rights Watch "drug offenses accounted for nearly two out of five (38 percent) of all black admissions,"[114] to prison. Therefore, even if the numbers are adjusted for legitimate disparities in rates of violent and property crimes, disparities in offense rate versus incarceration rates for blacks would be significant, primarily as a result of drug crimes. This pattern has emerged as a result of the War on Drugs.[115]

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[112] Mauer, Marc. *Race to Incarcerate*. New York: New Press, 1999. pp. 127-128. Percentages are based on arrest rates as they are the only way of calculating commission of crime. This presents a problem however if some groups are being disproportionately arrested as well.

[113] Legal Services for Prisoners with Children. *People and Color of the Prison Industrial Complex*. Online. 10 May 2005. http://www.prisonerswithchildren.org/pubs/color.pdf

[114] Human Rights Watch. *Punishment and Prejudice: Racial Disparities in the War on Drugs*. May 2000. Vol.12, No. 2. Online 1 January 2006. http://www.hrw.org/reports/2000/usa/Rcedrg00-04.htm

[115] Tonry, Michael. *Malign Neglect: Race, Crime and Punishment in America*. p. 82.

Parenti suggests that the War on Drugs emerged in the 1980's as part and parcel of the tough on crime policies developed by Nixon as a means of regaining control over the revolutionary minded public. The Civil Rights Movement and the anti-war movement fostered a political atmosphere which eventually spawned a growth in the popularity of 'law and order' politics. There was little that could be directly done to legally curb public protest, but narcotics control ideologically united the white voting public across class lines and facilitated the federal government's deeper role in law enforcement. In other words, fear of crime was a convenient tool of social control.[116] Human Rights Watch reports that, "contrary to popular assumption, the remarkably high and increasing rates of incarceration in the U.S. since the 1980s have not been driven by increases in the rate of violent crime. Rather, the burgeoning prison population is the result of changes in penal policies and practices and of the soaring number of drug offenders given prison sentences."[117] The War on Drugs, therefore, has not been about protecting the public from violent criminals but has instead acted as a means of incarcerating significant segments of the population for issues that could be more effectively dealt with through treatment and prevention initiatives. Chomsky suggests, "US domestic drug policy does not carry out its stated goals, and policymakers are well aware of that. If it isn't about reducing substance abuse, what is it about? It is reasonably clear, both from current actions and the historical record, that substances tend to be criminalized when they are associated with the so-called dangerous classes, that the criminalization of certain substances is a technique of social control."[118]

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[116] Parenti, Christian. *Lockdown America: Police and Prisons in the Age of Crisis*. pp. 1-12.
[117] Human Rights Watch. *Punishment and Prejudice*. http://www.hrw.org/reports/2000/usa/Rcedrg00 02.htm#P192_34820
[118] Chomsky, Noam. *On the War on Drugs*. Interviewed by Week Online. 8 February 2002.

Policing Race

For the individual entrance into the criminal justice system begins with police contact. Law enforcement agencies are the front line and it is here that we encounter the first factors that are significant in generating racial disparities. Problems with law enforcement are typically broken down into two main categories: police harassment and police abuse/brutality. Police harassment is characterized by unwarranted, extended and/or frequent stops by police that include but are not limited to extensive questioning and searches. Police abuse/brutality refers to physical or mental abuse by law enforcement officials of persons stopped that results in unwarranted physical or psychological distress.

It is difficult for white people to understand the extent to which people of color, particularly black males, experience police harassment. Whether in a car or on foot, black men can expect to be stopped by the police, often multiple times, while traveling from one place to another. These stops have been legitimized by law enforcement in a number of ways perhaps the most common being through drug courier profiles. They take place under the auspices of pretext stops or based on 'reasonable suspicion' which includes anything from driving a luxury car to being 'out of place.' The broad scope of the definition of a drug courier and reasons for probable cause makes everyone a suspect. Cole explains that,

> ... the available evidence suggests that traffic stops are routinely used as a "pretext" to stop minority drivers. The sheer scope of traffic regulations makes it easy for an officer to construct a legal basis for investigating virtually anyone in a vehicle... Once the car is stopped the officer can look into the windows of the vehicle. If he develops probable cause that the car contains contraband, he can

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search the entire car. And where the officer upon approaching the car finds nothing to justify a further search, he can simply ask the driver for permission to search, a request that... is rarely denied.[119]

Though it is clearly unconstitutional to stop someone based only on their race, drug courier profiles coupled with pretext stops and consent searches give the police a mechanism of achieving the same ends. They make a stop based on a minor traffic violation, and then establish probable cause based on miscellaneous evidence found in or on the vehicle. If the driver does not consent to the search, the officer can use that as justification for bringing in K-9 unit, delaying the driver even further.

Many would argue that this approach, known as 'quality of life policing,' though burdensome to the innocent, helps keep them safe by weeding out the criminals. If there is a good chance of getting caught, then crime is less likely to occur. The problem here is that, "this strategy relies heavily on inherently discretionary police judgments about which communities to target, which individuals to stop, and whether to use heavy-handed or light-handed treatment for routine infraction."[120] Leaving this much up to the discretion of individual officers in a society marked by racism open the door to the racial disparities prevalent in the criminal justice system.

Another dimension of contact between people of color and the police is the fear often felt not simply due to the threat of arrest, but also of excessive use of force or police brutality. The Rodney King case in 1991 brought national attention to the willingness of some law enforcement officials to unnecessarily beat a black man half to death. In 1999, the national spotlight shined again on the issue when Amadou Diallo, a young Guinean man was shot 19 times by New York police officers outside his home with only a wallet

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[119] Cole, David. *No Equal Justice: Race and Class in the American Criminal Justice System.* New York: New Press, 2000. pp. 38-39.

[120] *Ibid.* p. 45.

in his hand. There is a clearly racial character to excessive use of force cases that instills in the black community a deep distrust of and unwillingness to work with the police.

Ultimately race-based policing policies and discrimination have negative consequences for society as a whole. It is costly to tax-payers when suits are filed and won against law enforcement agencies. It means that people of color are less likely to trust the police and turn to them where there is legitimate reason. It also reinforces unjustified negative perceptions of everyone involved. Russell explains, "Race-based policies pit law enforcement against minorities and create an unbreakable cycle: racial stereotypes may motivate police to arrest Black more frequently. This in turn generates statistically disparate arrest patterns, which in turn form the basis for further police selectivity by race."[121]

The Color of the Courtroom

Jury Selection

In theory a jury is supposed to represent the opinion of the people. Its role in determining the guilt or innocence of the accused is a safeguard against corrupt judges and/or prosecutors. It is therefore crucial to the effective operation of the American justice system that the jury is in fact representative and fair. Despite efforts to the contrary, the process of jury selection frequently remains racially biased. "The fundamental question is this: How can we ensure that juries treat defendants and victims of different races, genders and classes equally, when we know that race, gender, and class

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[121] Russell, Katheryn K. *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions.* New York: NYU P., 1998. p. 45.

distinctions play a significant role in how people view the world?"[122] The most obvious way is to have juries that are diverse in terms of race, class and gender; however this task proves to be more difficult than one would think.

The first step in jury selection is to compile a list from which a jury pool can be selected. These lists are often based on voter registration and drivers license lists. Cole explains that, "Because minorities and the poor move more frequently than whites and the rich, these groups are less likely to receive jury summonses. For a number of reasons, from skepticism and alienation, to the inability to take time off from their jobs, minorities and the poor are less likely to respond to those summonses they receive."[123] During *voir dire,* the process of questioning potential jurors, both the prosecution and defense are allowed a certain number of preemptory challenges with which they can strike jurors without reason. Minority jurors are often struck under these challenges and since by nature no reason is given, discrimination is nearly impossible to prove. Without balanced juries, it is impossible for the justice system to operate as it should.

Sentencing

Mandatory minimums in sentencing were introduced as a means to eliminate racial disparities by insuring that defendants receive the same sentences for the same crimes regardless of race. Despite the presumably good intentions underlying this change, policy makers failed to consider the overall discretion inherent in the entirety of the criminal justice system. In other words, eliminating discretion in sentencing did not eliminate it from other areas of the system. Police officers routinely use discretion in deciding who to arrest and who to let go with a warning. Pre-trial services uses discretion

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[122] Cole. p. 102.
[123] Cole. p. 104.

in making recommendations to judges to determine bail. Perhaps most importantly, prosecutors use discretion in deciding with whom and to what extent plea bargaining takes place. As Mauer succinctly argues "discretion has not been eliminated from the system; rather it has been transferred from the judge to the prosecutor. The implications... are crucial: judicial discretion is exercised in an open courtroom subject to public scrutiny, but the exercise of prosecutorial discretion is conducted behind closed doors with little accountability."[124] According to a study conducted by the *San Jose Mercury News*, "The analysts concluded that 'at virtually every stage of pretrial negotiation, whites are more successful than non-whites.'"[125] Perhaps if bias was only present at the sentencing stage, mandatory minimums would be an effective tool for ensuring fair treatment, but as it stands, it only exacerbated the problem. Under the current sentencing scheme, even more people are going to prison for even longer periods of time and they are, as could have been predicted, disproportionately black men.

Outcomes

The consequences of the War on Drugs do not stop once someone has completed his or her sentence. According to a 1994 study conducted by the Bureau of Justice Statistics, recidivism rates for blacks (72.9%) outweighed that of whites (62.7%).[126] In both cases though, there is a significant rate of return to prison. The outlook for success after prison is bleak for a number of reasons. Drug convictions can close doors to employment, housing, education and voting rights. In 1998 congress amended the Higher

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[124] Mauer, Marc. pp. 137-138.
[125] *Ibid.* p. 138.
[126] Langan, Patrick A. and Levin, David J. Bureau of Justice Statistics. *Recidivism of Prisoners Released in 1994*. June 2002. Online 6 January 2006. http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf

Education Act of 1965 to bar students with drug convictions from seeking federal financial aid for higher education. Clearly this has a disparate impact on those who cannot afford to fund their own education and those disproportionately affected by drug convictions, namely black men.

Similarly, when applying for employment, most applications demand disclosure of criminal history. Even if an individual has completed their sentence and presumably repaid their debt to society, it is at the discretion of the employer whether or not to offer them a job. It has been noted that unemployment rates for people with felony convictions are as high as 50%.[127] This is especially troubling for people who are struggling to stay away from the drug trade as lack of employment may force many of them to turn back to it. In the same vein, making it more difficult for black men, who are already at a disadvantage, to attain gainful employment further undermines already struggling social welfare and poverty eradication goals.[128]

According to the American Civil Liberties Union, if a family member or guest of someone living in public housing uses drugs, the entire family can face eviction. "The 'One Strike' guidelines require that if the tenant, another member of the household, a guest, or any other person connected with the tenant is involved with drugs, the entire household can be evicted. A drug eviction makes the tenants ineligible for public housing for three years after the date of eviction."[129] Instead of assisting people with drug problems in finding and maintaining housing, policies like this one are increasing the population of those living on the streets.

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[127] Street, Paul. 'Color Blind: Prisons and the New American Racism.' In *Prison Nation: The Warehousing of America's Poor*. Herivel, Tara and Wright, Paul, Eds. New York: Routledge, 2003.

[128] Tonry, Michael. *Malign Neglect: Race, Crime and Punishment in America*. pp. 6-7.

[129] American Civil Liberties Union. *Collateral Consequences of the War on Drugs*. January 2003. Online 6 January 2006. http://www.aclu.org/drugpolicy/collateral/10726pub20030127.html

Finally, former felons in some states find themselves permanently disenfranchised. In a democratic society, loss of voting rights is of incredible significance in that it bars that individual from political participation, a fundamental tenant of citizenship. The 2000 presidential election hung on Florida which was decided by a few hundred votes. Interestingly, in the state of Florida there are approximately 200,000 individuals who have been permanently disenfranchised due to previous felony convictions. Given that a substantial number of these people would have been statistically likely to vote for the Democratic candidate, their vote could have changed the outcome of a presidential race.[130] Not only does felony disenfranchisement have the potential to impact political representation, it is also a marker of loss of citizenship. In a sense, this second-class citizen status is connected to the process of dehumanization discussed in Chapter 1. Denying convicted felons the right to vote is also a denial of their value as members of society, thus further dehumanizing them.

If society expects former felons to move away from criminal activity and become functioning members of society, then it is critical that they are allowed full participation. If an individual has demonstrated that they are having difficulty adjusting to social demands, as is exemplified by participation in criminal activity, then once their punishment has come to a close it would make sense that society would help them not hinder them. By making it more difficult for people coming out of prison to find employment and housing and by denying their civil rights, they are being lead directly back into crime, thus perpetuating the cycle.

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[130] Boyd, Graham.' Collateral Damage in the War on Drugs.' 47 *Villanova Law Review*. 839, 2002. Online
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    January 2006. http://www.aclu.org/drugpolicy/gen/10835pub20020501.html

The criminal justice system is perhaps the current American institution where racial discrimination is the most obvious. There are few people that will argue that racial disparities do not exist, but pinning them down is no easy task. Many scholars have tried to point a finger at one thing or another, but their efforts always seem to fall short. The difficulty of their task springs from the fact that there is no one person or single institution to blame. Covert discriminatory practices occur at every step along the way from the first encounter with law enforcement officials to the moment a former felon beings the process of trying to reintegrate into society after completing his or her sentence. In short, racial disparities in the criminal justice system are systemic.

In all areas of the American criminal justice system racism is present to varying but significant degrees. Cole explains, "…while our criminal justice system is explicitly based on the premise and promise of equality before the law, the administration of criminal law – whether by officer on the beat, the legislature, or the Supreme Court – is in fact predicated on the exploitation of inequality."[131] Whether intentional or otherwise, American society, by allowing these problems to persist in spite of clear evidence of their existence makes it complicit. Ultimately though, it is not just minorities that are being hurt by racial disparities in the criminal justice system. These trends are also socially, economically and morally taxing to society as a whole. Disparate treatment drives deeper the already present wedge between blacks and whites, and blacks and law enforcement officials. It reaffirms negative stereotypes that operate in an atmosphere of ignorance and perpetuate intolerance. It is costing tax payers enormous sums of money that could be better spent on education and rehabilitation efforts that would leave offenders in a better place than they were to begin with. Finally, injustice within the justice system breaks

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[131] Cole. p. 5.

down the legitimacy of the system as a whole, thereby undercutting the very foundation of American democracy.

Correcting unequal treatment will take a concerted, committed and caring effort on the part of individuals in every corner of society and at every level of the justice system. It is not just about Supreme Court decisions, federal legislation or grassroots organizing. All of those things are necessary, but an axiological shift in American society that puts greater emphasis on the humanity of all people is also necessary to see any real change. As long as the people in power refuse to openly acknowledge the realities of racism in society at large and shy away from the role they have played in the perpetuation of inequality little will change. In the same vein, the everyday people that form the backbone of society must acknowledge their role in the problem as well as the solution. Ending discrimination is not just about laws and social institutions changing. More importantly it is about changing people's attitudes and assumptions.

CHAPTER 4

PUNISHMENT, THE WAR ON TERROR AND HUMAN RIGHTS

September 11th, the War on Terror and Human Rights

September 11th was a turning point in global history, albeit one that many foretold would come.[132] For the first time since Pearl Harbor in 1941 there was a major attack on US soil and perhaps the first in a century aimed at a civilian target. A discussion of the events of that day typically ventures in two directions. One addresses the tragedy as it was experienced by Americans, the grief, loss and nationalistic solidarity in a time of mourning; it is a personal account. The other takes a macro or political view of what happened. It asks questions about why it happened, the motives of those involved, the meaning of the US response and the perception of the rest of the world.

What has happened since the fall of 2001 is nothing short of a redefinition of the rules of global politics by George W. Bush and his administration. Under a policy of unilateralism, America has taken the reigns of the global War on Terror. It is a war not on a country or on a specific entity, rather it is a war on an idea, a phenomenon. It is indefinite in length and undefined in scope.[133] A war on something that could last forever and be against anyone opens up possibilities for a vast number of things, perhaps the

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[132] CNN. 'Report cites warnings before 9/11.' 19 September 2002. Online 5 March 2006.
    http://transcripts.cnn.com/2002/ALLPOLITICS/09/18/intelligence.hearings/
[133] Farer, Tom J. 'Beyond the Charter Frame: Unilateralism or Condominium?' *The American Journal of International Law*. April 2002. Vol. 96, No. 2. p. 359.

most troubling of which is a perpetual state of exception wherein "the provisional abolition of the distinction among legislative, executive, and judicial powers"[134] threatens to become permanent. Part and parcel to this state of exception is the suspension of law when and where deemed necessary in the interest of national security. The creation of such an extralegal space makes possible grave human and civil rights violations that, like the War on Terror, may go on indefinitely.

The significance, meanings, and nuances of September 11th have been approached from a myriad of political, scholarly and personal perspectives. Many have pointed to Huntington's *Clash of Civilizations* which states that "the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural."[135] This approach to conflict ties into Said and Agamben's ideas in that it fosters spaces of 'otherness' which ultimately become exceptions to the rule of law.

The Events of September 11th, many have argued, mark the beginning of the great standoff between the West and Islam. On the surface, it may appear that this is a Western-Islamic tension. However, it is important to note that, first, there have been significant parts of Europe (the Western world) that have not supported US actions, particularly in Iraq and, secondly, that the vast majority of people in the Islamic world do not support the actions of those who carried out the attacks of September 11th. Similarly, there were some Arab and Muslim states (Iran, Saudi Arabia and Pakistan) that supported or did not contest the invasion of Iraq. Reducing the emerging global conflict as a cultural

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[134] Agamben, *Giorgio. State of Exception.* 2003. Chicago: U of Chicago P., 2005. p. 7.
[135] Huntington, Samuel. 'The Clash of Civilizations?' *Foreign Affairs.* Summer 1993. Vol.72, Iss. 3. pp.22 - 50.

battle between Islam and the West is an over-simplistic essentialist analysis of extremely complex social, political and economic as well as cultural movements.

The post-September 11th conflict is one between a small group of Islamic fundamentalists and a small group of hard line neo-conservatives using Christianity as a moral and ideological framework. It is significant that these religious based movements are part of a global phenomenon of religious revivals that have also been taking place in Haiti, the Philippines and the US.

Those who carried out the attacks of September 11th are fighting a fundamentally cultural and political battle to defeat US domination and its support of undemocratic leaders and, more recently, to thwart its attempts to rewrite Middle Eastern borders in an ethnic/sectarian fashion. They are looking to protect Islamic culture and law from Western cultural-imperialism and seek the liberation of Palestine from Israeli occupation. Generally though, the 'Islamist movement' is a fragmented, ideologically dis-unified set of decentralized movements, not a monolithic group organized in a single structure.

The American neo-conservatives are fighting a fundamentally economic and geo-strategic battle.[136] The US is dependant on Middle Eastern oil for the uninterrupted functioning of society and to assure that the oil continues to flow, they support the Israeli government almost unconditionally, further straining relations with the Middle East and Islamic world. It could be argued that the support the Bush administration has received from the rest of 'civilization' is result of disinformation. As the people of the US are beginning to see the consequences of the Bush administration's policies, his approval ratings continue to fall, demonstrating that US 'civilization' is not necessarily behind him

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[136] Farer, Tom. 'The Interplay of Domestic Politics, Human Rights and U.S. Foreign Policy.' In *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*. Thomas Weiss, Margaret Crahan, and John Goering, Eds. New York: Routledge, 2004. pp. 44-45.

or the 'culture' that he represents. This is not to suggest that cultural tensions are non-existent in current global conflicts, but reducing it to one of culture alone is dangerously simplistic, closing the door to a critical analysis of the economic, social, and political components that are also driving the conflict.

In a substantially different approach to September 11th some make the argument that states can be purveyors of terrorism. For example, Noam Chomsky suggests that the US itself may in fact be a terrorist state. He points first to the paradox of consistent US involvement with war in other countries, but the lack of large scale violence at home. September 11th marks the arrival of war on US soil; it is "the first time the guns have been pointed the other way."[137] Second, he points to the historical instances, such as Nicaragua and CIA involvement with Islamic militants in the 1980's, wherein the US supported both the overthrow of democratically elected officials and burgeoning terrorist networks. Chomsky asks that instead of blaming others, we critically analyze the role the US plays in the perpetuation of violence around the world and consider the possibility that we are, in part, responsible for that same violence being redirected at ourselves. Fundamental to Chomsky's argument is the necessity of self-criticism for any attempt at a holistic understanding of the situation

In her critique of September 11th Nancy Scheper-Hughs asks that US citizens first, consider the way we are perceived from below as "the passive beneficiaries of global affluence," and second, place the violence of that day within a continuum of violence

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[137] Chomsky, Noam. 'The New War Against Terror: Responding to 9/11.' In *Violence in War and Peace: An*
> *Anthology.* Nancy Scheper-Hughes and Philippe Bourgeois, Editors. Malden: Blackwell, 2004. p.
> 217.

ranging from the mundane to inconceivable.[138] In times of crisis it is easy to embrace

nationalistic rhetoric and forget that the position from which Americans view the world is

frequently quite different from the way others, particularly the ones America exploits, see

it. As we were experiencing shock that such a thing could happen on US soil, others were

shocked that it took as long as it did. For many throughout the world the sort of violence

and tragedy the US experienced on September 11th is relatively commonplace, and it does

not operate in a vacuum. "Mass violence is part of a continuum; it is socially incremental

and often experienced by perpetrators, collaborators, bystanders, and even by victims

themselves, as ordinary, routine, even justified."[139] Scheper-Hughs calls attention to the

embeddedness of violence in both global and domestic culture as normative, part of the

routine of everyday life. People become desensitized to certain kinds of violence while

others remain extraordinary. In the US the violence of September 11th was extraordinary,

but war, the arms trade, violence in Hollywood, and structural violence, to name a few,

are relatively normal. By placing both forms of violence into a continuum, Scheper-

Hughs forces us to address them as cyclical. The violence perpetrated by America against

what has been termed the 'global south' cannot be separated from what happened on

9/11. Violence of all kinds and in all contexts is mutually supportive.

Reason and Response

In the wake of September 11th the Bush Administration wasted little time in

instituting a swift and heavy handed response, the War on Terror. President Bush told the

nation on the 20th of September 2001, "Americans are asking: How will we fight and win

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[138] Scheper-Hughs, Nancy. 'Violence Foretold: Reflections on 9/11.' In *Violence in War and Peace: An Anthology.* Nancy Scheper-Hughs and Philippe Bourgeois, Editors. Malden: Blackwell, 2004. p. 224.
[139] *Ibid.* p. 225.

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this war? We will direct every resource at our command -- every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war -- to the disruption and to the defeat of the global terror network."[140] The significance of this declaration is its total commitment to a war that, over four years later, still remains loosely defined, lacking any clear end, and without any effective measure of success or failure. Part of the difficulty of this war is the inherent elusiveness of the target. Al Qaeda and other terrorist groups typically are,

> ...decentralized nonhierarchic networks. They follow a principal that is called Leaderless Resistance...You have small groups that do things. They don't talk to anybody else. There is a kind of general background of assumptions then you do it...If you assume correctly that whatever group you are in is being penetrated by the FBI, when something serious is happening you don't do it in a meeting, you do it with some people you know and trust, an affinity group and then it doesn't get penetrated. That's one of the reasons the FBI has never been able to figure out what's going on in any of the popular movements... decentralized networks are extremely hard to penetrate... When Osama bin Laden claims he wasn't involved, that's entirely possible.[141]

Given this organizational structure, or lack there of, it is no surprise that the War on Terror is not a battle that will yield quick or complete success. It would seem as though, given the circumstances, waging this sort of war would mean taking an entirely new approach to battle. Perhaps using a humanitarian paradigm rooted in justice and respect as a basis of foreign policy designed to win genuine support throughout the Middle East and Islamic world thereby eradicating any existing support for terrorism, could be one such approach, for example.

Following the events of September 11th US foreign policy, as it was already showing inclinations toward, became increasing based on exceptionalism, isolationism and unilateralism. Already opposed to the International Criminal Court (ICC) they

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[140] Bush, George W. Address to the Nation, September 20, 2001. Online. 1 December 2005.
    http://www.newsaic.com/res92001.html
[141] Chomsky. p. 223.

became even more vehement and concern over the application of humanitarian law dwindled.[142] If these act as the guiding principals and undercurrents, the primary foreign policy objective has clearly been national security. The questions that follow are: "What is to be secured – the state (national security) or citizens (personal security)? Where does the threat lie – externally or internally? And what is the nature of the threat – material or moral (ideological)?"[143] Issues with human rights and civil liberties arise when there is competition between the security of the state and security of the individual. Donnelly states that, "...human rights are about protecting citizens from the state...National security, by contrast, is about protecting the state from its (perceived) enemies."[144] The War on Terror is not just a material threat it is also an ideological one that has created a "tendency to conceive new threats in moralized terms and to respond with an irrational exuberance for a militarized crusade."[145] This is best exemplified by the 'axis of evil' rhetoric used to describe North Korea, Iraq, and Iran. Though these countries, in differing ways could conceivably pose security threats to the US, there are many others that should be of equal or greater concern. They are not simply ideologically enemies of the state; they are described as inherently evil. Highly moralized and subjective critique such as this infuses dialogue about the War on Terror and national security concerns with an overzealous and irrational character. This discursive construction is a powerful and conscious tool of sowing fear and generating support. Similarly, designating groups of

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[142] Forsythe, David P. ' U.S. Foreign Policy and Human Rights in an Era of Insecurity.' In *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy.* Thomas Weiss, Margaret Crahan, and John Goering, Eds. New York: Routledge, 2004. pp. 78-84.

[143] Donnelly, Jack. 'International Human Rights: Unintended Consequences of the War on Terrorism.' In *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy.* Thomas Weiss, Margaret Crahan, and John Goering, Eds. New York: Routledge, 2004. p. 104.

[144] *Ibid.* p. 105.

[145] *Ibid.* p. 104.

constructions of the Arab/Muslim enemy.[159] Instead of referring to the detainees as prisoners of war, they labeled them enemy or unlawful combatants. By using this terminology, they attempted to place the captives categorically outside of the Geneva Conventions. In a memorandum about the application of treaties and laws to al Qaeda and Taliban detainees John Yoo, Deputy Assistant Attorney General, writes "We conclude that these treaties do no protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that these treaties do not apply to Taliban militia."[160] By the time Guantanamo opened, the definition of an 'enemy combatant' had broadened to the point that, "It now meant not just someone thought to have engaged directly in terrorism against America, but anyone captured in Afghanistan suspected of fighting with the Taliban."[161] According to Human Rights Watch however, "Any person, whether a U.S. national or a non-citizen, is protected [under Geneva]. It is irrelevant whether the detainee is determined to be a prisoner-of-war, a protected person, or a so-called 'security detainee' or 'unlawful combatant.' And the prohibition is in effect within the territory of the United States or any place anywhere U.S. authorities have control over a person. In short, the prohibition against torture and ill-treatment is absolute."[162] The last part of this statement speaks to the space of Guantanamo Bay itself.

Another way the Bush administration has tried to skirt law is through the apparent legal vacuum that Guantanamo sits in geographically. The US attained an

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[159] See also discussion in Chapter 1 on *Constructing Race and Ethnicity*.

[160] Memorandum from Office of the Deputy Assailant Attorney General on 'Application of Treaties and Laws to al Qaeda and Taliban Detainees' In Greenberg, Karen J. and Dratel, Joshua, Eds. *The Torture Papers: The Road to Abu Ghraib*. Cambridge: Cambridge U. P., 2005. p. 38.

[161] *Ibid.* p. 25.

[162] Human Rights Watch. *Summary of International and U.S. Law Prohibiting Torture and Other Ill treatment of Persons in Custody*.

indefinite lease on the property around the turn of the century and, despite continued protest from the Cuban government, remains on the land claiming legitimacy by treaty and the fact that Castro's government cashed one of the lease checks. In theory Cuba retains sovereignty over the land, but the US has complete and practical control. The administration argues that since it is technically not on US soil or the soil of a US protectorate, then it is outside the jurisdiction of the US legal system. The Office of the Deputy Assistant Attorney General writes, "…we conclude that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Navel Base, Cuba. Because the issue has not yet been definitively resolved by the courts, however, we caution that there is some possibility that a district court would entertain such an application."[163] If this is in fact true, and if it is also true that the Geneva Conventions do not apply to the prisoners being held there, then they quite literally have no legal rights whatsoever, at least in the eyes of the Bush administration.

The final major way in which the Bush administration has tried to get around the law regarding the proper treatment of prisoners is through improper use of tribunals at Guantanamo Bay. According to Human Rights Watch under the current provisions the trials would, "Deprive defendants of a trial by an independent court, improperly subject criminal suspects to military justice, try prisoners of war (POWs) in a manner that violates the 1949 Geneva Conventions, provide lower due process standards for non-citizens, restrict the right to choose one's defense counsel, deprive defense counsel the

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[163] Memorandum from Office of the Deputy Assailant Attorney General on 'Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba.' In *The Torture Papers.* p. 37.

means to prepare an effective defense, [and] impose a gag order on defense counsel."[164] These tribunals put defendants in a position where there is no way that they can effectively mount a defense for themselves. In light of the fact that there is strong reason to believe that many of these individuals are innocent, the structure of these tribunals becomes even more disturbing.

We see then that by way of placing detainees outside the law in terms of status, geographic location, and recourse, the Bush administration has intentionally created a space in which it can act as it pleases without regard to international and domestic law. Attorney Joshua Dratel writes

> The policies that resulted in the rampant abuse of detainees first in Afghanistan, then at Guantánamo Bay, and later Iraq, were the product of three pernicious purposes designed to facilitate the unilateral and unfettered detention, interrogation, abuse, judgment, and punishment of prisoners: (1) the desire to place the detainees beyond the reach of any court or law; (2) the desire to abrogate the Geneva Convention with respect to the treatment of persons seized in the context of armed hostilities; and (3) the desire to absolve those implementing the policies of any liability for war crimes under U.S. and international law.[165]

Perhaps the most significant part of this evidence is the inherent intentionality of US actions. The mistreatment and torture of prisoners at Guantanamo was not an accident or the result of a few 'bad apples' among the rank and file of the armed services. It is instead based on a policy crafted at the highest levels of government and sanctioned throughout the upper echelons of the Bush administration.

Racializing the Arab and Muslim

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[164] Human Rights Watch. 'Human Rights Watch Briefing Paper on U.S. Military Commissions.' June 25, 2003. Online, 2 December 2005. http://www.hrw.org/backgrounder/usa/military-commissions.htm
[165] Dratel, Joshua L. 'The Legal Narrative.' In Greenberg, Karen J. and Dratel, Joshua, Eds. *The Torture Papers: The Road to Abu Ghraib*. Cambridge: Cambridge U. P., 2005. p. xxi.

How did we get to this place? How is it that the most powerful nation in the world has reduced itself to using torture against its perceived enemies? Beyond the historical and political reasons, why are these people, these particular people, being tortured? Would the US torture anyone or is there something about theses prisoners that sets them apart? If so, what is it about the detainees in the War on Terror that is different from other combat situations? One of the quickest and perhaps most common responses points back to the cost-benefit analysis. One may suggest that the difference is because of the valuable life-saving information that detainees are presumed to have, or the particularly horrific kinds of attacks they are supposed to have carried out. It is more complex though. The War on Terror is certainly not the first time enemies have had information that could save American lives. Furthermore, throughout the 20th century the US has been engaged in a number of extremely violent and horrific conflicts, the World Wars for one, that have not warranted torture. It is impossible to talk about the War on Terror without also addressing US perceptions of Arab and Muslim people and how we view detainees, not just in a political context, but in a personal one as well.

The historical relationship between the US and the Middle East is complex and far-reaching. Throughout the 20th century, US ties to the region have been based predominantly on US dependence on oil. Intuitively it would seem as though this dependence would necessitate a friendly relationship between the US and various Arab countries in the region, but due to the lasting impact of US racism, cultural imperialism and orientalist attitudes, this has not always been the case. Although it has maintained a positive relationship with Saudi Arabia and the Gulf states causing regional divides, it has also has pursued a general policy of coercion through support of Israel and direct military

intervention in the affairs of various countries. To be sure, Douglas Little points out that, "As early as 1900... Anglo-Saxon racism and Social Darwinism had fused in the collective mind of America to generate a powerful mental map in which, predictably, the 'civilized' powers – the United States and Western Europe – controlled a descending array of underdeveloped, even 'primitive' Asians, Latinos, American Indians, and Africans."[166] It is within this cultural context of Western arrogance and presumptuous superiority that American perceptions of Arab people developed.

Not surprisingly, the 'composite Arab' has been cast by popular media as being exotic, of inferior intelligence, dangerous, and obsessed with prestige and vengeance. Films live *Lawrence of Arabia*, *Exodus* and *Aladdin*, and popular magazines like *National Geographic* both highlight and reinforce these negative stereotypes. In the movies Arabs appear before audiences as menacing, dirty and ultimately dangerous. In its original form, the opening theme to *Aladdin* begins with the verse "Oh I come from a land, from a faraway place/Where the caravan camels roam/Where they cut off your ear/If they don't like your face/It's barbaric, but hey, it's home." Similarly, spreads in *National Geographic* have often juxtaposed images of modern, Westernized Israelis with poor, childlike, and hateful Muslims.[167]

In the aftermath of September 11th, government agencies too joined in the fray casting suspected Arab terrorists as vicious animals who, without absolute containment would destroy all that America stands for. Typical spaces of confinement would not be sufficient to contain them. They would instead have to be subject to the extreme measures taken in places like Guantanamo in response to the extreme circumstances. US

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[166] Little, Douglas. *American Orientalism: The United States and the Middle East Since 1945*. Chapel Hill: U. of North Carolina P., 2002. p. 10.
[167] *Ibid.* pp. 18-25.

Secretary of Defense Donald Rumsfeld characterized them as "the worst of the worst," "the hardest of the hardcore," "very tough, well trained terrorists," and "among the most dangerous, vicious killers on the face of the earth."[168] The fight against terrorism was not cast in terms of politics but rather one of good (the US) versus evil (them, aka Arabs and Muslims).

Historical ideologies, popular media, and official rhetoric have all come together to construct an image of Arab and Muslim people as backwards, deceitful, dangerous and ultimately, less than human.[169] When someone becomes less than human, empathy for them and others like them falls away. It is through this process of dehumanization that an ideological space is opened up in which torture and excessive punishment can occur.

Since the attacks of September 11th the US and the world have been struggling to make sense of a changing political climate that, in the era of globalization, leaves no one untouched. With a foreign policy and judicial theory that puts incredible emphasis on national security, the Bush administration has taken on an ideological battle in the War on Terror that is leading to grave human rights abuses. Some prisoners have now been languishing in Guantanamo Bay for upwards of three years without any charges being leveled against them. At the same time, allegations of torture are emerging, not just from Guantanamo, but also from Afghanistan and Abu Ghraib in Iraq. As a world leader and a nation with a vested interest in maintaining healthy relationships with our global

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[168] Équipe de Recherche sur le Terrorisme et l'Antiterrorisme au Canada (Terrorism and Counterterrorism Research Group, Canada). *Guantanamo Bay and its Detainees*. Online 2 February 2006. http://www.erta-tcrg.org/cri6224/guantanamo_politics.htm

[169] See Said, Edward. *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World*. 1981. New York: Vintage, 1997.

neighbors, it is critical that the US begins to address these concerns with an uncompromising commitment to human rights and global justice.

CHAPTER 5

ANALYSIS AND CONCLUSIONS

The primary undercurrent of this thesis is making connections between things that have more in common than is readily recognized. Starting with the overarching concepts of punishment and race and ethnicity, it is the goal of this study to gain a deeper understanding of how these constructs work together within the framework of the War on Drugs and the War on Terror. This chapter is laid out in such a way as to address the two major conclusions reached from an examination of the data. The first section addresses the process of white fear, racialization and dehumanization that opens up the way for excessive punishment. It builds a bridge between the way American conceptions of justice operate in both the national and international arenas. The second sections deals with the implications of conducting wars against an idea and how their indefinite nature creates a situation where power becomes increasingly concentrated in the hands of a small group of people thereby paving the way for unchecked abuse. The final two sections consider the way torture and excessive punishment have become a part of the paradigm of the administration of American justice.

Limiting Personhood

At the core of this inquiry of punishment and its relationship to race and ethnicity are people. These people are trying to carve out the best possible existence for themselves

people as evil further serves to dehumanize them, creating a greater space in which civilian casualties will be publicly accepted.

Human Rights

Human rights concerns have plagued the War on Terror.[146] In a very basic sense, anytime a war is going on, human rights are often set aside as time and resources are channeled into security concerns. On a deeper level are the international laws that govern conduct during war. The central human rights concern that has emerged out of the War on Terror is the treatment of those detained by the US military in connection to September 11th. Fundamental to this discourse is the balance between national security and human rights. To what lengths is it permissible to go to ensure security? What freedoms and rights should be sacrificed in the interest of preservation of the state? It is a line with citizen on one side and state on the other. As previously note, in times of war there is strong inclination to put the state first. The reasoning goes that the fall of the state would also mark the fall of the individual. If this happens then there are no longer rights to preserve. Most would agree with this, to an extent. It is in this conversation regarding the state and individual that tension emerges with the concept of inalienable rights.

Human rights discourse is built around inalienable rights – the idea that each individual is endowed from birth with rights that, under no circumstances, should be violated. These rights are universal; they know no boundaries or limits. In response to the unconscionable acts committed during World War II, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in December of

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[146] Weiss, Thomas; Crahan, Margaret E. and Goering, John. 'The Serendipity of War, Human Rights, and Sovereignty.' In *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy.* Thomas Weiss, Margaret Crahan, and John Goering, Eds. New York: Routledge, 2004. pp. 3-4.

1948.[147] The Declaration, though not legally binding, is meant to serve as a guidepost, the standard by which actions are judged. Because it is not legally binding, it relies primarily on moral suasion as a tactic of enforcement. There are however, legally binding statutes prohibiting torture and ill treatment of prisoners or detainees. According to Human Rights Watch, "International and U.S. law prohibits torture and other ill-treatment of any person in custody in all circumstances. The prohibition applies to the United States during times of peace, armed conflict, or a state of emergency."[148] The Geneva Conventions, ratified by the US in 1955, serve as the major source of international law overseeing the treatment of detainees. Domestic law, most of it pertaining to the armed forces, serves roughly the same purpose. According to the Geneva Conventions:

> Torture or inhuman treatment of prisoners-of-war (Geneva III, arts. 17 & 87) or protected persons (Geneva IV, art. 32) are grave breaches of the Geneva Conventions, and are considered war crimes (Geneva III, art. 130; Geneva IV, art. 147). War crimes create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. This obligation applies regardless of the nationality of the perpetrator, the nationality of the victim or the place where the act of torture or inhuman treatment was committed (Geneva III, art.129; Geneva IV, art. 146).[149]

Under these stipulations then, the rights of prisoners are clearly defined along with the role of the US, or any other state for that matter, in respecting them. The Geneva Conventions are often called on more frequently than the UDHR because of their legally binding status.

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[147] Ross, James. 'A History of Torture.' In *Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights*
    Perspective. Roth, Kennith and Worden, Minky, Eds. New York: New Press, 2005. p. 15.
[148] Human Rights Watch. *Summary of International and U.S. Law Prohibiting Torture and Other Ill treatment of Persons in Custody*. Online 2 December 2005.
    http://www.hrw.org/english/docs/2004/05/24/usint8614.htm
[149] *Ibid*.

All of this has become of greater significance as the US has been detaining more and more individuals in connection with terrorism. Most of these suspects are being held at the military base at Guantanamo Bay, Cuba for questioning and/or detention while, ostensibly, awaiting trial. Since its opening as a space for detention, allegations of torture and mistreatment have been leveled against the Bush administration for practices concerning the prisoners being held there. Most of them have not been allowed access to attorneys, many have not been charge with any crimes and are being held indefinitely without trial, and there is significant evidence that torture has been used in efforts to extract information from them. How then, with legal and moral principals that clearly prohibit such measures, is the Bush administration allowing this to happen?

Extralegal Space: How Guantanamo Stepped Outside the Law

> *Asif and I were taken on the first plane. We did not know where we were being taken. I was not allowed to use the toilet, or given any food, extra clothes or water. Throughout this time we still had the hoods on which made the experience even more terrifying. The plane itself was I believe a large cargo plane. It had hooks on the floor and they sat us down attaching each of us to some form of metal belt. The belt was then attached to a chain on either side and also padlocked to the floor. Because our hands were tied behind us and our legs were still tied in plastic cuffs, we had to keep our legs straight out in front of us. In normal circumstances this position would have been very difficult to maintain for any length of time. Given that I was extremely weak and that I was suffering from dysentery, dehydration, hunger and exhaustion it was impossible to maintain this position for more than a few minutes at a time. If however I leant back or tried to move, I would be struck with a rifle butt. These blows were not designed to prevent us from falling back or to adjust our position, they were meant to hurt and punish us – Shafiq Rasul[150]*

This is the manner in which Shafiq Rasul made the 18 hour trek from Afghanistan to Guantanamo Bay. Like many others, he has been held in a detention center outside

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[150] Ahmed, Rhuhel; Iqbal, Asif; and Rasul, Shafiq. Composite Statement: Detention in Afghanistan and Guantanamo Bay. 4 August 2004. Online, 2 December 2005.
http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23July04.pdf

Kandahar where he was subject to horrific conditions, intimidation and abuse before being transferred to Guantanamo. In 2001 Rasul and his companions, Asif Iqbal and Rhuhel Ahmed, had traveled from their home in Britain to Pakistan for a wedding. With the war breaking out in Afghanistan, they crossed the border in hopes of lending aid to those in need. Instead, they were swept up by the US armed services along with hundreds of others and shipped off to detention centers. None of these men are or ever were terrorists. Nor did they have any connection to them whatsoever, yet they have been held and tortured at Guantanamo without access to legal assistance. It is likely that the only reason they were released is because first, they are from England and second, their families found out what had happened to them and were able to find legal representation.[151]

Ahmed, Iqbal and Rasul are lucky in that they were released. It is unknown how many hundreds of other innocent men, some of them minors, languish there today. "The evidence suggests that large numbers of the Gitmo prisoners – running into the hundreds – were absolutely innocent of the least involvement with anything that could reasonably be described as terrorist activity. They ended up in Cuba as a result of military intelligence screening procedure in Afghanistan and elsewhere that were flawed and inadequate…"[152] The pattern that emerges from a study of Guantanamo points to negligence in screening processes, despicable living conditions, and inexperienced and poorly trained interrogators.

Prisoners arriving at Guantanamo's camp X-ray were housed in dog cages where they were directly exposed to the elements. They had to be escorted in shackles by

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[151] Rose, David. *Guantánamo: The War on Human Rights.* New York: New Press, 2004. pp. 1-15.
[152] *Ibid.* p. 9

Military Police (MP) officers to use restrooms. Military Intelligence (MI) officers who handled questioning of detainees were often poorly trained and inexperienced, rendering them ineffective and making way for them to cross the line into torture and mistreatment. Dogs, stress positions, exposure to loud noise for extended periods of time, sensory and sleep deprivation, 24+ hour interrogation sessions, physical and sexual degradation, and religious discrimination are but a few of the tactics used to 'break' prisoners.[153] Most people read about these things and wonder how the world's most powerful country, the one seemingly the most concerned with the spread of freedom and democracy, would resort to torture. What benefit are Americans getting out of all of this? Does torture make America, the world a safer place?

Engaging in any discussion of the permissibility of torture should begin with the reminder that torture is explicitly forbidden, in all circumstances, by both international and domestic law. Freedom from torture, cruel, inhumane or degrading treatment is a basic, inalienable human right. Conversations about torture frequently center on the idea of a const-benefit analysis. Presumably the 'justification' for the use of such techniques is that suspects have information that will lead to the thwarting of another terrorist attack. The number of lives saved justifies the means.[154] Assuming, for just a moment that this were true, how does one know who has such information and who does not? Guantanamo is a case in point. The few that have been released were innocent individuals who experienced torture, and there are presumably hundreds of others still there experiencing the same. If in fact the US is torturing innocent individuals to extract information from

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[153] Ratner, Michael and Ray, Ellen. *Guantánamo: What the World Should Know*. White River Junction: Chelsea Green, 2004. pp. 39-49.
[154] Levinson, Stanford. 'Contemplating Torture: An Introduction.' In *Torture: A Collection*. Stanford Levinson, Ed. Oxford, Oxford U.P., 2004. p. 24.

them could this not create more dangers to the lives that are being protected by such means? Torturing innocent people can lead to false confessions and thus, faulty intelligence that may ultimately put service men and women at greater and unnecessary risk. It also opens up the possibility for legal action to be taken against the tortures as well as the government, which diverts time and resources away from legitimate security concerns. Finally, it may create more enemies of the state then it thwarts. After an innocent individual has been tortured then released, who is to say another terrorists has not been created? In the same vein, as people around the world see the US government engaging in such actions, many who previously supported us may walk away, while others who were sitting on the fence may be pushed over the edge to become outright enemies. To be sure, "The unjust suffering of families and individuals engendered by this aspect of Operation Enduring Freedom is sowing dragons' teeth, turning moderates into fanatics determined to smite the West."[155] It has already been made clear that a significant number of the detainees being held at Guantanamo are innocent, so in this situation, a cost-benefit analysis is relatively useless. For the sake of argument though, we will continue down this line of inquiry just a few steps further.

When Guantanamo first opened as a detention center for suspects in the War on Terror it was under the control of Brigadier General Rick Baccus. The MP's and MI's that were working in the camp were having a difficult time balancing their interests. For the MP's, it was clearly illegal for them to mistreat prisoners. The MI's however, felt that their job was being made more difficult because the MP's were coddling prisoners. Donald Rumsfeld, US Secretary of Defense, was dissatisfied with the amount of 'actionable intelligence' that was coming out of the camp and decided in November 2002

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[155] Rose. p. 12.

to relieve General Baccus of duty as a result of his apparent leniency. He was replaced with Major General Geoffrey Miller who was known for his harsh techniques. Under his tutelage, the line between MP's and MI's was blurred and he brought in psychologists and cognitive scientists to help 'break' the prisoners. It was during this time period that Rumsfeld authorized the harshest interrogation techniques ever used by the US. Despite these 'improvements' under General Miller, no new intelligence was being generated.[156]

The efficacy of torture as a means of collecting information has been debated though most would agree that it is, more often than not, ineffective. Quoting an expert on the subject, Stanford Levinson reports, "pain alone will often make people numb and unresponsive. You have to engage people to get into their minds and learn what is there."[157] He goes on to say though that there is no way of ever effectively studying the topic with any statistical accuracy. What must be relied on then is experience, and what we have seen at Guantanamo on this subject does not necessitate further explanation. "Meanwhile, if Guantanamo has provided but a few meager scraps of information, it has also become an icon of oppression throughout the developing – and especially the Muslim – world."[158] Returning to the idea of cost-benefit analysis, it becomes clear then that torture is not worth the risks, morally, politically, or practically, that it poses.

The next question that must be asked is how the US has managed to create a situation in which it has sidestepped the law. The short answer is that US officials have rewritten legal theory to carve out legal space for torture, mistreatment and indefinite detention. The first way the administration went about doing this was through discursive

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[156] Frontline. *The Torture Question*. Aired on KET on 25 October 2005.
[157] Levinson, Stanford. 'Contemplating Torture: An Introduction.' p. 33.
[158] Rose. p. 11.

and those they claim as their own. Whether they are right or wrong, effective or ineffective, is not the issue. What is paramount is their humanity and that, somewhere along the way, it has been diminished.[170] As we shall see shortly, this is the case for all parties involved. The process of dehumanization starts with people, both individually and collectively.

Returning momentarily to Hobbes, we might recall that the main factor driving people into a political order is fear of death.[171] Implicit in life is the instinct toward survival. In a Hobbesian state of nature, every person is fighting against every person and thus no one is, at any point, without the threat of eminent death. By entering into a political order, the first duty of the state is to protect the individual from others. In this sense, fear drives social and political relationships. By entering into a contract with the state and with other citizens, the fear of death is theoretically mitigated. When the state fails to do this and/or members of the society refuse to live by the rules it lays down, punishment becomes the extension of the power and authority of the state. Thus there exists a critical relationship between fear and punishment. Out of the desire to diminish fear, people deal with those who excite their fears through punishment.

Fear is not limited only to physical harm or death. Moreover, loss of a way of life and its attendant privileges is a sub-text of the discourse of fear. It can also be fear of a loss of power, control and/or status. This fear will be termed 'social fear' and most often works in conjunction with fear of physical harm. When considering the War on Drugs

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[170] Human rights are based on being included as a member of the human race. As people's humanity is undercut, so too are their human rights.
[171] Hobbes, Thomas. *Leviathan*. 1668. Indianapolis: Hackett, 1994. See also discussion of Hobbs in Chapter 2.

and the War on Terror and their respective relationships to black and Arab/Muslim men, both levels of fear are operative.

The War on Drugs relies on a discursive construction of the dangerous black male drug dealer and the threat he poses to the community at large through the destructive power of the narcotics he pushes and the violence he is apparently willing to employ to achieve his ends. "The public's perception's that crime is violent, Black, and male have converged to create the *criminalblackman*. By itself, this mythical criminal Black figure is scary enough. However the figure has become ominous because we do not have anything to compare it with. There is no *criminalwhiteman*."[172] The presence of one figure but not the other automatically racializes crime and perhaps more importantly, the fear of crime. Though white people are committing more crimes than blacks, it is black men who are vilified, demonized and feared as the most common perpetrators.[173] It becomes clear here the significance of the white normative standard or unmarked category of whiteness. By constructing black men as the criminal other, the realities of white criminal activity become quietly overshadowed and public perceptions shift to emphasize the often inaccurate relationship between race and crime.[174]

Beyond the most obvious manifestations of fear lies a subtext of social fear. The drug dealer represents, not only the plague of drug addiction, but also the failure of capitalism, the availability of alternative means to wealth, the repercussions of slavery, and the centuries of white racism and supremacy. He is what the Civil Right Movement

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[172] Russell, Katheryn K. *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions.* New York: New York U. P., 1998. p. 114.

[173] See discussion of whiteness and white privilege in Chapter 2.

[174] While the most obvious negative manifestation of the linking of race and crime is disproportionate minority representation at all levels of the criminal justice system, it also perpetuates racism generally. If people of color are thought criminals, society at large is less likely to be sympathetic or lend a helping hand in other ways to all people of color, regardless of their criminal history. The *criminalblackman* Russell refers to comes to represent all black men, not just those who actually commit crimes.

failed to accomplish and is a product of America's misrepresentations of equality. Dealing humanely with the drug dealer would mean confronting the truly destructive forces of racism and classism, a task that would require a complete restructuring of American society. The drug dealer is feared not just because of the physical fear he inspires, but also because of the social implications of what he represents. He is not just a physical threat but a challenge to the dominant American narrative of justice and equality for all.

In a similar sense, the image of the black male drug dealer is also one of rebellion. He did not have the same opportunities for success as some of his white counterparts, yet he was still indoctrinated by capitalist consumer driven culture. At once he was taught that what he should want (material success) yet at the same time, that he could not have it. For him, the American dream was dangled before him just out of reach. In the face of this paradox, he stepped outside the system and what he couldn't achieve through established means, he achieved through the drug economy that sits outside the regulated economy. Where society left him without opportunities, he rebelled and created his own. The drug trade is a form of rebellion against the established capitalist system. It is a rebellion against poverty and the institutional structures that perpetuate its existence.

This is not to glorify the drug dealer for he is neither the hero nor the victim. He is part of a complex web of social, political, economic, cultural and psychological factors that make him feared by dominant society. This study does not seek to ascribe any moral value to who is or is not. Rebellion is, of course, not the only thing represented in the image of the black drug dealer. It is however, one of the elements that inspires social fear in mainstream society.

Fear operates in similar ways in regard to the War on Terror and the Arab and Muslim men that have come to represent it. In the aftermath of September 11th Americans were afraid that they were in constant danger of attack. That crowded place, mass transit systems, tall buildings and other highly trafficked areas were prime spots for bombings and/or chemical or biological attacks. Potential terrorist attacks constantly occupied the collective imagination and all brown skinned men became suspect. For a few, the regrettable acts of September 11th represented failed American foreign policy, cultural imperialism and the emergence of a global capitalist system that has continuously undermine local cultures. For most, September 11th was yet another reminder of the necessity for hard-line defense policies and justification for unilateral action and moral righteousness. As terrorists (Arab men and Muslims) came to be characterized again as sneaky, dangerous animals, and as ambiguous color-coded terror alert levels dominated the news media, mainstream fears grew without restraint and perhaps with encouragement.

A culture of fear thrives on people's ignorance and misinformation. It has served as a convenient means of social control. Fear of drugs and drug dealers keeps the black community internally divided and segregated from whites.[175] Fear of terrorist attacks has allowed for the violation of constitutional guarantees on individual privacy and the unraveling of civil liberties in the face of national security concerns. In a different way fear has been mobilized to silence people. Those who critique or question government action and policy are labeled as unpatriotic traitors in a way that echoes the persecution of Communists during the McCarthy era. Some of those voices become quiet for fear of

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[175] Glassner, Barry. *The Culture of Fear*. New York: Basic, 1999. See also discussion in Chapter 2 of the development and implications of a culture of fear.

reprisal. Fear divides people and fosters willingness to submit to requirements and policies that they would otherwise abhor. In other words, fear is an instrument of social control.

Part of the mechanism through which fear of drug dealers and terrorists operates is racial and ethnic 'othering.' In much the same way Said's Orientalism dichotomized the world into the civilized Occident and the sensuous, uncivilized and underdeveloped Orient; processes of othering continue to separate people into classificatory orders.[176] In modern American society a dichotomy is already operating that labels middle class white culture as the normative standard of what it means to be American. Black and brown people are the 'others.' At the center of this discursive construction are "what one might term 'culturalist' accounts of the alien other – accounts that assumed offenders had been born into the 'dependency culture' of the 'underclass', that they lacked all work skills and moral values, and that they were tied into habits of drug abuse, crime, and welfare fraud. In these accounts, the reality and humanity of individual offenders is replaced by an imagery that comes from horror films..."[177] Not only does that 'other' sit outside the bounds of mainstream society but he is also marked bad, evil and/or less than human. Some groups of 'offender others' are thought to be American, but only as marginalized sub-groups, while others, like recent immigrants, are not thought to be American at all regardless of their citizenship status, pushing them even further toward the periphery of the social order. Constructing groups of people as 'others' separates them from society at large. They become one step removed and their differences rather than similarities come

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[176] See Said, Edward. *Orientalism*. New York: Vintage, 1978. See also discussion in Chapter 2 of the process of 'othering.'
[177] Garland, David. *The Culture of Control: Crime and Social Order in Contemporary Society*. Chicago: U. of Chicago P., 2001. p. 136.

to define them. As Bandura's model of moral disengagement points out, diminishing or diluting people's human qualities opens up the door for excessive punishment.[178] Constructing black and Arab/Muslim men as racial 'others' calls into questioning their humanity. While simultaneously being labeled dangerous criminals, the severity of punishment meted out to these groups increases.

The racialization of criminality is further complicated by its wider repercussions. Images of the black criminal and the Arab terrorist come to apply not just to criminals and terrorists. With their prevalence in the media, they become signifiers for all black and Arab/Muslim men in the public consciousness. In this way, black and Arab/Muslim men come to be racialized as criminals and terrorists, objects to be feared. Their status as the other is the first step away from their humanity, their criminality is the second.

According to Bandura's model, once dehumanization has occurred, anything becomes justifiable. In the two cases being examined in this study, the processes of racial/ethnic othering coupled with constructed criminalities leave black and Arab men particularly vulnerable to human rights violations. People of color are, of course, not the only to suffer at the hands of the American justice system, but they certainly make up the vast majority. This could be the result of two things: 1) people of color are more prone to crime or, 2) there is institutional racism operating within the system. As to the first explanation there are particular crimes for which people of color offend at higher rates. There are, similarly, certain crimes that whites are more likely to commit. Saving a discussion of the social factors leading to this discrepancy for another time, we can suffice to say, overall, people of color are no more prone to criminal activity than whites.

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[178] Bandura, Albert. 'Moral Disengagement in the Perpetration of Inhumanities.' *Personality and Social Psychology Review*. 1999. Vol. 3, No. 3, pp. 193-209.

As to the second point, previous chapters have demonstrated the presence of institutional racism, albeit the degree is arguable.

If the 'punished' tend to be people of color, then it is also critical to address the punisher as well. US decision making structures are, by and large, in the hands of an elite class that is primarily white and male. They occupy most upper level positions in government, business and the military. They are the power brokers and have the tangible capacity to influence the lives of many. Not surprisingly, their interests tend to dominate social policy and when the ruling imagination is trying to cope with crime among a population of people who they see as less than human, human rights issues are bound to arise.

As Bandura alludes, there are multiple levels in the institutional structure of punishment. At the top major officials hand down orders and make policy decisions. Then, the intermediaries, who relay commands from the top to the bottom, oversee routine operations within the institution. Finally, there are the people on the ground that carry out the daily operations of punishment; these are the prison guards, the M.P.'s and M.I.'s who deal with prisoners on a day-to-day basis.[179] When discussing violations of prisoners' rights much of the conversation has centered on who is at fault. As allegations of torture in Guantanamo have come out, upper-level officials claim that the problem is nothing more than a few 'bad seeds.' The low-level officers who were the physical purveyors of abuse claim that they were carrying out orders from above and that the abuse occurred under the auspices of institutionally sanctioned policy. This is a prime example of what Bandura described as the *displacement and diffusion of responsibility* stages of moral disengagement. By laying the blame across a number of different

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[179] Frontline. *The Torture Question*. Aired on KET on 25 October 2005.

positions, the fundamental issue (that prisoners are being tortured) becomes overshadowed and the perpetrators have a window of time in which the public then loses interest.

For some, it is perhaps easy to see the perpetrators of abuse as monsters themselves, but it is critical to understand the psychosocial role they play as well. As much as their willingness to commit human rights violation against others is a mark of the dehumanization of those being punished, is it not also taking away some of their humanity as well? An excellent topic for further research would be how being in the role of the punisher has effected them. Some of the people who participate in this activity are probably in some way antisocial and may exhibit some psychotic tendencies. It is likely however that many more are enacting and performing physically prevailing hegemonic ideologies.

The distance between the decision makers and those who carry out the decisions speaks to the divide between varying levels in the hierarchy of authority. In other words, few of the wealthy, well-educated elites are clamping on the electrodes or shocking prisoners. More often than not, those engaged in torture are socially marginal and economically disenfranchised. In many ways, they may in fact have more in common with the people they are punishing than those they are working for. Adding to this complex scenario of the seeming connectedness between the punished and the punisher is that many of latter are also people of color.

In the end, this process of dehumanization and excessive punishment leaves us with the question: What is really being preserved in the process? In theory, punishment is a way of regulating behavior that is destructive, both physically and ideologically, to the

state. As it pertains to physical safety, at a first glance it would seem as though keeping people removed from society at large would prevent further violence. Digging deeper though, there are many more dimensions to this claim. As has been often argued throughout the War on Terror, Guantanamo has become a symbol throughout the world of American cruelty and hypocrisy. If we are torturing civilians and soldiers from the 'other' side, what can we expect when our own soldiers are detained? Is torture making Americans safer, or is inspiring greater outrage throughout the world that will ultimately lead more people to join militant anti-US movements? In the same vein, is locking away criminals with a bunch of other criminals, then removing access to housing, jobs and education once they are released really doing anything to reduce crime within the US?

Ideologically, America claims that it is fighting to preserve concepts of liberty, democracy and freedom. Yet the methods being employed in the War on Terror and the War on Drugs threaten to undermine these values. Though this study cannot directly answer these questions of efficacy, it is important that they be posed. Sound policy considers not just the end results, but how to achieve it and the collateral consequence of each method.

The experiences of black men in the American criminal justice system and the experience of the Arab and Muslim men being held in Guantanamo Bay represent a cycle of fear, racial/ethnic othering, dehumanization, and human rights violations. Operating on many different levels, this cycle is a complex web of interweaving political, cultural, economic, and social forces that have allowed the United States to perpetrate abuse against its citizens and those in its custody. Rhetorically, Americans like to consider themselves the purveyors of freedom, democracy, and equality around the globe, but as

the cases of the domestic criminal justice system and the military justice system demonstrate, the US is little better then many other nations and, in some respects, may even be worse. As the most powerful country in the world – indeed the only superpower - the US has a responsibility to set and enact high standards of respect for human rights and the law. When it fails to uphold these basic principals, it can no longer claim ideological legitimacy.

Wars on Ideas: Ideological Spaces of Boundlessness

The War on Terror and the War on Drugs are both wars on geographically ambiguous, globalized non-state, non-human actors. The problem with a war against something so undefined is its temporal limitlessness and spatial expansiveness. How do you know if it has been won? Is it over when drugs are eradicated or when drug addiction is eradicated? Is the war against all drugs or just some and if so which ones and why? Is the War on Terror over when terrorism disappears? Can terrorism even disappear? For that matter, what is terrorism? For the US government, terrorism is illegitimate attacks carried out by non-state actors. For others though, terrorism is a legitimate form of warfare. Some would even consider the War on Terror a war on war (terrorism). States have the capacity to air their grievances through official channels like the United Nations and if they cannot be reconciled they have militaries and laws governing actions in battle. Terrorism is warfare for those who do not have the ability to work through diplomacy and do not have the state infrastructure and military capacity to wage traditional warfare. The question then becomes what is legitimacy and who gets to decide what is legitimate warfare and what is not? Since terrorism can theoretically encompass a multitude of

actions, the US government, as well as others around the world, can appropriate the term 'terrorism' for any political end. At this point, almost any aggression could fall under the definition of terrorism because ultimately, terrorism was very loosely defined to begin with. Leaving it that way gives excessive latitude to political leaders to justify any aggression under the umbrella of combating terrorism.

What emerges from a war on ideas is first, a war that has no end and second, an ambiguously defined enemy. Traditional wars go on until one side accepts defeat or a formal cease fire is issued. This is effective because of the organized and relatively uniform manner in which traditional warfare is conducted. In the case of the War on Terror, since terrorism has no central command, definite goal or ideological unity, there is no point at which it can be 'defeated.' This is especially true when there is so little consensus about the ultimate goals of the campaign.

So should the US do nothing to combat terror? Of course not, but the actions taken should have a direct impact on the terrorist cells that have been responsible for attacks carried out or direct threats against the US. Furthermore, a war, particularly not one as open-ended as the War on Terror, should not be a reason to suspend human rights or constitutional protections.

In a similar sense, the War on Drugs has no apparent end. This case is even more ambiguous than the War on Terror which at least resembles warfare in so far as it involves combat situations. The War on Drugs is against a substance, its global trade, consumption, and negative social impact. The political implications of this system are far reaching. The international drug trade is a vast network of players ranging from government officials to powerful leaders of organized crime to low level drug-pushers to

the addict seeking to feed his or her habit. Further complicating matters are differences in drug laws and the capacity for enforcement across international boarders. In the US, as we have seen, the War on Drugs has had significant collateral consequences for the black community. It has been at once an attempt to pull primarily black inner city neighborhoods out from under the weight of drug problems as well as a means of social control. The prevalence of drug use in the US and throughout the world speaks to the unlikelihood of drug use ever being eradicated, so at what point is the problem in great enough control to allow the 'war' to end?

Part and parcel of war is the extension of wartime powers: increasing executive power and a corresponding diminishing of legislative power and constitutional protections. With this concentration of power also comes the danger of gross civil and human rights violations as it marks a suspension of a large number of the checks and balances built into the American democratic system to prevent the abuse of power. It is too easy for wars on ideas to become a convenient cover under which politicians can wield their increased wartime powers to achieve personal political gain with little room for accountability. In short, it opens the door to corruption.

In a war on ideas the problem of the enemy is equally contentious. In the War on Terror, clearly the terrorist is the concrete enemy and the ambiguity of who the 'terrorist' is has been addressed. That leaves the idea of terrorism itself to contend with. Not entirely different from the drug dealer, the 'terrorist' represents a thorn in the side of US power. For many years the US has coped with embassy bombings overseas, but when the 'terrorist' threat strikes the financial capital of the world and the Pentagon, suddenly they exposed weak links in security. The 'success' of the attacks of September 11th are not just

an ideological threat to US cultural and capitalist imperialism and national security, they become a meaningful threat to what the US stands for ideologically. September 11th was not just a tragedy because of the loss of life, it was also embarrassing that a group which the US government had previously failed to give any legitimacy was able to strike such a devastating blow. In this sense, the enemy is both the terrorist and the idea of terrorism.

In short, the fundamental political problem with wars on ideas is one of definitions. The boundlessness of an undefined war creates a situation that fosters similarly boundless extensions of the powers of leaders. As we have seen in recent years, the War on Terror has been a constant excuse for everything from indefinite detention of 'enemy combatants' to torture to illegal spying and wiretapping of US citizens. The War on Drugs has been an excuse for the expansion of police powers, racial profiling, extraordinarily harsh punishment and social control, particularly of poor black males. Dealing effectively and accountably with a threat means having a clearly defined plan of action that takes into account collateral consequences, human rights, and an attainable goal. Both the War on Terror and the War on Drugs have neither of these and are thus highly prone to corruption.

Spectacles Behind Closed Doors: The United States, Torture and Human Rights

In *Discipline and Punish* Foucault takes the reader from a time when the primary site of punishment was the body and it took place in the public area, to a time when punishment was directed at the mind and regulated body and it was located in institutions designed for that propose away from the public gaze. The cases explored in this study have demonstrated an intermingling of these two approaches to punishment where those

being punished are at once hidden from public view, yet the public knows just enough about what punishment entails that they effectively fear it.

For Foucault, punishment became more humane over time as it became less about physical pain and more about rehabilitation or regulation, or the structured discipline of the body.[180] Since the publication of *Discipline and Punish*, punishment has become less rehabilitative and more punitive, at the same time becoming more physical. An important question concerns the extent of punishment of the mind. In other words, does torture only entail the physical? By current international human rights standards, torture, cruel and/or inhumane treatment includes acts that cause mental anguish. Thus the absence of physical pain does not mean that punishment is necessarily humane. Locking someone in solitary confinement for 23 hours a day or leading them to believe that they are about to be attacked by dogs does not cause direct physical pain but clearly falls under the definition of torture.

Punishment continues to take place behind closed doors. It is no longer a public spectacle. Instead punishment has become a spectacle of the imagination. Few people have been allowed inside Guantanamo, yet enough photos and stories have escaped that most informed people have a pretty good idea of what is happening there. In a similar sense, civilians are not often allowed inside US prisons, especially control units, but many are generally familiar with prison conditions. The invisibility of the spectacle of punishment allows officials latitude in their treatment of prisoners while maintaining an official appearance of proper treatment. In the meantime, the threat of punishment theoretically instills enough fear in the general population that they make efforts to avoid

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[180] Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. 1975. New York: Vintage, 1995.

it. In this way, torture can sit beyond the reach of the law, but still retains its intended consequences.

The Universal Declaration of Human Rights contains seven Articles that pertain directly to punishment. The first, Article 5, states that, "No one will be subject to torture or to cruel, inhuman or degrading treatment or punishment."[181] It is clear from the case studies presented that the US government has repeatedly violated this right both in the domestic corrections system as well as in Guantanamo bay with prisoners of the War on Terror. Article 6 states that, "Everyone has the right to recognition everywhere as a person before the law." As a result of the suspension of habeas corpus and the failure to bring to trial and in some cases charge detainees in Guantanamo with a crime is a violation of the right to recognition before the law. The prisoners at Guantanamo are suspended in a legal vacuum with no recourse despite the Supreme Court's decision to the contrary. Article 7 states that, "All are equal before the law and are entitled to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination." Theoretically then, justice systems are supposed to operate blindly. The case of racial disparities speaks to the ineffectiveness of the American criminal justice system to carry out its intended consequences and its responsibilities to those who come before it. Similarly, it is hard to comprehend how some prisoners of war are granted recognition before the law, yet the prisoners of the War on Terror remain essentially invisible to the law. Detainees at Guantanamo are apparently not entitled to the law at all much less to

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[181] United Nations. *Universal Declaration of Human Rights.* Adopted 10 December 1948. Online 23 February 2006. http://www.un.org/Overview/rights.html

equal protection. This is even further aggravated by the fact that this principal is not only in the Universal Declaration but is also embodied in the Constitution of the United States.

Article 8 says that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law." The Bush Administration's attempts to cut off access to the US court system to detainees in Guantanamo are a flagrant violation of this right. In the domestic system, the difficultly of filing and proving racial profiling and other claims of racial injustice also fall under Article 8.

Particularly poignant in the case of Guantanamo is Article 9 which states that, "No one will be subject to arbitrary arrest, detention or exile." Given the fact that many detainees are being held without charges and in light of the ineffective methods used in the screening processes that brought many of them there, it is not difficult to determine that those arrests and detentions are 'arbitrary.'

Article 10 speaks to the right to fair trials when it states, "Everyone is entitled in full equality to a fair and public hearing by an independent and competent tribunal, in the determination of his rights and obligations of any criminal charge against him." In the case of the domestic criminal justice system, this issue becomes problematic in terms of access to effective legal representation and fair jury selection. Although *Gideon v. Wainwright* guarantees council to anyone charged with a crime regardless of their ability to pay under the due process clause, it is frequently rendered meaningless as a result of the poor quality of public defenders. Overworked and underpaid, public defenders are unable to give the same level of legal council as a private attorney could. In this sense, a significant number of public hearings that take place in the US are not fair, a problem that

disproportionately affects black men. Also important to a fair trial is an impartial jury of ones' peers. Juries have relatively few black jurors and many of those who make it to jury selection are struck through preemptory challenges. These are as much violations of the US Constitution and American jurisprudence as violations of Article 10 of the Universal Declaration. Article 10 is also of concern for those who will eventually face trial at Guantanamo. Instead of using the court system already in place, the Bush Administration has decided to conduct special military tribunals for detainees that raise significant due process concerns, especially in cases that could result in the death penalty.

Finally, Article 11.1 states that, "Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense." Lack of council is one of the obvious problems that falls under this article. Of particular significance to the Guantanamo tribunals is that defendants are being prevented from seeing all the evidence against them and are thus unable to prepare effective defense. Indefinite detention implicitly assumes guilt. Finally, the Guantanamo trials are slated to be completely closed to the public with gag orders on everyone involved. If wrongdoing occurs, there will be no recourse under the system in its current incarnation.

Punishment as handed down by the US has come to take on a paradoxical position of both secrecy and publicity. An examination of the parts of the Universal Declaration on Human Rights on punishment reveals that, at every step of the way, the US is in violation. Paramount to effective rule of law is the operation of a fair justice system. Without it, the law becomes meaningless and respect for the rule of law is replaced by fear of tyranny.

American Justice

Race, ethnicity, and the American Justice system have a long and sordid history. Clearly, improvements have been made from the days when blacks were not legally recognized as people, but there is a long way to go. The problems plaguing the domestic criminal justice system show improvement overall, but with a new conservative majority on the Supreme Court, there is danger of sliding backwards instead of making imperative progress. Globally, the Bush Administration's complete disregard of international and domestic law when dealing with the detainees in the War on Terror has dealt a serious blow to America's reputation in the international arena and with its mission to spread democracy.

Although the experiences of black and Arab/Muslim men take place under somewhat different circumstance and have different meanings within their unique contexts, the similarities between the two are striking. Both have experienced the effects of a self-supporting cycle of fear, racial/ethnic 'othering,' attendant dehumanization and excessive punishment. These cases demonstrate that there remain deep seated institutional racial and ethnic biases within the American justice system, making it fundamentally unjust.

This study has concerned itself primarily with the effects of the American justice system on black men domestically and Arab and Muslim men in Guantanamo, but a more exhaustive study might also include Abu Ghraib in Iraq, Bagram in Afghanistan, the emerging information on the secret detention centers scattered throughout Europe and the Middle East as well as the effects of the domestic criminal justice system on other

minority groups. Another interesting dimension to add would be the ways in which gender has effected punishment.

In conclusion, it is unlikely that a day will come in the near future where punishment will vanish from the social fabric. Punishment however, does not have to be a social ill. If humanely constructed and executed, the justice system can serve as a framework through which people can rights wrongs and those who are in need of rehabilitation can receive it. Restoring and reinforcing the humanity of those who come into conflict with the law is the first, and perhaps most important step in making real the promise of justice implicit in American judicial structures.

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CURRICULUM VITAE

Kristen T. Valentine
3802 Benje Way
Louisville, KY 40241
502/802-6033

Education

University of Louisville
Degree: Masters of Arts, Pan-African Studies (May 2006)
          Bachelor of Arts, Pan-African Studies, *cum laude* (May 2004)

Employment History

University of Louisville (Louisville, KY)   2006-2006
Academic Year
Graduate Research/Teaching Assistant, Department of Pan-African Studies
Research Assistant to ACLU of Kentucky Criminal Justice System Reform Project, Guest lecturer, assist with student relations and general classroom business

University of Louisville (Louisville, KY)   2004-2005 Academic Year
Graduate Research Assistant, Center for Educational and Social Policy Research, Department of Pan-African Studies
Grant seeking and assisted preparation, data collection and compilation

Highland Coffee Company (Louisville, KY)   April 2002 – January 2005
1140C Bardstown Rd.
Louisville, KY 40205
502/452-4545
Barista and Shift Leader
Began work as a barista. Was promoted to shift leader. In charge of general store maintenance, preparing drinks, customer service, training and supervising new and old employees, doing bank outs at the end of shifts and closing the store.

Volunteer Work/Internships

American Civil Liberties Union of Kentucky   Summer 2005
Intern with Criminal Justice Reform Project
Researcher, program development and organization

University of Louisville International Service Learning Program   Spring 2004/2005
On site work in Belize, research, service work with women in the Garifuna community,
development of future programs

The Center for Women and Families (Louisville, KY)   Summer 2000
Volunteer with Domestic Violence Program
Worked with children living in the shelter: designed art projects, group activities and
assisted with group counseling. Took on-call shifts for the Hospital Advocacy program:
provided advocacy for victims of domestic violence in the emergency room, documented
cases, provided information (legal and therapeutic) and acted as a support.

Extracurricular Activities

Pan-African Graduate Student Association   2004-2006
President 2005/06 academic year

Awards/Distinctions

The Nancy Pollock Memorial Award for Undergraduate Research   May 2004
       - Awarded to the top graduating senior in the Department of Pan-African Studies

College of Arts and Sciences Dean's Scholar (University of Louisville)   Fall 2001/2003
       - Awarded to students enrolled in 12+ hours who make only "A" grades.

College of Arts and Sciences Dean's List   Fall 2001 – Spring 2004
       - Awarded to students enrolled in 12+ hours who achieve a semester GPA of 3.5
       3.999.