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## Access to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens

### Introduction

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Two trajectories brought us to the topic of the 2011 Access to Equal Justice Colloquium, *Race to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens*. For Adrienne Davis, work with two organizations that were early critics of the prison industrial complex, Critical Resistance and INCITE!, exposed her to the need to create anti-racist responses to violence, including gender violence.<sup>1</sup> Annette Appell's work with poor families in the child

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1. "Critical Resistance seeks to build an international movement to end the Prison Industrial Complex by challenging the belief that caging and controlling people makes us safe." *About Us*, CRITICAL RESISTANCE, <http://criticalresistance.org/article.php?list=type&type=5> (last visited Nov. 22, 2011). "INCITE! works with groups of women of color and their communities to develop political projects that address the multiple forms of violence women of color experience in our lives, on our bodies, and in our communities." *About INCITE!*, INCITE!, <http://www.incite-national.org/index.php?s=35> (last visited Nov. 22, 2011). Davis attended three early conferences sponsored by what became Critical Resistance. Unfinished Liberation: Policing, Detention and Prisons at University of Colorado, Boulder (Mar. 13–15, 1998); Critical Resistance: Beyond the Prison Industrial Complex Conference at University of California, Berkeley (Sept. 25–27 1998); Color of Violence at University of California, Santa Cruz (Apr. 28, 2000).

protection system pushed her to challenge the narrative that places the risk of harm to children in their mothers' bodies, rather than the racialized policies that create and maintain conditions of poverty. For both of us, the question of mass incarceration and the negative state engagement surrounding it is best understood through its gendered and feminist lenses.

Mass incarceration is one of the biggest obstacles to social justice and democratic equality in the United States. This nation leads the world in imprisonment. As Angela Davis contended, the "prison industrial complex is much more than the sum of all the jails and prisons in this country. It is a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and court agendas."<sup>2</sup> Other developed states use social welfare policy to develop citizens' capabilities, which increase their employment and life prospects. In stark contrast, the United States has evolved a fairly permanent underclass, which does not have access to the basic capabilities necessary to enjoy even a working-class existence. In addition, faced with the choice to classify the 1980s rise in drug addiction and expansion in illegal drug markets as either a public health or criminal crisis, the United States consistently opted for the latter. Understood in this light, the solution was clear and immediate: incarceration. This policy was part and parcel of the emergence of the prison industrial complex, which has transformed the American political economy.<sup>3</sup> Much noted are the racial aspects and effects of mass incarceration, which has decimated communities of color across class and region.<sup>4</sup>

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2. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003). She and others call for "decarceration" and an abolitionist movement to target the prison system. *See also* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 19–48 (2005) (interview with Angela Davis exploring the role of prisons in her critiques of American democracy).

3. *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *supra* note 2, at 12 ("[A]s the U.S. prison system expanded, so did corporate involvement in construction, provision of goods and services, and use of prison labor. Because of the extent to which prison and building and operation began to attract vast amounts of capital . . . in a way that recalled the emergence of the military industrial complex, we began to refer to the 'prison industrial complex.'").

4.

What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of

The war on crime and its solution, incarceration, targets urban and rural, poor and working-class communities, and even middle-class communities of color have not been exempt.

For this intellectual inquiry, we chose black feminism as our lens. We decided to approach this phenomenon through a gendered lens for several reasons. First, mass incarceration has deeply gendered effects that cannot be understood as purely racial products. It affects men of color as *men*, and not just as racialized beings. Second, as several of the papers emphasize, mass incarceration has had acute effects on families that black feminist thought is particularly well suited to address.<sup>5</sup> Third, mass incarceration has introduced new forms of sexuality, both risks and desires that require a thick understanding of identity and intimacy. Finally, black feminism is particularly adept at prosecuting the gendered dimensions of power and state violence.

Black feminist thought emerged from the political and intellectual need for systems of thought that could comprehend and interrogate the massive state-sponsored violence against black people enslaved in the New World, including what Angela Davis termed sexual

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colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. . . . As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010).

5. A civil counterpart to these punitive and unhealthy state interventions is the child welfare system through which state child protection authorities scrutinize families (and even women's wombs, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)) and distribute their children to foster families and kin. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171 (2003). This system also intersects with the mass incarceration movement through the state's parenting methods. E.g., *U.S. v. Terry*, 427 F. Supp. 2d 1132 (M.D. Ala. 2006) (finding that the state utilized the criminal justice system to discipline its ward); Thom Reilly, *Transition From Care: Status and Outcomes of Youth Who Age Out of Foster Care*, 82 CHILD WELFARE 727, 729, 736 (2003) (rehearsing studies showing high incarceration rates of former foster children).

terrorism.<sup>6</sup> Importantly, this terrorism was targeted not only at black women, but also at black men as sexual and gendered beings.<sup>7</sup> Black feminism has proven particularly adept at theorizing how the state uses gender and sexuality instrumentally to manipulate, manage, and discipline targeted populations. Hence we chose this analytic lens to comprehend the current interplay of mass incarceration and masculinity.

To accomplish this, we invited two leading black feminist theorists to theorize about this question. Professor Angela Harris has written extensively about the confluence of race, gender, and justice

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In confronting the black woman as adversary in a sexual contest, the master would be subjecting her to the most elemental form of terrorism distinctively suited for the female: rape. Given the already terroristic texture of plantation life, it would be as potential victim of rape that the slave woman would be most unguarded. Further, she might be most conveniently manipulable if the master contrived a ransom system of sorts, forcing her to pay with her body for food, diminished severity in treatment, the safety of her children, etc.

ANGELA Y. DAVIS, *Reflections on the Black Woman's Role in the Community of Slaves*, in THE ANGELA Y. DAVIS READER 111, 123 (Joy James ed., 1998) (originally published in 32–34 THE BLACK SCHOLAR 3, 13 (Dec. 1971)).

7. Davis also observes,

The retaliatory import of the rape for the black man would be entrapment in an untenable situation. Clearly the master hoped that once the black man was struck by his manifest inability to rescue his women from sexual assaults of the master, he would begin to experience deep-seated doubts about his ability to resist at all.

*Id.* More recently, scholars have focused on sexual victimization of enslaved black men.

Like heterosexual relations between white men and black women, sex between masters and male slaves undoubtedly occurred, sometimes in affectionate and close relationships but also as a particular kind of punishment. That we have a handful of documented instances is noteworthy, given the prohibitions against sodomy in early America, the absolute power that owners wielded and that enabled them to keep such moments secret, and the shame that was attached to being sodomized by a master and that could ensure the victim's silence.

Thomas A. Foster, *The Sexual Exploitation of Black Men Under American Slavery*, 20 J. OF THE HIST. OF SEXUALITY, 444, 451 (Sept. 2011); see also DARIECK SCOTT, EXTRAVAGANT ABJECTION: BLACKNESS, POWER, AND SEXUALITY IN THE AFRICAN AMERICAN LITERARY IMAGINATION, 192–93 (2010) (“Homosexual rape, erastes and eromenos, serves as the easy figure for [the model of conqueror and conquered]: it is not only that indoctrination by the dominant culture is like rape but that rape, literal and metaphorical, material and psychological, is the very mode by which black men become black in the terms of white supremacy—that is, they become abjected, they become objects: they become acculturated (which is to say, dominated), in history and in the present as history relentlessly recapitulates itself.”).

in American law and life. One of the most influential scholars in the field, her work documents forces of identity and inequality and how they are regulated by law and culture. Her path-making article, *Race and Essentialism in Feminist Legal Theory*, was one of the earliest and most influential interrogations of essentialism in feminist thought.<sup>8</sup> Professor Beth Richie is one of the leading theorists of the gendered dimensions of incarceration. She has consistently challenged anti-violence movements to confront the effects of their collaborations with the carceral state as well as showing how economic and cultural forces entrap black women into crime.<sup>9</sup> To respond to these two keynote lectures, we invited several emerging scholars whose work, like Richie's and Harris's, is on the cutting edge of race, gender, and sexuality.

This symposium is composed of Professor Harris's keynote essay and the four papers inspired by her and Professor Richie's keynotes. In *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, Angela Harris makes two much-needed interventions into how left/liberals should theorize about justice for victims of hate crimes. First, she questions dominant analogies between violence against sexual minorities and violence against women. Professor Harris notes that the analogy is persuasive at first glance: both have a significant expressive dimension "and the message they send is about domination." This discrimination analysis often turns to the criminal system for solutions: "the message is that the victims of these crimes matter."

Yet Harris deftly demonstrates the limits of discrimination analyses of gender and homophobic violence. She urges that left/liberals abandon the hate crimes approach, which "focuses attention on finding conscious animus against particular identity groups and expects the perpetrator and the victim to be of different groups" in favor of an analysis of such crimes as gender violence, "which sends an expressive message about the gender identity of one or more participants." Such an approach takes account of how

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8. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

9. See BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED, BLACK WOMEN* (1996).

homophobia and misogyny are not parallel but intertwined and mutually reinforcing. It also exposes the ways that straight men can be victims of gender violence and highlights some of the racial effects. Second, she urges that we abandon the criminal system as the sole remedy for social violence. Instead, she encourages the restorative justice lens, which focuses on “healing, repair, and accountability.” Yet, restorative justice does not offer a complete account of social justice, as it is missing an analytic lens for comprehending how race, gender, and class complicate the processes of seeking justice. Professor Harris suggests looking to critical race feminism for the requisite “theory of power and privilege” needed to make restorative justice a full and complete account.

Feminism is in desperate need of an account of social violence that offers a trenchant critique of violence against groups subordinated by gender while simultaneously avoiding collaborating with the carceral state and its war on communities of color. Professor Harris’s paper offers an excellent example of such an approach. She deftly shows how discrimination analysis has captured progressive scholars, leading them to analogize violence against women and sexual minorities. Yet she draws on recent gender theory to show the limits of the analysis. Her lens demonstrates how intertwined these systems of gender repression and violence are. Harris also makes a powerful case for how, “[a]s opponents of structural subordination, feminist and queer advocates therefore urgently need to think beyond criminal justice in their quest for equality.” She moves then from diagnostics to prescriptive solutions, urging ways that critical race feminism can combine with restorative justice to yield a solution that appeals to both desires for justice—ending both gender violence and the prison industrial complex.

Professor Frank Rudy Cooper’s paper, *Hyper-incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire*, responds to and builds on Angela Harris’s opening paper. He adds economic analysis to Harris’s thesis and illustrates how neoliberalism deploys class, the criminal law, and markets to create the conditions for mass incarceration. His paper exposes the artificiality of markets and the not accidental connection between the decline in labor markets and the rise in criminal employment. More concretely, he illustrates the role of law in destroying markets while

creating new ones (e.g., illegal drugs) that in turn lead to both the employment and subsequent incarceration of redundant laborers.

Cooper's paper begins with a gentle critique of Harris's use of the term "mass incarceration" as a too-thin signifier of the phenomenon. Instead, Cooper claims that the incarceration movement is not merely a question of quantity or crime control, but instead a regulatory movement targeted at "certain people" (read poor, black, inner-city men) whom the current economy has rendered redundant. Cooper builds on this insight to develop a "materialist multidimensional masculinities" approach that extends Harris's analysis. Cooper offers the masterful HBO series, *The Wire*, to explain and contextualize the theory that crime, here drug dealing and its regulatory consequences, is a product of political choices that construct the market economy to protect the haves and push the have-nots into a Hobson's choice of poverty or the only lucrative economic activity available in the inner city: the drug trade. These dynamics produce the hyper-incarceration phenomenon which targets poor, black men for participation in the most viable economic activity available to them. This turn unites Cooper and Harris in their call for fuller conceptions of justice that include and remedy race, class, and gender disparities, resulting ultimately in a transformative justice.

In *Gender Violence in Prison & Hyper-masculinities in the Hood: Cycles of Destructive Masculinity*, SpearIt explores the influence of gender norms on prison culture and, conversely, the effects of prison culture on communities of color. His paper outlines the structural sexism and "masculine biases" that form "the baseline from which gender violence in prison builds." In this importation account, sexism is "the ideology by which prisoners express power behind bars" and "male behavior in prison is but an exaggeration of many accepted forms of masculinity in society." In prison a lack of access to material resources and dependency can be associated with femininity and lack of power, that become marked by sexual rituals. At the same time, SpearIt notes that prisons have a "cultural code of contempt for homo-sex."

His paper next considers the effects of prison culture on re-entry, when it is "marginal communities [that] disproportionately absorb the post-prison stress disorders associated with gender violence in prison." Hence prisons are not only shaped by but actively shape

sexualities in these communities. SpearIt concludes by considering various interventions into sexual violence in prisons, e.g., administrative and statutory proposals and also enhanced prisoner access to judicial relief, including class actions.

*Cycles of Destructive Masculinity* adeptly deploys recent theories of race, gender, and sexuality. SpearIt draws on the still emerging literatures on masculinities to illuminate the interplay of prison and “outside” culture. Much of prison masculinity draws on the twin imperatives of rigid gender roles combined with abhorrence of normalized same-sex relationships. Satisfying both of these requirements “requires the manufacture of female bodies in order to establish one’s identity as a ‘man.’” In addition, his paper documents the various instrumental uses of sexual violence and coercion in prison, by prisoners as well as guards, and also the creation and meaning of prison families. In this sense, SpearIt interrogates various complex appearances of sexuality, that extend beyond sex for pleasure or reproduction. Prison is a particularly insidious instrument of sexual terrorism, given the ways that its strictures and mandates then spill over its walls into the vulnerable communities to which its inhabitants return. Thus, in calling to “end[] institutional control of prisoner sexuality,” SpearIt embraces the feminist injunction to liberate sexuality from control of the state and its institutions.

Professor Kimberly Bailey’s commentary engages Beth Richie’s analysis of gender violence. Both Richie and Bailey examine the tensions between protecting women from violence, particularly in their own homes, and the state’s response, which is both punitive and dismissive of the conditions of poverty, race, and exploitation. Richie’s colloquium remarks explored the many individual and systemic failures to recognize subjective and objective gender violence that women face from abusers, as well as from the state actors assigned to protect them and vindicate their rights. Richie exposed how the largely white women’s movement helped steer the state’s construction of and response to protecting women from gender violence toward the build-up of the prison nation along racial and gender lines. The consequences of this build-up, she notes, extends far beyond incarcerating black men, but also encodes an ideal white, heterosexual, adult, female victim, thereby excluding from that category, queers, children, and women of color.



In this way, Richie illuminates the invisibility of violence against non-normative women—women of color, young women (girls), and lesbians—and the punitive responses that characterize the police response to them. This analysis uncovers the complex connections between homophobic physical and sexual violence against women and girls and the response of the criminal legal system, which both disregards the seriousness of these harms and unleashes abusive police power against these same women and their communities. Professor Richie also locates these failures and aggressions in the economics of urban renewal's craving to produce white, middle class, heterosexual spaces.

Bailey's paper builds on these observations to develop a cautionary tale of protective state intervention. She juxtaposes the exacting tensions between women's hard-won privacy protections regarding their own bodies, identities, and home lives, and the costs women must pay for state protection from intimate violence. She thus challenges the second-wave feminist critique of the private sphere for failing to account sufficiently for the hard-won (and still contested) decisional privacy for which women continue to struggle. Domestic violence confounds notions of a public-private divide, but presents new challenges for women's privacy vis-à-vis the state in exchange for these new legal norms and remedies which acknowledge and offer protection from private violence. Bailey is concerned about the costs of that protection for poor women, particularly mandatory arrest laws which increase women's vulnerability by eliminating their authority to fashion a remedy and by threatening their economic security because of the batterer's incarceration and consequent inability to help support the family. In addition, women are at risk of losing their children to the state on the grounds that the exposure to domestic violence represents neglectful mothering. Bailey suggests that women need more decisional privacy in these circumstances: the authority to decide how the violence is addressed. This solution would allow women to access the protective power of the state without relinquishing their authority—decisional privacy—regarding how, if at all, the state should address that violence.

Professor Jessica Dixon Weaver focuses on African-American grandmothers and how they are entrapped by the cycle of incarceration in poor black communities. Although the effects of

imprisonment are most apparent on those incarcerated, Professor Weaver demonstrates the devastating causes and effects of mass incarceration on grandmothers. She builds on Professor Richie's theory of "gender entrapment," which exposes the cycle of socialization, employment opportunity, and intimate relationships that socially marginalize many black women, leaving them vulnerable to domestic violence which can in turn lead to coercion into criminal behavior. Professor Weaver contends that an analogous process is at work in the lives of these women's mothers. Maternal grandmothers often become the primary or sole caregivers for their grandchildren when their gender entrapped daughters are incarcerated. Weaver shows that often these grandmothers take custody to prevent the state, "an untrustworthy public entity in the black community," from becoming guardian of their grandchildren. Kinship care by grandparents is both exceptional and part of a growing trend, as her startling and poignant statistics show. "Since 1991, the number of children with a mother in prison has more than doubled, up 131%" and "[e]ighty-five percent of the primary caregivers of children during the mother's incarceration were maternal grandmothers." Yet, custodial grandmothers frequently lack adequate resources to raise their grandchildren, leaving these older women "vulnerable to poverty, generational disease and shorter life spans." Hence, like their daughters, these women end up entrapped by the criminal system. They end up with custody but without authority. Or resources.

Professor Weaver's paper concludes by identifying some potential policy and legal reforms. Most notably, she urges law schools to create clinics to provide family legal services to vulnerable families. These clinics would "assist[] female prisoners in establishing a legal custody and visitation plan for her minor children in her absence" and also help grandmothers identify the "necessary financial, psychological and social services available in the community for the family caregiver and children."

In demonstrating how race, gender, and class converge to entrap black women in the carceral system, Professor Weaver's paper exemplifies a classic black feminist approach. The idea of gender entrapment demands a simultaneous focus on multiple categories of social repression. Gender entrapment cannot be understood without

reference to how families socialize sons and daughters differently, how markets and economic institutions differentially allocate educational and employment opportunities to black men and women, and how racial loyalty and economic opportunity shape the form of black desire and intimate partnerships.

It is not simply the case that black women are subordinated vis-à-vis black men. Rather, in some ways black women may enjoy *greater* economic opportunities and their families may encourage them to seek out the resources to become economically independent, but within patriarchal structures they may feel guilty, leaving themselves vulnerable to coercion and violence in their intimate relationships. One crucial insight from Professor Weaver's paper is that this gendered cycle does not limit itself to the women themselves. Gendered kinship patterns also affect incarcerated women's mothers: these custodial grandmothers are themselves entrapped by the complex interplay of race, gender, and class, which they navigate as best they can. Finally, Weaver's proposed solution exemplifies black feminist thought in that it seeks to intervene in the state's management of black family life by empowering generations of black women with emotional and economic resources.