Repositioning criminal justice in the American settler colony

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Received 18 April, 2017; accepted 19 July 2017

Abstract

The American criminal justice system intersects with racial injustice, and this intersection has manifested itself most recently with high profile incidences of police brutality and a rising incarceration rate of Black individuals. It is critical to understand the history of criminal justice as it relates to racial injustice in the United States. This article examines the relationship between criminal justice and racial injustice within a frame of understanding that identifies the United States as a settler colony. I situate criminal justice and legislation that has historically promoted racial injustice within Patrick Wolfe’s settler colonial theory as and Michael Omi and Howard Winant’s theory of racial formation in order to understand criminal justice as it creates racial meaning that marginalizes Black people within the settler colonial population. I argue that criminal justice forms race in a manner that supports and sustains White supremacy as the system on which American settler colonialism depends. I conclude my analysis with an examination of criminality and consciousness.

Keywords: racial injustice, criminal justice, race, discrimination, settler colony

Introduction

The American criminal justice system intersects with racial injustice, and this intersection has manifested itself most recently with high profile incidences of police brutality and a rising incarceration rate of Black individuals. It is critical to understand the history of criminal justice as it relates to racial injustice in the United States. This article examines the relationship between criminal justice and racial injustice within a frame of understanding that identifies the United States as a settler colony. I situate criminal justice and legislation that has historically promoted racial injustice within Patrick Wolfe’s settler colonial theory as and Michael Omi and Howard Winant’s theory of racial formation in order to understand criminal justice as it creates racial meaning that marginalizes Black people within the settler colonial population. I argue that criminal justice forms race in a manner that supports and sustains White supremacy as the system on which American settler colonialism depends. I conclude my analysis with an examination of criminality and consciousness.

America has found itself with a problem that is has no interest in solving. This deep-seated, congenital infection of the American paradigm has manifested itself time and time again through the history of the Land of the Free. Such a problem cannot continue to exist without bearing witness to the eventual decay of America, and without divesting in the violence and manipulation that have been cemented into American civilization, such decay is inevitable. America has impressed the most heinous of crimes upon the most vulnerable people for centuries, and has seen to it that the effects of such crimes will not only be sustained, but justified. Refusal to recognize the realities of violent displacement and dispossession is a reflex to the fear of one’s own dispossession, which poses a threat to the politic of status that American civilization depends upon. The problem of Settler Coloniality has become invisible to the Settler, and is the rotting foundation, the infection of the body of American civilization. On trial in this article is White supremacy, the structure that functions as the nervous system of the American Settler colony. This indictment of White Supremacy will interrogate the American brand of criminal justice, a modern means of preservation of White Settler status.

In order to understand criminal justice in relation to Settler Colonialism, a connection must be established between the criminal justice system, how race is made, and how race operates to sustain White supremacy. To do this, we must examine the criminal justice system as it relates to racial formation and contributes to the making of race. This relationship requires an historical understanding of the positionality of Black people throughout American history, and how racist institutions became mass incarceration, a defining element of American criminal justice. In this history we can see the mechanisms of White supremacy and how such mechanisms function to create what the American imaginary sustains as Blackness via the theory of Racial Formation.

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Once a connection has been established between criminal justice and racial formation, we can further interrogate how criminal justice operates to sustain White supremacy. To be an operative of White supremacy, the criminal justice system must be able to use racial meanings in order to affect the access to citizenship that one has and protect the investment that America has made into Whiteness. By identifying how criminal justice operates, we can properly situate it within the Settler Colonial context, and thus problematize the criminal justice system as a means of maintaining American Settler Colonialism.

Repositioning Black American history and carcerality in a settler colonial context

Mass incarceration exists in a historical context that dates back to American chattel enslavement of African people. This marks the first of several formations of dispossession that Black people have faced in the centuries since that time. In The New Jim Crow, Michelle Alexander defines this history as one of racial caste, which, while accurate, relies on an isolated observation of race. Recognizing the dynamics of race as it intersects with other formations in the history of Black people in which we have been positioned is important. Taking Alexander’s racial caste perspective relies on preserving Whiteness as an uninterrogated guarantee of Americanism, where, in America, Whiteness is normative, rather than a constructed racial identity that exists within a community of other racial identities.

Once this is recognized we may observe that the racial caste system that is taking place is in fact a product of the colonial relationship that White people share with everyone within the American sphere of influence. Population economy is critical to Settler Colonial theory, introduced to the Settler Colonial context by Veracini, it is an economic approach to relationality in a population that utilizes different values in order to measure position. It is important to understand that within this population economy exist all peoples in the American Settler colony, and each moves within fluid states of righteousness and degradation as well as indigeneity and exogeneity. 1 A rudimentary understanding of population economy as a formation of the Settler Colonial body politic frames White settlers’ motivations to keep Black people in a constant state of abject otherness. Settler Colonial theory allows for an alternative perspective through which to view the institution of slavery and its later manifestations.

Chattel slavery is historically juxtaposed to the dispossession of Indigenous American peoples from their lands in order to settle America, which comes as no coincidence when observing the formation of the population economy that Settlers hoped to create. What is perceived as a struggle for land and a display of military power is actually the investment in Whiteness as a metric for Americanness in this newly founded nation. The Settler relies on the suppression and othering of the truly indigenous in order to fabricate a status of indigeneity of their own. By shedding their identity with the European metropole and creating a society in which they hold an invented birthright to the land they have stolen from the indigenous Other and violently repatriating an exogenous Other, the Settler has created a nation in their own image. Repositioning chattel slavery in context with the dispossession of Indigenous Americans is critical in understanding consequent formations of enslavement and incarceration in the Black American history.

A common thread can be identified in the trials and tribulations that Black Americans faced from chattel slavery through the slavery of mass incarceration. This thread is often identified simply as a newly devised method of oppression for Black people, however Settler Colonial theory offers an alternative perspective. Such trials and tribulations are new formations of the same racist structure that upholds Settler Colonialism: White supremacy.

Slavery served a dual purpose: to provide coerced labor to the growing colonies, and to degrade enslaved Africans and place White people into a dominant space, above Black and Native peoples. The Thirteenth Amendment declared slavery to be entirely unconstitutional except as punishment for a crime, effectively abolishing the institution that played such a key role in maintaining American White supremacy; however, the caveat in the Constitution’s language provided the loophole necessary to keep Black people indentured to Whites. In order to exploit this, Southern states imposed Black Codes as a means to criminalize free Blacks. The Codes included vagrancy laws that criminalized any Black men over the age of eighteen without written proof of employment. 2 Immediately following the abolition of slavery, newly freed Black people in the South found themselves subject to forced labor as a result of incarceration, rebuilding the South in the reconstruction era. Early prison labor created a peonage system of indentured servitude that directly reflected slavery, effectively placing formerly enslaved Black people back into the same position as before. Ultimately the Black Codes were repealed, and the following Civil Rights legislation gave rise to the advancement of the African American population; gaining political power and access to education posed a threat to White supremacy. In order to once again solidify White supremacy and separate Black and White peoples, Jim Crow laws were enacted.

Jim Crow segregation represents the Settler’s investment in its structure, maintaining a purity of the

1 For a visual depiction of population economy, see Veracini chapter 1, Figure 1.1

2 Black Codes and Reconstruction are further elaborated on Alexander 28-29
Settler identity as the dominant racial group. Integration and interracial procreation posed the threat of the development of a hybrid form of population. The threat of hybridity provides a new perspective in which to understand American histories dating back to the relocation of Indigenous Americans, as well as Jim Crow segregation. “Hybrid forms disturb the triangular system of relationships inherent in the Settler Colonial situation, and ultimately reproduce a dual system where two constitutive categories are mixed without being subsumed.” The violence situated around the time of legislative segregation, through a Settler Colonial framework, can be understood as the result of a dying structure of White supremacy, taking place during a time in which America is also fighting in a war defined by Hitler’s campaign of anti-Semitic, colonial White supremacy. Jim Crow sees its demise starting with the integration of public schools, beginning with Brown v. The Board of Education, and the rise of a Civil Rights movement that held a mirror to America. The American response to the Civil Rights and Black Power was to criminalize Blackness once again.

This Settler Colonial reflex catalyzes formation of mass incarceration, giving rise to new legislation and practice that emerges under the Nixon administration. The Black Power movement posed a threat to Whiteness, and to mitigate such threat, “Law and Order” rhetoric that emerged in the 1950s saw a dramatic rise in popularity as a means to criminalize Black protest. This rhetoric gave way for what’s known as the Southern Strategy: a campaign of politically correct language used by the Republican party in order to gain the Southern anti-Black Democrat vote. The Southern strategy, along with media sensationalism of crime in Black communities and Moynihan’s report on a Black “culture of poverty,” empowered a social production of Black people as criminal, negligent, and addicted to drugs. The Nixon administration saw to the racialization of Black people as heroin addicts, and pushed an agenda to heavily criminalize drug use. The Regan administration not only enacted tax breaks for the wealthy that economically devastated inner city communities, but demonized crack cocaine and proceeded to racialize Black people to become almost synonymous with crack. Regan’s administration also began a de facto War on Drugs, which was literally and rhetorically waged in primarily Black communities promised on the notion that drug addiction was, as Nixon referred to it, “Public Enemy Number One.” The drug war gave rise to incarceration unlike any that history had previously seen, and unapologetically racialized Black people as the perpetrators, rather than victims, of the drug epidemic.

Racializing rhetoric was harnessed by the Republican party, and forced a political platform of Law and Order which allowed Republicans to dominate elections. Following Bush’s victory on the Law and Order campaign, a shift occurred in the Democratic party that cemented the trajectory of mass incarceration as it has become today. Bill Clinton, in order to win his first term, adopted a tough on crime platform that introduced mandatory sentencing laws, three strikes legislation, and superpredator rhetoric into the American consciousness. This platform proved successful not only with White America, but had great appeal to Black Americans who were convinced that Clinton’s tough-on-crime attitude would effectively reduce crime and rebuild Black communities. What was not as apparent was the nature of tough-on-crime as an investment in the removal of Black people from American society as a means of sustaining White supremacy. Clinton’s appeal to Black communities was, in reality, an investment in the structure of Whiteness that his Republican predecessors made before him.

Today America’s incarcerated population makes up roughly twenty-five percent of the world’s overall incarcerated population despite the American population only making up approximately five percent of the world’s population. This is evidentiary of a civilization in decline. Because incarceration and criminalization are key operatives in the dispossession of citizenship in the United States, we see a definite trend; when Black women are twice as likely to be imprisoned as White women and Black men are nearly six times as likely as White men. America has made clear its investment in Whiteness, using mass incarceration as its new mode of colonization of transferring Black people back into the abject Other position that enslaved Africans once occupied.

**Criminal justice as a racial project**

Understanding how race is made by the criminal justice system requires an understanding of the theory of Racial Formation, introduced by Michael Omi and Howard Winant as a navigation of race as a “master category” that operates in American society to discern difference. The necessity of identifying the process of race making is crucial in identifying race as an operative of White supremacy. Interrogating American history proves effective in extracting social productions and racial implications from institutions and legislation that may appear to be racially neutral, and recognizing these implications is key in understanding how race operates. Racial Formation Theory operates on the assertion that race making is a reciprocal process involving racial meanings, racialization, and racial projects.

Racial meaning is the product of corporeal observations of difference between people in conjunction with social observations and generalizations about different people. These observations are applied to people, and meaning is cemented through the process of racialization.

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3 Veracini, Kindle Locations 627-628

the catalyzing element of racial formation, defined by Omi and Winant as “the extension of racial meaning to a previously unclassified relationship, social practice, or group.” For example, racial meaning may be given to physical features such as brown skin, wide flat noses, and epicanthic folds, and someone with such features may be racialized as Southeast Asian, because that is the racial meaning associated with those physical characteristics.

Conversely, racial meaning is created by socially constructed generalizations of people, such as citizenship, criminality, or sexual morality. These types of racial meaning are attributed to people through racialization in order to construct general assumptions about one who belongs to a racial group. For example, Hispanic people in the United States are often racialized as Mexican because of their appearance, and as such, are racialized as immigrants, undocumented or otherwise, because of the racial meanings assigned to Hispanic and Latino people.

Racialization exists as a reciprocal concept between racial meaning and racial project. Racial projects are “simultaneously an interpretation, representation, and explanation of racial identities and meanings, and an effort to organize and distribute resources (economic, political, cultural) along particular racial lines.” The work is done both ideologically and in praxis to create attributes that are assigned to people via racialization and then proceeds to act upon those constructed characteristics in order to sustain them. Black women are very often on the receiving end of the welfare racial project’s interpretation of Black women as Welfare Queens, which combines the racial meaning of welfare abuse that is ascribed to Black women with the rhetoric condemning Black women for abusing welfare benefits. The ideological work that racial projects do has real world implications that are woven into American society, and largely uphold White supremacy.

As demonstrated above, Black people have been subject to enduring formations of dehumanization and racialization as a means to justify subjugation that has been instrumental to the structure of White supremacy that America was founded on. Omi and Winant provide a lens through which we can examine the production of Blackness in America dating all the way back to slavery, and from that, we can understand how Blackness was ideologically positioned within the Settler Colonial body politic. Race operates to justify and rationalize White supremacy premised on a constructed difference, and this constructed difference is a result of religious, (pseudo)scientific theory, and politicization that grants Whites access to humanity that the Other is restricted from.

Racial consciousness stems from a religious understanding of Europe as the metropole, where European people were the standard and the Other (Jews and Muslims) existed outside the same kind of humanity and morality that Europeans occupied. This translated to a racial understanding of Whiteness compared to the non-White, non-European Other when Europe colonized African and Indigenous American people. A scientific understanding of race emerges with studies of cranial capacity, genetic difference, and a belief that the Other was unable to understand or think in either the same way or to the same degree as the European. The science of race gave rise to an understanding of colonized indigenous people as an inferior species, and rationalized a paternalistic generalization of the Other as savage and unsophisticated, which inspired American racial politics that endured the twentieth century and still find recognition to this day.

In the twentieth century, racial politics around Blackness very greatly relied on the constructed belief of Black men as violent, hypersexual, and unintelligent, while the Black woman was either naturally subservient and desexualized or dangerously cunning and sexually promiscuous. These racial meanings paved the way for the political racialization of Black people as a general threat to the welfare of White people, justifying enslavement, lynching, segregation, and mass criminalization, followed by mass incarceration. Racial meaning was translated into the racial politics that were detailed in the previous section through institutions and practices that allowed for the mass brutalization and containment of Black people from slavery until now. American criminal justice is a long enduring racial project that functions to continually manufacture racial meanings and enforce legislation and practice that sustains such racial meanings.

Criminal justice is a key racial project that is sustained by, and sustains the mythology of Black inferiority and savagery that America has relied on. Slavery was justified by paternalistic interpretations of Blackness as naïve, unable to function without the structure that slavery provided, and dangerous if not contained, while Blacks who escaped and hoped for peaceful existence were demonized because of these mythologies, and either captured and returned to slavery or isolated to Maroon communities. Following emancipation, a rise in imprisonment and fatal violence toward free Black people occurred because of the same interpretations of Blackness. In the American imaginary, Black men posed a threat to White women, which is answered by imprisonment under Black codes and lynchings for offenses as innocuous as vagrancy or eye contact with a White woman. Through Jim Crow laws, Civil Rights protests, and Black Power movements, we see criminality taking a more formal shape as the racial meaning applied to Black people. The same myths are present; diminished moral capacity, hypersexuality, inclination to violence and criminal activity all played key roles in the institutions and practices that led to the War on Drugs and Tough on Crime legislation that only further produce the racial meanings that they resulted from.

5 Omi and Winant (111)
6 Omi and Winant (125)
The power that criminal justice has to racialize Black people comes from its power to determine one’s access to rights typically possessed by United States citizens. In conjunction with the social constructions that mass incarceration and criminal justice produce about Blackness, felony disenfranchisement greatly hinders one’s access to rights and resources that are granted to United States citizens. Felony disenfranchisement effectively removes those convicted from citizenship. Because of the gross overrepresentation of Black people either incarcerated,\(^7\) disenfranchised due to felony conviction,\(^8\) or under adult correctional supervision (parole, probation,)\(^9\) the criminal justice system is designed to remove Black people from the status of citizenship, and generate a racial meaning that is not only criminal, but non-citizen, or undeserving of the rights of citizenship. This removal of citizenship is instrumental in reshaping racial meaning, and resituating people within a population economy. Understanding this is critical to making a connection between how the criminal justice system makes race, and how the criminal justice system sustains White supremacy. As a racial project, criminal justice functions to do the ideological and practical work that produces and sustains the racialized understandings of Blackness, and because of this, criminal justice has become a crucial mechanism of Settler Coloniality in America. The population economy in a Settler colony, as discussed earlier, depends on the compartmentalization of Settler as separate from the Other. By generating cultural understanding of Black people as less than human, and simultaneously as non-citizen members of society, Black people are moved back into the abject Other position, incarcerated, brutalized, and dehumanized.

**White supremacy as settler colonial structure**

White supremacy’s importance in American Settler Colonialism can best be described through the population economy model, which places the White Settler in a position that supposes an inalienable right to the land that’s been settled and citizen status above the indigenous population. In the population economy, as described by Veracini, the Settler makes a claim to power above all others in the body politic, and makes a claim to indigeneity that erases their exogenous roots, while also claiming Europeanness to distance themselves from the indigenous Other. The ideological work that the Settler does to place themselves in a simultaneously indigenous and exogenous position of righteousness functions as a means in which to establish themselves as the rightful owners of a land that they stole from the indigenous Other.

Settler Colonialism depends on the maintenance of this structure in which the indigenous population is disenfranchised, the exogenous population is carefully evaluated for their ability to conform to Whiteness, and enslaved Africans are completely dispossessed of humanity, positioned outside of the indigenous/exogenous spectrum, entirely degraded. Otherness must be interrogated as a function of White supremacy in order to fully connect mechanisms that racialize the people that have been Othered in relation to the American Settler colony, and to do this by examining population economy demonstrates how such mechanisms, and White supremacy, function in a Settler economy.

Whiteness is situated at the top of the racial hierarchy of the Settler population, so to theorize America’s racial history through the population economy allows us to better understand how Whiteness functions, and how racialization functions within a Settler Colony. This is reflective of Michelle Alexander’s interrogation of American society as a system of racial caste, though population economy is framed in a manner that better allows us to observe the nuance in positionality between marginalized communities. This distinction is critical to understanding how people can be racialized in order to produce different outcomes, for example, Indigenous Americans can be racialized as backwards and savage by tradition, so White supremacy offers assimilation as a solution, but criminally inclined Blacks must be addressed with a carceral solution.

Whiteness functions as a given, in an uninterrogated position within the White supremacist structure. The Settler inhabits a position, as noted before, that is simultaneously indigenous, exogenous, and righteous, and is a fixed position for the Settler. In Veracini’s model, the “Settler Self” is defined entirely as uplifted or righteous, and simultaneously becoming indigenous (more indigenous than the colonized indigenous people) and remaining European (or White in racial status, rather than national allegiance.) This positionality is maintained by way of institutions that reaffirm White Settlers as militarily powerful, conceptually American, and economically secure, while inflicting institutionalized violence upon the Other.

Within the Settler Colonial population economy, Indigenous Americans exist in an othered position below White Settlers. The indigenous Other has a position in history that differs greatly from Black people because of the passage granted to the indigenous Other into the Settler identity. This passage is not a gracious gesture on the part of the Settler, rather, it’s another mode of transfer that

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\(^7\) 35.8% of incarcerated people in 2014 were Black (The Sentencing Project) despite Black people only representing 13.3% of the total US population a year later (United States Census Bureau)

\(^8\) 7.66% of African Americans, compared to 2.5% of White people in 2010 (Uggen and Shannon)

\(^9\) 30% of probationers in 2013 were Black, 38% of parolees (Bureau of Justice Statistics, 2013)
benefits Whiteness by assimilating indigenous peoples who wish to transgress the boundaries of indigeneity. This works to assist the Settler to further secure their own indigeneity. Transfer by assimilation has been imposed upon the indigenous Other in the forms of campaigns and boarding schools designed to purge any characteristics that possess racial meaning that indicates difference from the Settler in order to make them indistinguishable from a White Settler. Assimilation is an attempt to convince the colonized that Whiteness is humanity in order to maintain colonial control.

Exogeniety is a complex concept in the Settler Colonial population economy. One who enters the Settler colony from outside is subject to the scrutiny of the Settler, and assigned status based on the potential to be assimilated. Desirability is determined by the exogenous subject’s proximity to Whiteness, so an Irish immigrant, for example, may have suffered prejudice in the early twentieth century, but because of their European origin they have access to Whiteness, and thus, Irish has become synonymous with Whiteness. In contrast, an immigrant from Central America does not possess features that allow them to be racialized as White and are viewed to be less desirable in the eyes of the Settler, unless they are able to shed that which racializes them as an Other.

Enslaved Africans and Black people today exist in a space unoccupied by any other group in the Settler population economy. The abject Other is one who is dispossessed entirely, left with nothing from their origins and subjected to degradation with no reprieve. Understanding the positionality of enslaved Africans and their African American descendants requires the understanding that, by design, Black people have no claim to American indigeneity, but cannot claim exogeneity in the same fashion as an expatriate. The Black American identity is one constructed by the colonial formation, and is subject to the whim of the colonial structure. Because of this, Blackness is malleable, and can be distorted to fit the narrative most suitable to the agenda of the Settler. White supremacy has depended on the maintenance of the dehumanization of non-White peoples in the Settler body politic, and to do so requires institutions in which to create understandings of one’s race in order to problematize it followed by a sweeping solution that effectively removes the problematized, dehumanized peoples from American civilization. This can be seen in the dehumanization of enslaved Africans, offering slavery as a solution to the “problem” of the servile, uncivilized African by providing structure and work in order to protect White America from the otherwise inevitable chaos that would ensue if Blacks were allowed freedom in the States. Blackness is racialized in a manner that creates space in which the colonial structure can devise mechanisms with which to control the Other. From the incarceration of slavery to the slavery of incarceration, a common thread is identified: each institution that has existed to control Black people exists because of a reinvestment into White supremacy, developing new ways in which to reaffirm the colonial hegemony of the Settler by once again relocating undesirables from citizen status.

Situating criminal justice within the settler colonial structure

Criminality is socially constructed, devised by those in power as a means of social moderation. In a truly democratic civilization, criminality functions to benefit society by identifying those who do not act in accordance with the good of the society; however, considering the nature of the socially constructed, its function becomes dangerous when functioning within a population economy such as America’s. American Settler Colonialism depends on White supremacy remaining on top of the racial hierarchy that the settler created within their colony, and in order to do so, institutions were set in place to assure that anything resembling a challenge to Whiteness will be neutralized. The institution of criminal justice has been developed over time to advance the agenda of the Settler, and maintain the colonial structure of White supremacy.

In his chapter on consciousness, Veracini identifies the need for the Settler to maintain a constructed image of the colony, defined by collective work ethic and settler moral traditions. This need intersects with a need to control the growing population, organizing social capital within the population economy. Criminality functions to maintain the ideals of the Settler, who is attempting to create distance between their past of foundational violence and their present, characterized by their ideal depiction of the Settler Colony. Focusing on establishing “Law and Order” in the twentieth century contradicts the violence on which America was founded. This position is by no means a disavowal of the intent to achieve peace, rather, it is a disavowal of the attempt to erase a cycle of violence that the Settler Colony depends on.

In accordance with the “Law and Order” platform adopted by twentieth century politicians, a strategy was designed by which to criminalize Blackness, as it was perceived as a threat to the White Settler. Nixon’s administration campaigned to associate the Black population with heroine, which was then heavily criminalized and demonized by War on Drugs legislation and rhetoric. This was followed by further demonization and criminalization during the Regan administration and the introduction to crack cocaine into inner city communities. Criminality was ascribed to Black people by means of this massive cultural focus on drug use as a criminal matter, rather than a health issue. The decision to approach epidemic drug use with penalization and incarceration serves to remove those who are primarily targeted in this “war” from the general population. Incarceration rates increased dramatically, and the rate of
in carcereated Black people has reached a level nearly six times that of White men, and three times that of the American male population.

Constructing the association between Black people and drug use binds Black people at large to the criminal construct, effectively removing us from the image of settler colonial America. The conceptual transfer of criminality, coupled with the physical removal from the general populous by incarceration, relocates Black people back into abject otherness. The socially constructed functions to allow the criminal justice system to regulate who has access to the benefits of citizenship and participation in the population, as well as the organization of social capital within the population economy.

References