DIGITAL DIVISIONS: RACIAL (IN)JUSTICE AND THE LIMITS OF SOCIAL INFORMATICS IN THE *STATE OF GEORGIA VS. TROY ANTHONY DAVIS*

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The recent decision by the Georgia State Board of Pardons to execute Troy Anthony Davis for the murder of police officer Mark McPhail raises a number of legal, social, and media issues that coalesce around questions of racial justice and reconciliation. The legal issues raised by the decision range from the unequal application of the death penalty to tensions between the rule of law and the rule of justice, between efficiency and fairness. The social issues cover terrains as diverse as the efficacy of new and traditional media coverage and advocacy, all democratic possibilities of social informatics, and raise fundamental questions about the value and validity of rational discourse in the justice system when race is a central issue. In this essay we will focus an interdisciplinary lens on the procedural, philosophical, and pragmatic tensions raised by the trial, media coverage, and eventual execution of Troy Davis. We seek to illuminate the ways in which legal, social, and moral attitudes and institutions remain tainted by the hidden racialized communication of the media.

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Drawing upon critical theories of law, media, and race, we will challenge two prevailing social mythologies, one traditional and the other emergent: that an adversarial and retributive legal system can achieve racial justice, and that the decentralization of communication brought about by internet technologies alone can create and cultivate a more democratic public sphere. Central to our analysis is a critique of assumptions that rational-critical discourse can cultivate and sustain systems of social and legal relations that serve the public good. Instead, we argue that the legal and mediated communication structures in question remain wedded to what Charles Mills describes as a "Racial Contract," an empirical set of social relations that expose law as a system of privilege that protects the interests of the stronger, and undermines genuine democratic inclusion, social equality, and racial reconciliation.

I. INTRODUCTION

On September 21, 2011, after serving more than twenty years on death row, Troy Anthony Davis was executed by the state of Georgia. The Davis case garnered international attention from death penalty opponents around the globe, and received substantial attention from traditional and new media. Despite this attention, after "weighing all the facts," the Georgia State Board of Pardons denied Davis's final appeal for clemency.[1] The Davis case raises several important issues: the role of race in the criminal justice system; the effectiveness of legal safeguards to protect against wrongful executions in death penalty cases; and the limits of social and traditional media to influence public attitudes, debate, and policy. The case also sheds light on the historical and cultural constraints and limitations of a legal system based upon retributive justice, and offers insights into how alternative approaches to crime and punishment might more productively guarantee the rights and liberties of all members of society.

This essay will explore these questions vis-à-vis critical perspectives on law, race, and media, and then consider what these analytical approaches can tell us about the past, present, and future of our system of jurisprudence as it relates to race, retribution, and reconciliation. The essay will begin by placing the case within a contemporary context and examining the conversations and debates it initiated in the public sphere. Next, it will offer a critical interrogation of the case that integrates the insights of critical legal, race, and media scholarship in exploring intersections between the cultural, institutional, and attitudinal impulses that framed those events and conversations. Finally, the essay will

1. Greg Bluestein, *US board: All Facts Weighed in Troy Davis Case*, TIMES UNION, Sept. 22, 2011, http://www.timesunion.com/ news/article/US-board-All-facts-weighed-in-Troy-Davis-case-2179012.php. *See also Troy Davis Put to Death*, CNN, (Sept. 21, 2011, 11:50 PM), http://news.blogs.cnn.com/2011/09/21/lawyers-file-appeal-to-stay-troy-davis-execution/; Greg Bluestein, *Ga. Executes Davis; Supporters Claim Injustice*, YAHOO! NEWS, (Sept. 22, 2011), http://news.yahoo.com/ga-executes-davis-supporters-claim-injustice-031409578.html.

examine what the case might mean for how justice is conceived and enacted, and how issues of crime and punishment might alternately be addressed in this society.

The purpose is not to consider the innocence or guilt of the individual, Troy Davis, but to consider more broadly how innocence and guilt function in a society informed by what philosopher Charles Mills calls "The Racial Contract."[2] Mills contends that the legal and political institutions of Western societies, built upon the foundations of contractarian ideals, have failed to enact those ideals because of their collective and possessive investments in "whiteness." This failure has its roots in the tension between the democratic and egalitarian impulses of Western moral philosophy, and the history of European colonialism and imperialism that arose simultaneously with those impulses. The result has been an irreconcilable conflict between principle and practice that undermines the emancipative projects of Western law and politics.

The Davis case is but one of many examples of that conflict, yet it offers the opportunity to explore new ways of making meaning of the schism between an idealized social contract and the reality of the Racial Contract. It also enables us to consider the problems and possibilities presented by technology for the creation of an inclusive and egalitarian polity. While race was arguably one of the central issues in the case, its significance might best be understood through an examination of the epistemological, ideological, and institutional forces that have, and continue to, shape its meaning in American law and society. This is the purpose of this analysis which, the authors believe, holds important implications for critical legal, race, and media scholars and practitioners committed to enacting theoretical and practical strategies that facilitate political, economic, and social justice.

II. THE TRIALS OF TROY ANTHONY DAVIS

State of Georgia v. Troy Anthony Davis[3] is a case that is an all too familiar story in our collective social narrative about race, media, and justice. A black man is accused of murdering a white policeman in the South. He is depicted in the media as a monster: accounts of the trial published in the newspaper report that witnesses testify that he "smiled" over the body of the wounded policeman as he delivered the fatal shot.[4] He is reported to have "bragged and boasted" about the shooting, is implicated in another shooting earlier that night, and was involved in the beating of a homeless man when the murdered officer arrived at

2. CHARLES W. MILLS, THE RACIAL CONTRACT (Cornell University Press, 1997).

3. The State of Georgia v. Troy Anthony Davis, EF 284361, Criminal Indictment Number 089-2467-H, Superior Court of Chatham County, State of Georgia.

4. Jan Skutch, *Eyewitness: Davis Shot Cop, Smiled*, SAVANNAH MORNING NEWS, August 14, 1991, at C1.

the scene.[5] He is reported to have fled the scene, and turned himself in after a "relentless" five-day manhunt, claiming that he was innocent of the crime.[6] News outlets document his trial, conviction, and sentencing to execution by a jury of his peers, and as he begins the journey of a death row inmate, fighting for his life through an appeals process that is expensive and slow, the trial fades from public view.

Several years later, however, a new story emerged, still familiar, but far less black and white. Stories of witness recantations, evidence of police coercion, and a new theory of the crime. All of these thrust the case back into the media spotlight, and drew the attention of people from across the nation, as well as celebrities, advocates of racial equality and social justice, and proponents and opponents of the death penalty from around the globe.[7] The case was also framed by an emerging set of issues and concerns related to race and fairness in the justice system. DNA testing revealed that large numbers of innocent black men had been convicted on the basis of inaccurate witness testimony;[8] rising incarceration rates for African American men raised questions about the use of the penal system as a form of modern disenfranchisement and enslavement;[9] and media critics and legal scholars were increasingly concerned about the influences of representations of crime and criminality in news and popular media. [10]

The story of the trial also found a new technological venue for expression: the Internet and World Wide Web. More voices than ever before were joining conversations about race, crime, and social justice, and the diversity of voices ranged from experts to ordinary people. This enlarged public sphere of discourse was by no means unproblematic: just as supporters of Davis could

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5. Jan Skutch, *Testimony to Begin in '89 Murder Case*, SAVANNAH MORNING NEWS, August 23, 1991, at 1, 11A.

6. Derek Smith, *Suspect Jailed in Police Slaying*, SAVANNAH EVENING PRESS, August 24, 1989, at 1.

7. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, *Where is the Justice for Me?: The Case of Troy Davis, Facing Execution in Georgia* (2007). *See also* Matthew Bigg, *Campaign grows to halt execution of U.S. inmate*, REUTERS, (July 13, 2007, 6:09 PM), http://www.reuters.com/article/2007/07/13/us-usa-execution-idUSN1339557120070713.

8. *See* The Innocence Project, http://www.innocenceproject.org/ (The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent further injustice.). *See also* The Innocence Network, http://www.innocencenetwork.org/ (The Innocence Network is an association of thirty member organizations dedicated to providing pro bono legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiative designed to enhance the truth-seeking functions of the criminal justice system.).

9. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, (The New Press 2010).

10. Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009). *See also* Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004).

describe his trial as the "anatomy of a frame-up,"[11] those less sympathetic toward his situation dismissed him as a "media's latest baby seal."[12] Nonetheless, the prospect of these new technologies as a "road to democracy"[13] gave hope to many: in the final hours of his life, Davis's supporters tweeted, blogged, emailed, and posted pleas on his behalf. In the end, however, social media could not save his life. In order to understand why these methods did not prevail, we must consider both the contemporary story of Troy Davis and the historical story that ultimately decided its outcome.

On August 19, 1989, at approximately 1:00 a.m., Officer Mark Allen MacPhail was shot and killed in a Burger King parking lot at the intersection of Oglethorpe Avenue and Fahm's street as he attempted to aid Larry Young, a homeless man who had been assaulted moments before the off-duty officer arrived. Troy Anthony Davis, who admitted to being present at the crime, fled the scene, and after being accused of the crime by Sylvester "Red" Coles, who was also present in the parking lot, surrendered to police and was arrested four days later on August 23rd. Davis was indicted on November 15, 1989, by the Superior Court of Chatham County, for the murder of Officer MacPhail. On August 28, 1991, Davis was convicted by a jury, and later the same day sentenced to death by electrocution.

On February 26, 1993, the Georgia Supreme Court affirmed Davis's conviction and sentence. On March 15, 1994, Davis filed a Habeas Corpus petition; it was denied on September 9, 1997 by the state court. The petition was denied a second time by the Georgia Supreme Court on November 13, 2000. The Habeas petition was submitted to the U.S. District Court for the Southern District of Georgia's Savannah Division, and denied on May 13, 2004. On September 7, 2005, the Eleventh Circuit Court heard oral arguments in support of the petition, and affirmed the District Court's denial of federal habeas corpus relief on September 26, 2006.

On April 11, 2007, Davis submitted his certiorari petition to the United States Supreme Court, which was denied on June 25, 2007. On June 27th, the

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11. Marlene Martin, *Anatomy of a Frameup: The Case of Troy Davis*, INTERNATIONAL SOCIALIST REVIEW (2008). http://www.isreview.org/issues/61/rep-troydavis.shtml.

12. *See* Ann Coulter, *Cop Killer is Media's Latest Baby Seal*, Ann Coulter, (Sept. 21, 2011), http://www.anncoulter.com/columns/2011-09-21.html.

13. Tony Cox, *Internet Road to Democracy . . . Or Elsewhere?*, NATIONAL PUBLIC RADIO (2011), http://www.npr.org/2011/08/15/139640456/internet-road-to-democracy-or-elsewhere; William Saletan, *Springtime for Twitter: Is the Internet Driving the Revolutions of the Arab Spring?*, SLATE (July 18, 2011, 8:34 AM), http://www.slate.com/articles/technology/future_tense/2011/07/springtime_for_twitter.html; Lama Al-Haqhaq, *Social Media Megaphone Reaches More People*, KUWAIT TIMES, Aug. 9, 2011, http://www.kuwaittimes.net/read_news.php?newsid=OTMzMDA5MDQ1NA==; John Boudreau, *Occupy Wall Street, Brought toYou by Social Media*, SAN JOSE MERCURY NEWS, Nov. 2, 2011; Jennifer Preston, *Occupy Wall Street and its Global Chat*, N.Y. TIMES, Oct. 17, 2011, at 7; Jennifer Preston, *When Social Media Alone Don't Seem Enough: Occupy Movement Sees a Need to Make News the Old Fashioned Way*, INTERNATIONAL HERALD TRIBUNE, Nov. 28, 2011, at 16.

Chatham County Superior court issued an execution warrant, and on July 5th, the Georgia State Department of Corrections scheduled Davis's execution for July 17, 2007, at 7:00 p.m. On July 16, 2007, the Georgia State Board of Pardons and Paroles granted a 90-day stay of execution for Davis, and the following August, the Georgia Supreme Court granted Davis a discretionary appeal for a new trial. On March 17, 2008, the appeal was denied.

On September 12, 2008, the state parole board denied Davis clemency, but on September 23rd, the U.S. Supreme Court granted him a stay of execution. On October 14th, 2008, the U. S. Supreme Court refused to hear Davis's appeal, however on October 24, 2008 the federal appeals court granted him a stay of execution. On April 16, 2009, the federal appeals court rejected Davis's request for a new trial, on the following day the U.S. Supreme court ordered a federal judge to hear new evidence in the case. A hearing was convened in U.S. district court on June 23, 2010, to hear new evidence, but on August 24, 2011, the presiding judge rejected Davis's request for a new trial based on that new evidence. On March 28th of the following year, the U.S. Supreme Court declined to hear Davis's appeal of the district court's ruling, and on September 6th, the Georgia State Department of Corrections set his execution date for September 21, 2011. On September 20th, the Georgia Board of Pardons and Parole denied Davis clemency, and on September 21st, after his appeals to the Georgia and U.S. Supreme Courts were rejected, Troy Anthony Davis was executed by lethal injection.[14]

At its inception, Davis's trial attracted an expected amount of media attention. The *Savannah Morning News* reported on the case from 1989 through 1991, documenting Davis's naming as a suspect, surrender, arrest, trial, and eventual conviction.[15] The case gained significant media attention in 2003, when the *Atlanta Journal Constitution* began a series of articles and editorials

14. There are a number of timelines that document these events. *See Timeline of Troy Davis Case*, USA TODAY, Sept. 22, 2011, http://www.usatoday.com/news/nation/story/2011-09-21/troy-davis-timeline/50498302/1; *see also Troy Davis Execution: Timeline*, THE GUARDIAN, Sept. 22, 2011, http://www.guardian.co.uk/world/2011/sep/19/troy-davis-georgia-execution; *Troy Davis: The time line*, SAVANNAHNOW.COM, Sept. 22, 2011, http://savannahnow.com/news/2011-09-22/troy-davis-time-line#.T-d0d3CbQlM; *Troy Davis: Timeline of Main Events in Legal Saga*, THE TELEGRAPH (Sept. 22, 2011, 5:16 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8780680/Troy-Davis-timeline-of-main-events-in-legal-saga.html; *Troy Davis' Case Timeline*, ATLANTA JOURNAL-CONSTITUTION, Sept. 20, 2011, http://www.ajc.com/news/troy-davis-case-timeline-1184930.html.

15. *See* Derek Smith, *Neighbors Say Suspect Not the Man They Knew*, SAVANNAH MORNING NEWS, Aug. 24, 1989; *see also* Jan Skutch, *Davis: I Fled*, SAVANNAH MORNING NEWS, Aug. 28, 1991; Jan Skutch, *Davis is Convicted; Jury Quick to Render Guilty Verdict in Murder of Officer*, Aug. 29, 1991, at 1; Jan Skutch, *Davis to Jury, 'Spare My Life': Panel Recesses After Debating Defendant's Fate for Five Hours*, SAVANNAH MORNING NEWS, Aug. 30, 1991; Jan Skutch, *Davis Requests New Trial In Police Officer's Slaying*, SAVANNAH MORNING NEWS, Oct. 2, 1991; Jan Skutch, *Convicted Murderer Wants New Trial*, SAVANNAH MORNING NEWS, Feb. 19, 1992; Jan Skutch, *Davis Conviction Upheld*, SAVANNAH MORNING NEWS, Mar. 21, 1992; Jan Skutch, *Georgia High Court Upholds Sentence*, SAVANNAH MORNING NEWS, Mar. 21, 1992.

raising questions about the trial and reporting on witness recantations.[16] In 2007, a film produced for Amnesty International entitled *A Life in the Balance: Examining the Troy Davis Case* further documented the legal and moral issues the case presented.[17] In 2009, CNN aired a story that highlighted the witness recantations and raised the question of whether Davis was a "cop killer or innocent man."[18] During the appeals process, this and other media attention helped to garner support from around the globe, eliciting calls for justice and clemency from prominent individuals such as Sister Helen Prejean,[19] Pope Benedict XVI,[20] and Archbishop Desmond Tutu.[21]

New media also played a critical role in bringing the case into the public consciousness. Traditionally media outlets featured the case prominently on their web pages, and anti-death penalty organizations such as Amnesty International dedicated significant resources to reporting on Davis's trial and appeals. Numerous African American and civil rights organization websites also documented Davis's life and trial, and the power of social media was seen as a vital part of the campaign against his execution. "With the onset of technology and social media, our advocacy has gone digital," proclaimed Curtis Johnson of the NAACP. "Perhaps one of our social media campaigns garnered as much worldwide participation as the 'Too Much Doubt' campaign. Started in support of Troy Davis, a man set to be executed in the face of overwhelming doubt, we campaigned for Troy using virtually every social network at our disposal."[22] Davis's case and the issues that it raised held a strong presence in the public

16. Bill Rankin & Alan Judd, *Witnesses Recant: Law Stymies Death Row Appeal*, ATLANTA JOURNAL-CONSTITUTION, Sept. 21, 2003; *see also* Editorial Staff, *Our Opinions: Don't Execute When There's Doubt*, ATLANTA JOURNAL-CONSTITUTION, Oct. 2, 2003, at A14; Moni Basu & Sonjua Jacobs, *State High Court Taking Another Look at 1989 Murder of Savannah Cop*, ATLANTA JOURNAL-CONSTITUTION, Nov. 11, 2007.

17. AmnestyUSA, *Troy Davis Case: Part Four*, YOUTUBE (Aug. 24, 2011), http://www.youtube.com/watch?v=BJxudiudK4c&feature=BFa&list=PL57BCB0861959BD96&index=5.

18. Anderson Cooper, *Cop Killer or Innocent Man?*, CNN (August 17, 2009), http://transcripts.cnn.com/TRANSCRIPTS/0908/17/acd.02.html.

19. Letter from Sister Helen Prejean, author, Dead Man Walking, to State Board of Pardon and Paroles (June 26 2007).

20. *See* Vicky Eckenrode, *Pope Makes Plea to Spare Life of Troy Davis*, SAVANNAHNOW.COM, July 21, 2007, http://savannahnow.com/troy-davis/2007-07-20/pope-makes-plea-spare-life-troy-davis#.T-d-QXCbQlM.

21. Letter from The Most Reverend Desmond M. Tutu to the State Board of Pardon and Paroles (June 26, 2007).

22. *See* Curtis Johnson, *A Social Media (R)evolution*, NAACP.ORG BLOG (Dec. 9, 2011), http://www.naacp.org/ blog/entry/a-social-media-revolution; *see also* Kiratiana Freelon, *2011: The Year of Black Digital Domination*, LOOP21 BLOG (Dec. 29, 2011, 10:57 AM), http://loop21.com/life/2011-year-black-digital-domination. For examinations of the potential of technologies to address digital divisions, see Julianne Malveaux, *Will Technology Bridge the Gap Between Black and White? – Technology and Racism*, FINDARTICLES.COM (Aug. 22, 1996), http://findarticles.com/p/articles/mi_m0DXK/is_n13_v13/ai_18880706/.

sphere, and contributed significantly to both public and private deliberations concerning racial justice and the death penalty.

Despite these efforts, Davis was executed, and his case raises serious issues for those who envision the Internet as a democratic technology, intoxicated by the apparent influence of social media on events in other parts of the world and the notion that the "combination of improved publishing technology and social networks is a catalyst for social change where previous efforts have failed."[23] In the aftermath of Davis' execution, for example, supporters of this view contend that his case has led to an increased awareness of the injustice of the death penalty that could "have a corrosive effect on support for the death penalty down the road." A less sanguine and ultimately realistic assessment holds that "by the rules of instant communication, social media failed. People tweeted, posted, and forwarded, but Troy Davis was still executed."[24] Like democracy itself, the technologies to which it gives rise offer no guarantees of rendering a system of jurisprudence just.

Research in social informatics supports this view. Deborah Johnson, for example, notes that there are many forms of expression and interaction embedded in the Internet that are non-democratic, anti-democratic, and unconcerned with democracy.[25] Lincoln Dahlberg similarly argues that the technology itself is only incidental to popular participation in democratic processes: "The public sphere will not be extended merely through the diffusion of a new technological artifact. People must be drawn into rational-critical discourse before new technologies can be successfully employed to extend the public sphere."[26] The insights of Johnson and Dahlberg point to conflicts between political participation and technology that might very well be rooted in the modernist visions of Western democracy that shape our contemporary legal and political systems. These contradictions were cogently explicated in George Parkin Grant's exploration of the tensions between liberalism and technology in his book *English Speaking Justice:*

> In England, modern liberalism was above all the creed of the new bourgeois, in that the insistence on political liberties was related to the liberation of dynamic commercial technology, and thus with the expansion of that dynamism around the world. The claim to legal and

23. *Social Media in the 16th Century, How Luther Went Viral, Five Centuries before Facebook and the Arab Spring, Social Media Helped Bring About the Reformation*, THE ECONOMIST (Dec. 17, 2011), http://www.economist.com/node/21541719.

24. Kate Dailey, *Troy Davis' Execution and the Limits of Twitter*, BBC NEWS MAGAZINE (Sep. 22, 2011), http://www.bbc.co.uk/news/magazine-15028665.

25. *See* DEBORAH G. JOHNSON, COMPUTER ETHICS (Prentice Hall 2001); *see also Democratic Applications of Internet Technology*, CTR. FOR COMMC'N & CIVIC ENGAGEMENT, http://depts.washington.edu/ccce/digitalMedia/demonet.html (last visited June 24, 2012).

26. *See* Lincoln Dahlberg, *The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums for Extending the Public Sphere*, 4 INFORMATION, COMMUNICATION & SOCIETY 615, 630 (2001).

> political freedoms at home was not a claim that could be universally applied abroad to alien races who had to be made the subjects of that commercial technology. This was an even more pressing difficulty for the French, because after the revolution their ideology more explicitly universalized the rights of man.[27]

The "difficulties" that confronted the English and French were even more pronounced in the Americas, where the destruction of indigenous cultures coupled with the "peculiar institution" of chattel slavery revealed the limitations of an idealized social contract that effectively excluded and exploited non-Europeans, and non-Christians.

These limitations continue to be revealed in contemporary intersections between difference, identity, and technology, as well as in the ways in which the legal and political institutions and forces that define and decide the meaning of "justice" continue to be caught between the abstractions of an incoherent social contract and the realities of an inequitable "Racial Contract." Thus, faith in technology, like the faith in the reason it presupposes, is misguided precisely because it assumes an idealized vision of democracy in which race does not matter. The trial and execution of Troy Anthony Davis suggests otherwise, and we now turn to several critical perspectives on law, race, and media to offer an enlarged framework for enacting theoretical and practical strategies that facilitate political, economic, and social justice.

III. RE-SIGNING THE SOCIAL CONTRACT: MEDIA, RACE, AND THE LAW

Questions concerning the nature and character of justice are as old as Western civilization itself. In Plato's *The Republic*, the dialogue between Socrates and Thrasymachus revolves around such questions, with Thrasymachus making the infamous claim that "justice is nothing else than the interest of the stronger," and Socrates offering an idealized conception of justice as each one acting in accordance with his true inner nature for the benefit of all.[28] The same debate is rehearsed again centuries later in the moral philosophies that gave rise to the notion of a "social contract," in which the unfettered self-interest of individuals in a state of nature are juxtaposed against the need for constraints imposed upon them by institutional authorities. While the definitions of "nature" and the character of institutional authority are seemingly reversed in the two debates, they hold in common the claim that justice is ideally an art of social management that protects the interest of all and functions in service of the common good.[29]

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27. GEORGE PARKIN GRANT, ENGLISH-SPEAKING JUSTICE 6 (House of Anasi Press Limited, 1998).

28. PLATO, THE REPUBLIC 176-77 (Benjamin Jowett trans., Oxford University Press 1953).

29. See JOHN WILD, PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW (University of Chicago Press 1953), for continuities between classical and modern conceptions of rational justice. "In fact, as we shall attempt to show, Plato was a moral realist. As such, he must be

Historically, this art has been embodied in an adversarial culture and consciousness that has dominated legal theory and practice in the West. Grounded in rationality and practical reasoning, law has evolved largely as a set of attitudinal and institutional practices and procedures that aim at retributive instead of restorative ends. The violation of individual rights and liberties is addressed largely through processes of institutionally sanctioned discipline and punishment, and it is through this process that contractarian agreements are executed and sustained. While, ideally, such processes effectively protect the rights of *all* individuals, in reality they have excluded those "alien races" that the framers of English speaking justice have deemed less than rational, and less than human. Nowhere is this clearer than in moral incoherence characterized by the West's domination and exploitation of people of African descent.

That moral incoherence exposes the failures of contractarian notions of justice by revealing how an idealized social contract has been enacted in what Charles Mills describes as a "Racial Contract." "The ideal 'social contract' has been a central concept of Western political theory for understanding and evaluating the social world," explains Mills. "I am suggesting, then, that as a central concept the notion of a Racial Contract might be more revealing of the real character of the world we are living in, and the corresponding historical deficiencies of it normative theories and practices than the raceless notions currently dominant in political theory."[30] This embrace of racelessness is one of two aspects of Enlightenment. The first is justice that illustrates its failure to acknowledge historical and cultural realties. The second is revealed in its privileging of retribution as the dominant strategy for framing issues of crime, criminality, and punishment.

In the Interests of the Stronger: Historicizing Capital Punishment

Judith Kay argues that this privileging on retributive justice reflects a master narrative, one that denies its status as a historically constrained "story" and instead positions itself as an inevitable outcome of "natural" law. It is a story that, *ideally*, treats all who deserve punishment equally, and forms of punishment equitably. Historically, however, that has not been the case. As Judith Kay explains:

> When Enlightenment philosophers tried to de-story their concepts of punishment, they wrote as if their views were free from the constraints of culture. This pretense resulted in a lack of critical insight into the

classified with the tradition which later came to be known as natural law." *Id.* at 62. "The great social and political struggles of our era have called forth widespread and intensive reflection on the nature of law and its foundations. As in the past, such reflection has led to a serious questioning of that positivistic legal theory which denies any natural foundations for prescriptive principles and reduces all law to the level of subjective human decree." *Id.* at 233.

30. *See* Mills, *supra* note 2, at 7.

> question of who decides what counts as a harm (the ruling elites) and what harms would be designated as criminal actions (actions that harm those interests). The result is an ideological naïveté about the harsh injustices of the criminal justice system. Most Americans repeat the delusion that the criminal law targets for prosecution all intentional lethal actions and that the death penalty is reserved for the worst of the worst. These delusions are deadly.[31]

Kay's analysis is decidedly *rhetorical*, and is specifically concerned with the moral and social implications of the death penalty as they are realized in the particular and concrete, in contrast to the ideal and abstract. She suggests that our contemporary investment in capital punishment is grounded in a set of beliefs about justice, crime, and punishment that remain rooted in antiquated Enlightenment beliefs, assumptions, and language about criminal justice. "By treating ethical concepts as if they made sense apart from any story, Enlightenment philosophers' cover story became that they had no story. Today, punishment is discussed almost exclusively in Enlightenment categories."[32] Like the social contract to which it gave rise, the Enlightenment "story" of crime and punishment was, and continues to be, framed by an unspoken set of assumptions that define what we accept as reasonable, acceptable, and just, not only for ourselves, but for our fellow members of society as well.

Mills and Kay are by no means alone in their assessment of the moral incoherence of political theory and the legal and social institutions and practices to which it gives rise. Contemporary legal and moral philosophers have interrogated this rupture between idealized and enacted Critical theories in law, race, and media echo this analysis of the ideological and institutional impulses that enact and sustain privilege and perpetuate inequality through legal and political practices. Each of these perspectives offer powerful analytical lenses through which the trial and execution of Troy Anthony Davis might be viewed, and may provide a frame for understanding what many of his supporters experienced as a failure of justice and a reification of the interests of the stronger.

IV. REFRAMING TROY DAVIS: CRITICAL LENSES OF LAW, RACE, AND MEDIA

One of the most sustained and radical critiques of modernist legal and political theories have been advanced by Critical Legal Studies (CLS) scholars. Motivated by a postmodern critique of rationality and influenced by the progressive politics of the 1960s, critical legal theorists challenged both the rational foundations of law and the social practices it embodied. Theorists also offered a political and analytical critique of law that challenged its reliance upon

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31. *See* JUDITH W. KAY, MURDERING MYTHS: THE STORY BEHIND THE DEATH PENALTY 13 (Roman & Littlefield Publishers 2005).

32. *Id.* at 10.

objectivism, foundationalism, and ruptures between legal and political conceptions of rights. CLS has an avowedly oppositional agenda that rejects liberal-democratic values and institutions, and argues for their radical replacement. Beginning with a leftist critique of law as a politicized hegemonic practice, they argue for its deconstruction, and evaluate it as a fundamentally repressive and regressive institution.[33]

Despite its powerful critique of contractarian law, the ideological agenda of CLS has not been translated into concrete legal and political advances for members of minority groups. Indeed, the inadequacies of CLS, when issues of race are concerned, led to the emergence of Critical Race Studies (CRS), an interdisciplinary critique of law and legal institutions that focuses on the lived experiences of people of color, those "alien races" historically exempted from signatory inclusion in the social contract. A key point of conflict between CLS and CRS is the radical rejection and replacement of enlightenment ideals by the former, and the belief that aligning those ideals with social practice offers a more constructive approach to transforming the Racial Contract into a legitimate and inclusive social contract held by the latter.[34]

The oppositional stance/perspective of CLS, which argues for informal and decentralized social and legal arrangements, runs the risk for CRS scholars of potentially replacing one idealized set of relations for another that has equally problematic assumptions of "race neutrality." Scholars in Minority Legal Studies (MLS), a subset of CRS, articulates this concern in the following terms: "The two ideals, perhaps at an abstract level, share a vision of society in which citizens live their lives unfettered by oppression. However, the Minority Scholar ideal, by proposing institutional protections which CLS does not, moves from an abstract ideal to a realistic one."[35] Having never themselves experienced oppression, CRS scholars contend, "Crits" cannot conceive of the realities of racism and discrimination in anything other than abstract terms.

This resistance to abstraction and an emphasis on race and embodied knowledge has helped to cultivate an awareness of the need for self-reflexivity in CRS and those areas of inquiry that it has significantly influenced such as MLS, Feminist Legal Studies, and Critical Criminology. In her early analysis of essentialism in Feminist Legal Theory, for example, Angela Harris contends that

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33. *See* ROBERTO MANGABERIA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (Harvard University Press 1986); Wayne Eastman, *Critical Legal Studies*, Encyclopedia of Law and Economics Volume I The History and Methodology of Law and Economics (Boudewijn Bouckaert and Gerrit De Geest, eds., Edward Elgar**,** 1991); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies* in *Left Legalism/Left Critique*, (Janet Halley & Wendy Brown eds., Duke University Press, 2002); Katheryn K. Russell, *A Critical View From the Inside: An Application of Critical Legal Studies to Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 222 (1994).

34. *See* MARI MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 4-5 (Westview Press, 1993).

35. John Hardwick, *The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?*, 11 B. C. THIRD WORLD L.J. 137 (1991).

"legal theory, including feminist legal theory, has been entranced for too long and to too great an extent by the voice of 'We the People.' In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."[36] This focus on language and lived experience reflects the same impulse toward the rhetorical embodied in Kay's critique of capital punishment, and is evident also in the critical work of scholars in the areas of crime and criminology.

Raymond Michalowski calls for a reconstructive agenda expressed in what he defines as "Critical Criminology" that emphasizes the "voices of immediate suffering."[37] Michael Coyle explicitly connects the concerns of Critical Criminology with the need for recognition of the powerful relationship between language and the social construction of racial identity. "The implication inherent in critical criminology is that if a racist 'criminal justice system' is present, then the racism lives in the language and importantly, given our age of political correctness, in a language that frequently *does not sound racist*."[38] The alignment of the symbolic with the structural that characterizes Critical Race studies is paralleled by an emerging body of inquiry and expression that addresses the role of media in the representation of criminality.

Craig Haney describes the emergence of fictionalized and media depictions of crime as "media criminology," and argues that it "reinforces a dominant cultural narrative about the origins of violent criminality—one that implies something about the nature of the persons who perpetrate such crimes and the societal policies that are needed to properly address them."[39] Haney argues that this "master narrative" is not the result of media alone, and echoes the arguments of other scholars that place its roots and origins in 19th century notions of crime and punishment. While this narrative broadly influences attitudes toward violent crime, it is particularly troubling when race is involved, as it cultivates an "empathic divide," particularly "when defendants of color are judged by white jurors, a dynamic that is likely to occur more often in death penalty cases because of the way in which death qualification disproportionately eliminates non-whites from participating on capital juries."[40] Media criminology thus reifies historical and institutional practices that perpetuate and sustain systems of domination and inequality through largely representational means.

This analysis is widely supported by critical media scholarship and creative work. "The targeting of 'others' has been a continuing element in public

36. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

37. Raymond Michalowski, *Critical Criminology for a Global Age*, 11 W. CRIMINOLOGY REV. 3, 5 (2010).

38. Michael J. Coyle, *Notes on the Study of Language: Towards a Critical Race Criminology*, 11 W. CRIMINOLOGY REV. 11, 17 (2010).

39. Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 727 (2008-2009).

40. *Id.* at 736.

punishment in the United States as well. Such official retribution has often targeted blacks and other minorities, whether in public lynchings, or death penalty cases, particularly if the victim is white," explains Rachel Lyon. Further,

> Dramatizing the villains, who must then be prosecuted and punished, has been a big business for print, television, broadcast news and even in the newer mediums of Internet entertainment. These media function as mediators of meanings, powerfully shaping the ways in which people understand our world by organizing information in such a way that the viewer/media participant forms perceptions over time about good and bad.[41]

Lyon's documentary work reframes this understanding through an interventionist critique of the relationships between mediated construction of identity, social power, and racial privilege.[42] Like critical studies of the law and race, critical studies of media offer a comparable account of identity, power, and privilege as they are shaped by mediated representations of difference. Influenced by the progressive agenda of cultural studies, critical media scholars argue that media are not comprised of objective rational agents who describe the world based on facts, evidence, and information. They are instead, made up of ideologically motivated individuals for whom the protection of privilege, whether consciously or unconsciously, influences understanding, perception, and decision making.[43]

This is made powerfully clear at the point where media and the law regularly intersect: the reporting of crime. Criminologist and critical media scholar Gregg Barak has explored this intersection extensively, and echoes the concerns of critical legal, race, and media scholars in his attempt to articulate a counter-hegemonic practice, what he terms a "replacement discourse," which "is not simply critical and oppositional, but provides both a critique and an alternative vision."[44] Barak is suspicious of essentialized conceptions of race, crime, and justice, and articulates an approach to criminology that shows "the intertwined connections between individuals, activities that harm, and the whole of which we are a part."[45]

Barak's project intersects and amplifies the emancipative impulses of critical race and criminology theory, and affirms the emphasis in both of these areas of inquiry for an alignment of the structural with the symbolic. It calls for a

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41. Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*. 58 DEPAUL L REV. 741, 741-42 (2008-2009).

42. *See* RACE TO EXECUTION (Rachel Lyon 2007); INTERNET DOCUMENTARY: JUROR NUMBER 6 (Rachel Lyon 2009).

43. *See* BRIAN L. OTT AND ROBERT L MACK, CRITICAL MEDIA STUDIES: AN INTRODUCTION (Blackwell Publishing, 2010).

44. GREGG BARAK, MEDIA, PROCESS AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING CRIMINOLOGY 290 (Gregg Barak ed., Garland Publishing, 1994).

45. *Id.*

reflexive account of the intersection between law and media that recognizes how "the retelling of stories of crimino-legal justice reveal [sic]the interplay between media consumption and the social construction of crime and danger."[46] His "interventionist" critical agenda, calls for a reframing of criminality that challenges the narratives that we have inherited and, often unconsciously, consumed as true, just, and real. Barak's observations provide a powerful lens through which to view the trial and execution of Troy Anthony Davis, precisely because they point to both the possibilities and problems of the assumptions underlying the narrative turn in critical research.

One of those assumptions is that an enlarged public sphere of discourse and knowledge, the inclusion of more voices, can help to bring about a more equitable and just society. While the inclusion of multiple voices might be a necessary precondition for a more democratic society, it is hardly sufficient: indeed, this has precisely been the case with the rapid technological advances that have transformed traditional media.

> Hence, the mass production of knowledge, or what passes for it, which was once primarily confined to the writings and research findings of the professionally trained experts or disciplinarians, today, by contrast, include widely disseminated information propagated by nonexpert, and often, unadulterated ideological sources, such as those found in fiction, film, and television, not to mention the ever expanding and omnipotent Internet and World Wide Web.[47]

Barak's project is both instructive and prescient. It is instructive in that it opens up the possibility of understanding the politics of racial justice in terms of its institutional, ideological, and individualized forms. It is prescient in that it presages one of the most perplexing and contested dimensions of the Troy Davis case: the failure of traditional and emerging media technologies to intervene successfully in his eventual execution.

After being convicted and sentenced to death by a jury of his peers, the legal considerations afforded Troy Anthony Davis in the appeals process did not ultimately address the question of whether he was guilty or not guilty: only if he should be put to death or kept in prison for the rest of his life. That the state's decision to enact the ultimate punishment was highly contested and by no means inevitable is evidenced by the fact that there were numerous stays during the twenty years that Davis spent on death row, and that several appeals for reconsideration of evidence were granted. It is also suggested by the lack of unanimous decisions in the case. Yet despite this uncertainty and doubt, as well as the significant outpouring of support for clemency, Davis was ultimately put to death.

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46. Gregg Barak, *Reflexive Newsmaking and Representation,* 16 CRITICAL STUDIES IN MASS COMMC'N 480 (1999).

47. *Id.* at 481.

The reasons for the decision to execute Davis were both procedural and statutory. Among other things, presiding judges cited Davis's failure to present evidence at the original trial, jurisdictional issues, and lack of witness credibility as reasons for rejecting his appeals and requests for reconsideration.[48] Davis's case was also hampered by the lack of support for post-conviction defenders enacted in 1995, and the legislative constraints of the Anti-terrorism and Effective Death Penalty Act passed in 1996.[49] But the reasons given that led to Davis' execution, although sufficient to justify the decision, did not *necessarily* require the result. Indeed, at any point in time, an alternative set of reasons could have been adopted that would have justified different decisions: a lack of physical evidence (no murder weapon was ever found), inconsistent witness testimony, evidence of police coercion, witness recantations, and evidence that his accuser may have himself committed the crime.[50]

The question of why this set of reasons did not result in reasonable doubt about the necessity of executing Troy Anthony Davis might be partially answered by Kay's analysis: that they do not fit our cultural "story" about the death penalty. "A great deal of confusion in thinking about the death penalty stems from the denial of the story dependence of any rationale for punishment. Indeed, the repudiation of story has had grave consequences for the practice of punishment."[51] Beyond the legal and procedural concerns raised by this alternative set of reasons, explains Kay, there are concerns that challenge the "cover story" of who we are as a society, and dismisses the mistreatment of the disadvantaged as inconsequential. "In the United States, the cover story says that there is no structural injustice in the land of liberty and equality. It denies that people suffer disadvantages because of their class, sex, or race, and that such mistreatment—if left unchallenged—can ruin lives."[52] In Troy Davis's case, a life was not simply ruined: it was ended.

Critical theories of law, race, and media all offer powerful insights into the institutional and ideological impulses that framed and constrained the Troy

48. For the legal arguments presented on Davis's behalf and rulings associated with his appeals see Davis v. State, 426 S.E.2d 844 (Ga. 1993); Davis v. Turpin, Civ. Action No. 94-V-162; Davis v. Turpin, 539 S.E.2d 129 (Ga. 2000); Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006); Docket for 06-1407 Supreme Court of the United States.

49. *See* Amnesty International, *supra* note 7, at 4. *See also* Matthew Bigg, Campaign Grows to Halt Execution of U.S. Inmate, REUTERS, July 13, 2007,http://www.reuters.com/article/2007/07/13/us-usa-execution-idUSN1339557120070713; Leigh Lundin, *The Crime of Capital Punishment*, SLEUTHSAYERS (Oct. 2, 2011, 12:39AM), http://sleuthsayers.blogspot.com/2011/10/crime-of-capital-punishment.html.

50. *See* Elizabeth Schulte, *Justice Denied Again for Troy Davis*, SOCIALISTWORKER.ORG, March 28, 2008, http://socialistworker.org/2008/03/28/justice-denied-troy-davis (Georgia State Supreme Court Justice Leah Ward Sears, in her dissenting opinion, questioned the court's refusal to grant him a new trial: "If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically").

51. *See* Kay *supra* note 28, at 1-2.

52. Kay *supra* note 28, at 2-3.

Davis case, yet fail to achieve the *praxis* they theorized. All of these perspectives, however, even as they contest the objectivist and essentializing impulses of modernism, nonetheless embrace one of its most compelling epistemological commitments: an investment in what Jürgen Habermas defines as the "emancipatory cognitive interest."[53] Habermas affirms the modernist commitment to rational discourse as a precursor to the creation of a democratic polity, arguing that it cultivates the capacity for self-reflexivity that is at the heart of public and critical discourse.

The point at which Habermas and the critical theorists of race and criminology mention above depart from Enlightenment rationalism is the faith in the power of discourse to transform institutional structures. Underlying Habermas' emancipative interest is a belief in the efficacy of communication for the mediation of individual, ideological, and institutional conflicts. Thus, Habermas envisions an "ideal speech situation" as the culmination of the modernist enterprise, a situation in which, given equal access to the public sphere, practical reasoning and persuasion can be vehicles through which contractarian guarantees of justice and equality can be achieved.[54]

The Habermas ideal is, however, just that: an ideal. And the realities of the Racial Contract, as well as the critical interventions of legal, race, and media critics, not only stand in juxtaposition to the rationalist orientations of modernism, but also render problematic one of the celebratory commitments that it shares with these critical projects: that, if given the "right" information, individuals and institutions can be transformed through reasoned discourse. This is an unspoken assumption of much contemporary criticism, and it presupposes that racism is ultimately a problem of rational deliberation. As such, it is a problem that can be addressed adequately through education: that if "reasonable" people are given the "correct" information, they will make the "right decisions." The Troy Davis case suggests otherwise.

The Davis case challenges this celebratory belief in the power of persuasion and intellectual understanding, central to Enlightenment thinking and still nascent in the "rhetorical turn"[55] that characterizes the critical projects of law, race, and media. It illustrates the fact that, despite a preponderance of evidence that pointed to reasonable doubt; despite a plethora of examples of the inequitable application of the law in death penalty cases when race is involved; despite an enormous public outcry expressed through both traditional and new

53. JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Beacon Press, 1971).

54. Jürgen Habermas, *Towards a Theory of Communicative Competence, Inquiry* 13, 360-375 (1975).

55. *See* HERBERT W. SIMONS, THE RHETORICAL TURN: INVENTION AND PERSUASION IN THE CONDUCT OF INQUIRY (University of Chicago Press, 1990) (discussing the numerous ways in which rhetorical inquiry is central to various disciplines and professions). *See also* NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING (Oxford University Press, 2006) (discussing the centrality of rhetoric as an art of practical reasoning to the study and practice of law).

media demanding that his life be spared; despite all of this, Troy Anthony Davis was put to death. For some, his death represented the righteousness of retributive justice. To others, it caused a sense of resignation and disbelief leading to a loss of faith in reason, fairness, and the basic principles and practices of American law. For the authors of this essay, his death represents an important opportunity to interrogate and rethink the problems of how law, race, and media might enhance our understanding of the possibilities of restorative justice.

V. EXECUTING DEMOCRACY: FROM RETRIBUTION TO RESTORATION

It is not unreasonable to argue that the decisions that led to the execution of Troy Davis were motivated by race. Indeed, there is ample evidence to indicate that race continues to play a significant role in capital cases. Baldus *et al* in their analysis of the relationship between race and capital punishment in Pennsylvania conclude "the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions."[56] Peffley and Hurwitz, in their analysis of the effect of arguments that emphasize the unfairness of the death penalty draw even more troubling conclusions. "When confronted with the argument that the death penalty is racially unfair, whites who believe that black crime is due more to blacks' dispositions than to a biased justice system end up rejecting the racial argument with such force that they become even more supportive of the death penalty."[57] At both the institutional and attitudinal level, race continues to influence how justice is understood and enacted in American society.

Peffley and Hurwitz suggest that, in contrast to white resistance to persuasion, blacks are more likely to be influenced by the fairness issue in light of their historical experience with the justice system. Yet, in the Davis case, this conclusion is undermined by the fact that both the jury that tried, convicted, and sentenced him to execution, and the Board of Pardons that affirmed their decision, were racially mixed. The Davis case was, on the surface, a stereotypically racialized case of a black man accused of killing a white police officer in the South, yet it was also at a deeper level, a case that simultaneously challenges static notions of racial identity and difference, and questions the effectiveness of rational discourse in cultivating a just and equitable society. It points to the power of deeply held beliefs about race and justice to influence and

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56. David C. Baldus ET AL., *Racial Discrimination and the Death Penalty in the post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998).

57. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AMERICAN JOURNAL OF POLITICAL SCIENCE 996, 1007 (2007.) For a discussion of how white racial attitudes influence responses to crime and punishment see also Eva G. T. Green, ET AL., *Symbolic Racism and Whites' Attitudes Toward Punitive and Preventive Crime Policies*, 30 Law Hum. Behav., 435-54 (2006).

motivate action, and suggests that a more nuanced understanding of race might be needed to facilitate the movement of critical inquiry toward social transformation.

It is worth noting that despite the racially mixed composition of both the original jury and the Board of Pardons, whites outnumbered blacks. To the extent that the two races maintain different perspectives on crime, punishment and justice itself, such inequality tends to reproduce existing power relations even as appearing to offer the possibility of fairness.

To the extent that the perspectives are reproduced in the processes of the jury and parole board, they represent the continued institutional power of whiteness the imposition of this observation is underscored by two areas of inquiry that hold promise for that movement: the study of implicit bias and research on the rhetoric of racism. Based upon an empirically grounded "Implicit Association Test," implicit bias research reveals the persistence of underlying beliefs about race and difference, and how they unconsciously influence individual and institutional decision-making. "The types of racial bias revealed in this testing have been found to affect all aspects of the criminal justice system," explains David Harris, pointing to research that examines probation officers' perceptions of offenders of different races, jury attitudes, and even judges' sentencing decisions. He concludes, *a fortiori:* "If experienced judges cannot seem to avoid racial bias, it is hard to imagine that death penalty jurors are exempt from such influences."[58]

Most importantly, implicit bias research illustrates how these beliefs cut across established categories of physical difference and, by virtue of their unconscious character, actively resist persuasive, argumentative, and even critical interventions. It affirms a critical conception of racial identity that is closely aligned with the important distinction drawn by Mills between *white* as a physical category, and *whiteness* as a way of knowing and being: "Whiteness is not really a color at all, but a set of power relations."[59] The heuristic power of Mills's observation is important, for it recognizes that while people of European descent have historically been the beneficiaries of the Racial Contract, they have not been its only signatories: "All people can fall into Whiteness under the appropriate circumstances," he writes, citing as an example the intra-racial genocide that occurred in Rwanda in 1994.[60] For Mills, the Racial Contract is not a rejection of Enlightenment ideals, but a racially informed critique of its unspoken assumptions and ideologies.

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58. *See* David Harris, *Written Testimony Submitted to the Maryland Commission on Capital Punishment,* Charles Hamilton Houston Institute for Race and Justice, Harvard Law School, 16-17 (2008). *See also* Christine Jolls, The Law of Implicit Bias, Yale Law School Legal Scholarship Repository (2006).

59. *See* Mills, *supra* note 2, at 127.

60. *See* Mills, *supra* note 2, at 128-29.

(Re)Signing the Racial Contract

Research on the rhetoric of racism also explores the constitutive power of whiteness and questions the efficacy of rational discourse in the achievement of racial reconciliation. At its most sanguine, the research affirms the reconstructive impulses of critical race theory in its recognition that a purely oppositional critique remains complicit with oppression, and in its affirmation of coherence between principle and practice as an alternative to that complicity.[61] At its most skeptical, it points "to the limitations of rational rhetoric to address the realities of race, as well as the inability of law and politics to extend to people of African descent the inalienable rights ostensibly enshrined the in the foundational beliefs and expressed in their forensic and deliberative declarations."[62] It questions the efficacy of rational rhetoric and practical reasoning in the critique of racial identity and division, positing that the history of rhetorical inquiry as it relates to race clearly illustrates the inadequacy of finding and using "the available means of proof, " and suggests instead that racism is more likely a problem of "psychiatry" than "persuasion."[63]

Like Critical Legal Studies, research on the rhetoric of racism offers a racial critique of contractarian justice, but follows the approach of Critical Race Studies in its suspicion of critical deconstruction that lacks a reconstructive agenda. Like CRS and Critical Media studies, it considers the roles of language and symbolic representation in the social construction of race, and cautions against the essentializing impulses of oppositional notions of difference and identity. Such notions obscure the degree to which the dominant and the dominated can be complicit in systems of oppression, whether through language, thought or action. In its most recent articulation it aligns the moral and philosophical social critique of Mills's Racial Contract with the empirical findings of symbolic racism and implicit bias research.

The critical project of the rhetoric of racism affirms the notion that limiting our discussion of race to identity and physicality limits the available means of political transformation, resulting not in an idealized democracy envisioned in Enlightenment discourse, but in what Joel Olson calls "white democracy": "The problem with limiting our understanding of race to personal identity is not that it leads to a politics of resentment, victimization, or balkanization, as many critics of identity politics argue, but that it leads to very little politics at all."[64] The critical project of the rhetoric of racism calls our attention to the extent to which

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61. *See* MARK LAWRENCE MACPHAIL, ZEN IN THE ART OF RHETORIC: AN INQUIRY INTO COHERENCE (State University of New York Press, 1994).

62. *See* Mark Lawrence McPhail, *The Politics of Complicity Revisited: Race, Rhetoric and the (Im)possibility of Reconciliation*, 12 Rhetoric & Public Affairs 107, 117 (2009).

63. MARK LAWRENCE MCPHAIL, THE RHETORIC OF RACISM REVISITED: REPARATIONS OR SEPARATION*?* (Rowman and Littlefield Press, 2002).

64. *See* JOEL OLSON, THE ABOLITION OF WHITE DEMOCRACY 6 (University of Minnesota Press, 2004).

oppositional criticism too often reifies the rationalizations of Enlightenment reason by privileging abstract and idealized possibilities instead of practical and empirically verifiable realities.

The rhetoric of racism reveals that, in the case of race, rhetoric, like reason, has failed in Western theory and practice to translate democratic thought and discourse into an embodied social practice. It nonetheless also acknowledges that in the absence of an embodied politics, intellectual inquiry can still offer a productive vehicle for articulating strategies of transformation that connect the personal with the political. This connection is important to our understanding of law, race, and media, precisely because it considers the limits of institutional and representational changes that are divorced from and embody politics. The transformation of law, race, or media may begin with institutional practices and bodies, but if those transformations fail to find expression in the lived experiences of the individuals who interact within their contexts change will not occur.

Critical theories of law, race, and media provide a starting point for such transformations, and we here return to George Parkin Grant's consideration of English-speaking justice to suggest some productive future directions: "At a time when massive technological advance has presented the race with unusual difficulties concerning political liberty, what was needed from our academics was an attempt to think through all that was valuable from the great western traditions which could help us in dealing with these difficulties."[65] It would appear that we are today confronted with the same conditions that gave rise to the legal and political theories and practices that marked the period of history that produced the difficult and dangerous "story" that contains and constrains our understanding and experience of racial (in)justice, crime, and punishment. The question before us is whether we can learn from that history, or if we will be condemned to repeat it.

Grant's analysis suggests that a return to contractarian values and notions of justice may be our best hope for the future of the race, and for the reconciliation of the Racial Contract, and Mills also infers that this might well be the case. Mills argues that the Racial Contract is not simply a rejection of deconstruction of Enlightenment ideals, but an attempt at their reconstruction, a call for coherence between principles and practices. The Racial Contract "criticizes the social contract from a normative base that does not see the ideals of contractarianism themselves as necessarily problematic but shows how they have been betrayed by white contractarians," explains Mills. "Thus it lays claim to truth, objectivity, realism, the description of the world as it actually is, the prescription for a transformation of that world to achieve racial justice—and invites criticism on those grounds."[66]

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65. See Grant, *supra* note 26, at 92.
66. *See* Mills, *supra* note 2, at 129.

Mills's Racial Contract is thus a restorative vision of justice, in that it focuses "on the harms caused by the offense," and seeks "to repair the damage and restore broken relationships."[67] It is a "replacement" story of justice, one that emphasizes ethics, morality, and relationships over procedure, one that, evidently, we as a culture have difficulty accepting because it challenges our belief that our institutions truly serve the common good, and not simply the interests of the stronger. It is a story that might have led to a very different ending to the final chapter of Troy Anthony Davis's life. It is a story that invites us to consider carefully the possibilities and problems of law, race, criticism, and the promise that technology holds for the cultivation of deliberative democracy.

The unfulfilled promise of social media romanticized in the Troy Anthony Davis case reminds us that our commitments to legal, racial, and representational change remain incomplete unless realized in embodied practices. They invite a rethinking of race that takes us beyond the biological determinism and essentialist impulses of understanding racism in terms of *white people*, and instead recognizing it as a manifestation of *whiteness*. This rethinking is, we believe, necessary for a reconciliation of the oppositional tendencies of thought and practice which perpetuate racial and retributive (in)justice, and contribute to what Olson describes as "White Democracy": "The radical democratic ideal, then, is neither the refusal of recognition of race nor the equal recognition of cultures or races but *the refusal of recognition of whiteness.* Such a refusal opens space to create new forms of identity—for those who are white and those who are not—amidst a reinvigorated public sphere."[68] Olson's claim sounds eerily like those of new media enthusiasts who believe that the Internet and other forms of social media can open new spaces for democratic participation in the public sphere. Yet in the absence of an embodied politics that challenges racial and digital divisions, the degree to which either claim can be translated from an abstract ideal into a concrete practice, remains to be seen.

In *Executing Democracy: Capital Punishment & the Making of America, 1683-1807*, Stephen John Harnett's explication of "the rhetorical history of a very hard choice" magnifies the connections that we have drawn here between law, race, and media when he noted that

> [T]he history of the death penalty converges on this period of American history with the dawn of the culture industry. As new forms of mass-produced persuasion and entertainment began to flourish, and as elites continued to address the masses from the gallows, so the voice of these documents began to change.[69]

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67. *See* Kay, *supra* note 28, at 9.

68. *See* Olson, *supra* note 58, at 123.

69. *See* JOHN HARNETT, EXECUTING DEMOCRACY: CAPITAL PUNISHMENT & THE MAKING OF AMERICA 1683-1807 110 (Michigan State University Press, 2010).

Excluded from these voices, except perhaps as objects of their stories, African Americans cultivated an embodied politics that enlarged the limited notion of equality envisioned by the British colonists, persistently calling for the colonizers to be true to what they "put on paper."

This call for coherence was echoed in the abolitionist discourse of Frederick Douglass and in the civil rights rhetoric of Dr. Martin Luther King, Jr., and informs the emancipative projects of critical theories of law, race, and media. Their call for a system of legal justice that connects the personal with the political, gives voice to the silenced, and seeks a reconciliation of the contradictions of a "post-Revolutionary nation struggling to live up to its professed principles."[70] This might be our best--if not only--chance to heal the divisions, social and digital, that continue to separate us from the better aspects of our natures.

One of the most powerful examples of the translation of this theoretical project into embodied action can be seen in the words of Charles Ogletree, presented in a letter to the Georgia State Board of Pardons in July 2007, requesting the commutation of Troy Anthony Davis' death sentence. The letter presented legal and empirical arguments as justifications for the request, but it also drew upon Ogletree's own personal experience of violent crime: the murder of his sister Barbara Jean Ogletree Scoggins.

> It took a great deal of reflection and prayer to accept that my younger sister had been murdered. This brutal fact haunts and pains me to this day. My commitment to finding the person responsible for her death has not diminished. I have offered a reward for information leading to an arrest. While Barbara's killer should be punished, taking that person's life based on the kind of self-contradictory and recanted statements of unreliable witnesses found in the Davis case would not be a solution that Barbara, my family, or I could endorse.[71]

Six days later, the Georgia Board of Pardons granted Davis a 90-day stay of execution. While there is no way of knowing what effect Ogletree's words might have had on the Board's decision, his letter clearly reflected a commitment to reconcile tension between personal and political interests in the pursuit of restorative justice.

Five years later, in a letter released on the Internet reportedly written by Davis, he made a similar call for restorative justice:

> I can't even explain the insurgence of emotion I feel when I try to express the strength I draw from you all, it compounds my faith and it shows me yet again that this is not a case about the death penalty, this is

70. *Id.* at 210.

71. *See* Letter from Charles Ogletree, Chairman of the Board of the Southern Center for Human Rights, to Garland Hunt and the Georgia State Board of Pardons and Paroles (July 11, 2007).

> not a case about Troy Davis, this is a case about Justice and the Human Spirit to see Justice prevail."[72]

Unlike Ogletree's words, this plea for justice fell on deaf ears, and on September 21, 2011, Troy Anthony Davis, finally free, was silenced forever.

In the final statement made before that silencing, Davis poignantly expressed the point that we ultimately wish to make in this essay: "All I can ask . . . is that you look deeper into this case so that you really can finally see the truth."[73] What critical studies of law, race, and media suggest, and our contemporary practices that shape crime, criminality, and justice confirm, is that the truth can be found in the Thrasymachean assertion of justice: that is, indeed, little more than the interests of the stronger. But the life and death of Troy Anthony Davis reveals other truths: that human beings are capable of profound forgiveness and compassion, and that restorative justice is not simply an ideal, but also a possibility.

VI. CONCLUSION

Throughout this essay we have focused largely on the stories of race, crime, and justice as they have framed the life and death of Troy Davis, but we have been largely silent about the life and death of the other actor involved in these events: Mark MacPhail. While we cannot do justice here to the complexity of his story or history, we can acknowledge that he was a white police officer who gave his life in attempt to aid another man, himself the victim of a violent crime. He had a wife and children, and he chose a profession that he knew might inevitably put his life in danger. His final deeds were, by any account, heroic. We have no doubt that he believed in the possibility of a society in which the lives of all individuals were worth protecting, in which all individuals were worthy of justice. Charles Ogletree characterized MacPhail in his letter to the Georgia Board of Pardons: "As a respected police officer no doubt committed to peace, justice, and fairness, it is terribly difficult for me to believe that Officer MacPhail would have endorsed the decision to execute Mr. Davis despite a complete absence of physical evidence or reliable eye-witness testimony."[74]

Although we cannot know what Officer MacPhail might have endorsed, we do know what his family believed: that Troy Davis was responsible, and that he deserved to be executed. "We have followed the law, played by the rules, and those that are in positions of power have made their decisions along this long

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72. Letter Reportedly from Troy Davis Released on Internet | WSAV TV. http://www2.wsav.com/news/2011/sep/21/letter-reportedly-troy-davis-released-internet-ar-2443673/.

73. The Associated Press, *Troy Davis maintains Innocence in Final Words*, HUFFINGTON POST, Sept. 21, 2011, http://www.huffingtonpost.com/huff-wires/20110921/us-georgia-execution-last-words-glance/.

74. *See* Ogletree, *supra* note 65.

sorrowful trip," observed MacPhail's youngest sister, Kathy McQuary. She continued, stating that

> It is time to deliver the appropriate punishment and show our communities we believe in them and we will do what we need to do to ensure we are all safe. The rules are in place for a reason, we all have to abide by them. They are there for the safety of ALL of us.[75]

Like the members of the Georgia State Board of pardons and all those who supported the execution, the MacPhails believed that Davis had violated an agreed upon social contract and, as a consequence, deserved to suffer the highest penalty.

Yet, as we have shown, that contract has not in its execution truly applied to all. Following the law, playing by the rules, and trusting the judgments of the powerful and the privileged is no guarantee of justice. Still, we conclude with a sense of hope, not in our institutions, ideologies, or strategies of inquiry, but in the decisions made by individuals seeking to find a justice that lives in both principle and practice, a justice based not on retribution, but on a restoration of our broken beliefs, communities, and lives. We turn to the case of Russell Brewer, the murderer of James Byrd, who was also executed by the same system of retributive justice that took the life of Troy Davis. Brewer's execution shows again, that race, crime, and justice, cannot be adequately understood in black and white terms.

On September 21, 2011, the day that Troy Davis was executed, Byrd's family pleaded that Russell, an unrepentant white supremacist, be spared[76]. That their request was denied sadly reflects the same voicelessness of the millions who sought to spare Davis, but the Byrd family's words suggest that the Racial and Social Contracts might one day be reconciled, if not through intellectual inquiry or institutional transformation, then through individual acts of forgiveness and compassion. "If I saw him face to face, I'd tell him I forgive him for what he did," said Byrd's sister, Betty Boatner. "Otherwise I'd be like him. I have already forgiven him."[77] Byrd's son's words also offer hope for the possibility of a society no longer blinded by retribution and revenge, in which restorative justice is possible: "I hope that they will stand back and look at it before they go down that road of hate. Like Ghandi said, an eye for an eye and the whole world will go blind."[78]

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75. Kathy MacPhail, Speech in Support of Mark MacPhail (transcript available at http://www.fop9.net/ markmacphail/katesspeech.cfm).

76. *See* Doug Miller, *James Byrd's killer: 'I'd do it all over again*,' KENS5.COM (Sept. 21, 2011, 6:15 PM), http://www.kens5.com/news/130314468.html.

77. *See* Karen Brooks, *Victim's Son Objects as Texas Sets Execution in Hate Crime Death*, REUTERS, Sept. 21, 2011, http://www.reuters.com/article/2011/09/21/us-texas-execution-son-idUSTRE78K35B20110921.