

# Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama

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The 2008 election of Barack Obama to the U.S. presidency is racially momentous. Few would gainsay that the elevation of an African American to the most powerful and most public position in our national life signals a remarkable step toward racial equality. But what exactly does Obama's election portend for race in America? This Essay uses the tremendous racial disparities in the American crime control system to assess race and racism as key features of contemporary society. The Essay begins by considering a compelling thesis that racialized mass incarceration stems from backlash to the civil rights movement. If true, this raises the possibility that Obama's election, potentially marking the end of backlash politics, also represents a likely turning point in the war on crime. The Essay then reconsiders mass imprisonment from the perspective of "racial stratification," a structural theory that emphasizes the simultaneous formation of racial categories and the misallocation of resources between races. A stratification approach leaves one less sanguine about rapid change in American race relations, though without disparaging either the historic nature of Obama's inauguration or the possibility of incremental improvements in racial justice. Recognizing the continued need to push for

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positive racial change, the Essay concludes by arguing for a renewed focus on racism, in particular on “post-racial racism.”

## I INTRODUCTION

The election of Barack Obama to the presidency has inspired many to marvel at the seeming evaporation of race as a basis for social ordering in the United States, a euphoria often expressed in proclamations that we now live in a “post-racial” America.<sup>1</sup> For his part, Obama seems disinclined to lead a national conversation on race, let alone on the necessity of confronting continuing racial hierarchy.<sup>2</sup> Nevertheless, the very fact of his ascendancy to the country’s most powerful position suggests that a sea change in race relations has already occurred; simultaneously, his elevation to the most public position of national authority guarantees that for the next several years, at least, conversations on race, and perhaps even on racism, will occur almost daily, likely furthering racial progress.<sup>3</sup>

But there is reason to hesitate before celebrating. The nation elected Obama in the midst of profound economic, environmental, martial, and constitutional crises. Perhaps the crises, coupled with Obama’s exceptional racial background—combining Kenya and Kansas, an immigrant success story, and the positive exotic of Hawaii—better explain his election than any purported fundamental shift in racial attitudes. A pollster with special expertise on race opined just before the election that “a black man [cannot] be president of

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1. Hua Hsu, *The End of White America?*, THE ATLANTIC ONLINE, Jan./Feb. 2009, <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208/>; Tim Rutten, *The Good Generation Gap*, L.A. TIMES, Feb. 6, 2008, at 31 (suggesting that Obama “personifies and articulates the post-racial America in which most of our young people now live”); see also GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* (2009) (promoting Obama, among others, as a black politician who has transcended race); Peter J. Boyer, *The Political Scene: The Color of Politics*, NEW YORKER, Feb. 4, 2008, at 38 (same).

2. Even before he retreated to sharing a beer with the implicitly equally blame-worthy (or blame-free) Harvard professor Henry Louis Gates, Jr., and the police officer who arrested him, the scope of Obama’s comments on the incident elided the most pressing questions regarding racial justice and federal criminal policy. See, e.g., Glenn C. Loury, Op-Ed., *Obama, Gates, and the American Black Man*, N.Y. TIMES, July 26, 2009 at WK11 (“It is depressing in the extreme that the president, when it came time for him to expend political capital on the issue of race and the police, did so on behalf of his ‘friend’ rather than stressing policy reforms that might keep the poorly educated, infrequently employed, troubled but still human young black men in America out of prison. This is to say that, if Mr. Obama were going to lose some working-class white votes to the charge of ‘elitism,’ I’d much rather it have been on countering the proliferation of ‘three strikes’ laws, or ratcheting down the federal penalties for low-level drug trafficking, or inveighing against the racial disproportion in the administration of the death penalty.”); see also James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1004–05 (2010) (noting that while many professional African Americans experience discriminatory policing, only the poor end up in prison, and tying this observation to Obama’s outrage over the mistreatment of Gates and his silence concerning the almost one million blacks in prisons and jails).

3. Krissah Thompson, *Top Officials Expand the Dialogue on Race; Month’s Celebrations Evoke a Mix of Views*, WASH. POST, Feb. 28, 2009, at A01.

the United States of America. However, I think an exceptional individual who also happens to be black can be president of the United States of America.”<sup>4</sup> Perhaps, then, race has not been overcome so much as temporarily superseded.

Indeed, perhaps more than mere hesitation is warranted. Maybe there is reason to fear the immediate racial future. National crises have historically intensified, not ameliorated, race hatred. Widespread economic distress traditionally fuels racial resentment against nonwhites; perceived international threats typically spawn virulent xenophobia. Perhaps racial and xenophobic eruptions once again loom before us.

At this moment of swift change, hopefully but not assuredly in the direction of racial justice, this Essay seeks to take stock of how racial hierarchy now functions in the United States, and to evaluate what this portends for race in the age of Obama. To do so, it discusses racism through the lens of mass incarceration. It uses this magnifying glass because race seems so central to the administration of criminal justice, and yet racism when conceived as Klan-type bigotry offers limited explanatory purchase. It also uses this lens because, according to the dominant racial narrative explaining mass imprisonment, there seems good reason to hope the war on crime may soon wind down.

The public security system in the United States produces shocking racial disparities at every level, from stops to arrests to prosecutions to sentencing to rates of incarceration and execution.<sup>5</sup> The United States today places almost one in every thirty of its residents under correctional control in a racial pattern that generates state prison populations that are two-thirds black and Latino.<sup>6</sup> Racial differences in the penal context dramatically exceed those in every other social domain: “Whereas racial disparities in unemployment and infant mortality stand at roughly two to one, and the disparity in unwed childbearing is three to one, the differential with respect to imprisonment is eight to one.”<sup>7</sup> Even so, for the last two decades and more, the Supreme Court has assured us that these dramatic, persistent racial inequalities do not denote the presence of racial discrimination. *McCleskey v. Kemp* famously shrugged off the most sophisticated and exhaustive survey of criminal sentencing thus far undertaken when it rejected the claim that racism tainted Georgia’s death penalty machinery.<sup>8</sup> Though it accepted that Georgia imposed the ultimate penalty on blacks who murdered whites at *twenty-two times* the rate for blacks who killed blacks, the Court

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4. Marc Ambinder, *Race Over?*, THE ATLANTIC ONLINE, Jan./Feb. 2009, <http://www.theatlantic.com/magazine/archive/2009/01/race-over/7215/> (quoting Cornell Belcher).

5. MARC MAUER, *RACE TO INCARCERATE* (rev. & updated 2d ed. 2006); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

6. ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 7 (Pew Center on the States, 2009), available at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf) [hereinafter ONE IN 31]; WESTERN, *supra* note 5, at 16.

7. DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 99 (2007); WESTERN, *supra* note 5, at 16.

8. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

nonetheless opined that these statistics proved “at most . . . a discrepancy that appears to correlate with race.”<sup>9</sup> *McCleskey’s* dismissal of the evidence rested on a particular conception of racism as rooted in the episodic expression of individual malice.<sup>10</sup> Even crediting the Court’s conclusion that intentional racism is largely absent from contemporary crime control, the dismal numbers in *McCleskey* and beyond cry out for explanation.

Also militating for a special focus on mass incarceration is that the war on crime may soon be over, especially if a new theory regarding its origins proves correct.<sup>11</sup> Sociologists and political scientists have recently persuasively argued that the rise of mass imprisonment reflects a backlash against the civil rights movement. They point to the triumph of Richard Nixon’s “southern strategy,” whereby the Republican Party gained ascendance by attracting previously Democratic voters from the South, as well as the working and middle classes nationally, through coded appeals to racial fears—with “crime” serving as a potent synonym for the threatening presence and demands of nonwhites.<sup>12</sup> “Nixon’s strategy was based on the linkages between racial conflict and lawlessness; indeed, in viewing [one of his own campaign ads], he remarked triumphantly that it ‘hits it right on the nose. It’s all about law and order and the damn Negro-Puerto Rican groups out there.’”<sup>13</sup> Rather than challenging the politics of racial fear mongering, Democratic politicians almost immediately acceded to it, seeking to out-tough Republicans in “competitive upward bidding wars over the terms of punishment” that over decades created the carceral state we know today.<sup>14</sup> If this story is correct, however, then Obama’s electoral victory may be especially relevant to mass incarceration, for he triumphed not by meeting Republicans on the terrain of Nixon’s southern strategy, but by winning the presidency despite the opposition of southern whites, and indeed without a majority of white support at all.<sup>15</sup> Perhaps, then, Obama’s election

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9. *Id.* at 312.

10. *Id.* at 292.

11. Only very recently have there been any signs that the war on crime may have run its course. “As American society confronts a multitude of new challenges ranging from terrorism to the disappearance of middle-class jobs to global warming, the war on crime may be up for reconsideration for the first time in a generation or more.” Jonathan Simon et al., *Introduction to AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 1* (Mary Louise Frampton et al. eds., 2008).

12. See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 38 (1997); NAOMI MURAKAWA, *ELECTING TO PUNISH: CONGRESS, RACE, AND THE AMERICAN CRIMINAL JUSTICE STATE* (2005); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230 (2007).

13. Weaver, *supra* note 12, at 259.

14. MURAKAWA, *supra* note 12, at 5.

15. The point should be more finely put, for *no* Democratic presidential candidate has carried a majority of white voters since Lyndon Johnson in 1964, and even he lost the white southern vote that year. Timothy Noah, *What We Didn’t Overcome*, *SLATE*, Nov. 10, 2008, <http://www.slate.com/id/2204251/> [hereinafter *Overcome*]. The point, rather, is that Obama won without nearly matching his opponent’s performance among whites. Whereas Jimmy Carter won the presidency by coming within four percentage points of his opponent’s white vote, and Bill

presages an end to racialized crime rhetoric and policies, and the mass imprisonment that has resulted. Part II of this Essay explores the thesis that the current catastrophe of mass incarceration resulted in major part from racial politics, and further examines why this conclusion might give rise to optimism in the wake of Obama's election.

The remainder of the Essay tempers such optimism by suggesting a racial model that pictures race as much more deeply embedded in social ordering than the political story might initially suggest. To help develop that model, I draw on the insights proffered by Douglas Massey to explain social stratification. One of the leading contemporary scholars of social inequality, Massey argues that stratification has two principal components: the creation of social categories, and the misallocation of resources between those groupings.<sup>16</sup> Focusing on the misallocation of resources, Massey distinguishes between "exploitation," wherein one group expropriates resources from another, and "hoarding," in which a group that has previously acquired disproportionate resources acts to preserve its advantage.<sup>17</sup>

Building on this approach, this Essay argues that race in the United States functions as a form of social stratification: *racial categories arise and persist in conjunction with efforts to exploit and exclude*. Part III develops this racial stratification model, which I sometimes refer to as a "structural racism" approach. I do so to emphasize its focus on larger social processes rather than interpersonal dynamics, and also to stress its connection to past theories of race as a fundamental social force.<sup>18</sup> Reconsidering mass incarceration and also reprising the earlier horror of the convict-lease system that arose in the postbellum South, Part III gives particular attention to the misallocation of resources. Part IV emphasizes the other pillar of racial stratification, the construction of racial categories. Again assessing crime control, that Part focuses on three often neglected mechanisms by which races are created and stratified: violence, cumulation, and racial ideology. By way of conclusion, this Essay contends that racial stratification provides insight into "post-racial racism," a term used to refer to the various practices that collectively operate to maintain racial hierarchy even in the face of a broad social repudiation of purposeful racial mistreatment. "Racism" may seem a tendentious word, especially given the recent and dramatic advances relative to slavery and Jim Crow. The Essay

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Clinton won twice by inching within two points, Al Gore lost with a 13 percent deficit in white votes and John Kerry fell short with a 17 percent gap. Timothy Noah, *Sidebar: Presidential Candidate's Share of White Vote, 1968–2008*, SLATE, Nov. 10, 2008, <http://www.slate.com/id/2204251/sidebar/2204308/>. Obama's 12 percent shortfall in white votes, while admittedly better than Gore's or Kerry's, nevertheless marked a break from the pattern established by Carter and Clinton of Democrats gaining the White House by virtually splitting the white vote in half.

16. MASSEY, *supra* note 7, at 5–6.

17. *Id.* at 6.

18. For a discussion of the etymology of "structural racism," see *infra* notes 208–09 and accompanying text.

ends with an argument specifically engaging why the rhetoric of “racism” should be maintained, and even reinvigorated, in discussions of racial inequality.

Before turning to the main text, a brief comment on the relationship between racial stratification and other models of racism is warranted. In referring to “structural racism” and “post-racial racism,” it might seem my point is to emphasize the “structural” or the “post-racial” in a way that suggests that racism now operates “without racists”—that is, in a manner largely free of conscious intent.<sup>19</sup> True, stratification theory countenances individuals discriminating unintentionally, and also anticipates that entrenched patterns will routinely reproduce inequitable results. A stratification approach does not, however, exclusively privilege these relatively automatic mechanisms. Instead, it attributes continuing stratification to a broad range of behavioral and systemic practices, from volitional to unconscious, individual to institutional. The stratification approach is less a model of defined racial dynamics and more a framework for understanding the myriad mechanisms contributing to racial hierarchy. In keeping with this, the Essay discusses various theories of how race skews criminal enforcement, including approaches emphasizing intent, rational discrimination, implicit bias, institutional dynamics, and backlash politics. It does so to build upon, rather than correct, these approaches. Yet a stratification model is not simply syncretic, for it insists upon and aims to bring to the fore two foundational insights: first, racism assists in the misallocation of wealth, power, and prestige; and, second, racial stratification in turn both requires and contributes to the construction of races.

## II

### THE RACIAL POLITICS OF MASS INCARCERATION

Even the most cursory engagement with American criminal justice at the start of the twenty-first century drives home the twin points that the United States puts people under the control of the correctional system at an anomalously high rate, and that it shuts behind bars an overwhelmingly disproportionate number of black and brown persons. A 2009 report shows that one in every thirty-one adults in the United States is in prison or on parole or probation; broken down by race, that is one in every eleven African Americans, one in twenty-seven Latinos, and one in forty-five whites.<sup>20</sup> These two facts—extremely high rates of subjection to the carceral system and the highly disproportionate targeting of nonwhites—form the essence of racialized mass incarceration.<sup>21</sup> After summarizing some of the statistics on our present

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19. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003).

20. ONE IN 31, *supra* note 6, at 7.

21. *Cf.* David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1–2 (David Garland ed., 2001) (defining

situation, this Part considers the hypothesis that racial-backlash politics brought us here, and also explores reasons to hope that social repair soon may be possible.

### A. *The Numbers*

A dramatic, unprecedented expansion in the rate as well as the social impact of incarceration in the United States has been underway since the late 1960s. Between 1970 and 2003, the number of people in state and federal prisons serving at least one year behind bars rose from around 200,000 to 1.4 million.<sup>22</sup> At the end of that period, county jails warehoused another 700,000 persons either awaiting trial or serving sentences of under a year, while a further 4.7 million persons were on probation or parole.<sup>23</sup> Putting these numbers together leads to the astounding conclusion that in 2003 the correctional system held under its coercive thumb *more than one in every twenty* adult males in the United States.<sup>24</sup> This incarceration rate, the highest in the world, exceeds the highest rate in Europe by 500 percent.<sup>25</sup> The United States has 5 percent of the world's population, but holds 25 percent of the planet's prisoners.<sup>26</sup>

This “rage to punish” targets primarily poor African Americans and Latinos.<sup>27</sup> It does not, of course, entirely spare whites, who have also seen their rates of incarceration rise, if not as precipitously.<sup>28</sup> Nevertheless, for poor blacks and browns—and for poor, young, uneducated black men in particular—a year or more in prison is now excruciatingly common. The hundred-to-one sentencing disparity between crack and powder cocaine has emerged as the quintessential example of how the war on crime, conjoined to race, especially targeted blacks.<sup>29</sup> Partly as a result, in 2000, black men were more likely to be in prison

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“mass imprisonment” in terms of two essential elements. First, “a rate of imprisonment and a size of prison population that is markedly above the historical and comparative norm for societies of this type.” Second, “[i]mprisonment becomes *mass imprisonment* when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.”). This Essay uses the terms “mass incarceration” and “mass imprisonment” interchangeably.

22. WESTERN, *supra* note 5, at 3.

23. *Id.*

24. *Id.*

25. *Id.* at 15. This disparity persists despite the fact that Europe seems to be moving toward adopting the hypertrophied penal system pioneered by the United States. Loïc Wacquant, *Ordering Insecurity: Social Polarization and the Punitive Upsurge*, 11 RADICAL PHIL. REV. 9, 20–23 (2008).

26. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 27 (2009).

27. LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING (1994).

28. Among white men with no high school degree born between 1945 and 1949, the cumulative risk of incarceration was 4 percent. The risk of incarceration for this same group born at the end of the baby boom was 11.2 percent. WESTERN, *supra* note 5, at 27.

29. MAUER, *supra* note 5, at 154–56; WESTERN, *supra* note 5, at 52–81. Judge Clyde Cahill provided a stinging indictment of Congress's racial fears in enacting draconian punishment for

or jail (7.9 percent) than were white men in the high crime ages of twenty to forty who never completed high school (6.7 percent).<sup>30</sup> For young black men who failed to complete high school, the incarceration rate soared to 32.4 percent, meaning that at any given point nearly one in three languished behind bars.<sup>31</sup> Shifting from the rate of imprisonment within the population to the risk of incarceration during adulthood, by 1999 a black man born in the late 1960s had a one-in-five chance of having gone to prison for at least a year, while for men in that cohort who dropped out of high school, the risk of imprisonment surged to a staggering 59 percent.<sup>32</sup> Note that these last numbers *understate* the full reach of the criminal system, as they do not count the hundreds of thousands immured for less than a year.<sup>33</sup> Nor do they count the dramatic increase in the number of women, again primarily African American, subjected to incarceration. “[B]etween 1990 and 2000 the number of women in prison increased by 125 percent, and at the start of the twenty-first century over 166,000 women were held in U.S. prisons and jails.”<sup>34</sup> Serious time behind bars has become overwhelmingly common, a destructive rite of passage for many young, disadvantaged nonwhites; it is thus also an omnipresent torsion on families and neighborhoods, an implacable pressure on poor communities of color.<sup>35</sup>

### B. *The Disconnect Between Crime and Incarceration Rates*

One might expect certain disjunctures between crime rates and incarceration, while nevertheless supposing that over periods of years these would largely

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crack offenses:

[S]tereotypical images undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the “crack epidemic.” The fear of increased crime as a result of crack cocaine fed white society’s fear of the black male as a crack user and as a source of social disruption. The prospect of black crack migrating to the white suburbs led the legislators to reflexively punish crack violators more harshly than their white, suburban, powder cocaine dealing counterparts.

United States v. Clary, 846 F. Supp. 768, 784 (E.D. Mo. 1994), rev’d 34 F.3d 709 (8th Cir. 1994); see also Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y. REV. 257, 261–78 (2009); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290–97 (1995). Not all those who note this disparity condemn it. See Randall L. Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

30. WESTERN, *supra* note 5, at 17.

31. *Id.*

32. *Id.* at 26, 27.

33. *Id.* at 24.

34. Candace Kruttschnitt & Rosemary Gartner, *Women’s Imprisonment*, 30 CRIME & JUST. 1, 2 (2003) (internal citations omitted); see also WESTERN, *supra* note 5, at 15.

35. The crime control system, Glenn Loury argues, is a “monstrous social machine that is grinding poor black communities to dust.” GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 27 (2008); see also Tracey L. Meares, *Social Organization and Drug Laws*, 35 AM. CRIM. L. REV. 191 (1998); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).



follow each other. As it turns out, however, imprisonment over the last several decades surged even as crime rates moved in the opposite direction. In the best demographic analysis of mass incarceration to appear to date, Bruce Western documents how, even as the rage to imprison gathered momentum, rates of crime were declining.<sup>36</sup> Rates of incarceration started skyrocketing around 1980: after holding more or less steady for nearly forty years, the 1980 rate of fewer than 150 persons imprisoned for every 100,000 persons in the population shot up to a rate of almost 500 per 100,000 by 2004.<sup>37</sup> Meanwhile, crime rates peaked in 1981 at around six incidents per hundred inhabitants, and then fluctuated at lower levels before starting a steady slide down to about four incidents per hundred persons by 2002.<sup>38</sup> In short, rising incarceration rates cannot be explained by increasing crime rates, as after 1980 crime largely declined even as incarceration rapidly accelerated.<sup>39</sup>

### C. Racial Politics

If crime rates don't explain the rise of mass incarceration, what does? Recently, scholars in sociology and political science have suggested that today's punitive regime originated in a backlash to the civil rights movement.<sup>40</sup>

36. "Poor and minority men were much less involved in crime in 2000 than twenty years earlier, matching declines in crime in the population as a whole. Although disadvantaged men became much more law-abiding, their chances of going to prison rose to historically high levels." WESTERN, *supra* note 5, at 50.

37. Weaver, *supra* note 12, at 234 fig.1.

38. *Id.* at 235 fig.2.

39. But perhaps mass incarceration responded to increasing infractions, though in the 1960s and 1970s, rather than in the period from 1980 forward. On this account, rising crime rates during the 1960s and 1970s produced a shift in law enforcement techniques that, once institutionalized, continued to generate ever-higher rates of imprisonment. Crime statistics from the 1960s in particular are notoriously ambiguous, reflecting changing techniques in crime reporting, and crime statistics in general suffer from an endogeneity problem, as they can be driven up by the same increased level of policing they are often used to justify in the first place. Weaver, *supra* note 12, at 234. Nevertheless, it seems clear that crime did rise during this period. Even so, a unilinear connection between increasing crime and rising imprisonment seems unlikely. Crime was rising for almost a decade before being defined as a political problem. Moreover, rising crime rates can be confronted in a variety of ways, including a combination of more prevention and more punishment. *Id.* at 235. As Weaver concludes: "The simplistic assumption that increases in crime are behind changes that led to increasing prison populations ignores the politicization of the issue, how target groups were socially constructed, and elite incentives and agency." *Id.*; cf. WESTERN, *supra* note 5, at 71 (finding that differences in crime rates were less powerful in explaining differentials in state incarceration rates than was the election of Republican governors).

Nor can mass incarceration be given credit for most of the decline in the crime rates. Bruce Western dedicates a chapter to parsing this thesis. WESTERN, *supra* note 5, at 168–88. He concludes as follows:

My best estimate suggests that the 66-percent increase in the state prison population, from 725,000 to more than 1.2 million prisoners, reduced the rate of serious crime by 2 to 5 percent—one-tenth of the fall in crime between 1993 and 2001. Fully 90 percent would have happened without the 480,000 new inmates in the system.

*Id.* at 186–87.

40. See *supra* note 12 and accompanying text.

This is not to say that the backlash to civil rights expressed itself exclusively in terms of imprisonment; on the contrary, reactionary politics also, and relatedly, targeted the state's welfare functions. Nor is this to suggest that the current carceral system is rooted solely in racial dynamics; factors beyond race doubtless also spurred the emergence of crime control as a modality of governance. Nevertheless, there is ample evidence that racialized mass incarceration finds its origins as well as a persistent animating force in racial politics.

### *1. Crime Control as Opposition to Civil Rights*

The legislation that laid the groundwork for the war on crime first began appearing in the mid-1960s, a time during which the country experienced a metastasizing sense of social disorder. To a certain extent, popular anxiety about social disorganization reflected numerous nonracial factors, whether the economy, protests against the Viet Nam war, political mobilization on college campuses, the counter-culture movement generally, or the sense of social crisis engendered for many by the demands for women's and gay rights. Perhaps most potently, though, a sense of social breakdown stemmed from rapidly shifting race relations. Across the country, political mobilization by multiple nonwhite communities, whether African American, Latino, Native American, or Asian, destabilized racial hierarchy and concomitantly contributed to an escalating sense of social breakdown.

Many elected officials opposing civil rights used the language of law and order to respond to, and in turn stoke, racial anxiety among whites. Recourse to such rhetoric partly reflected the ready availability of this frame. From the inception of the civil rights movement in the 1950s, southern politicians had disparaged racial activists as "lawbreakers"—as indeed they were.<sup>41</sup> In the Jim Crow regions, citizens had long pressed basic equality demands through lawbreaking: sit-ins and freedom rides purposefully violated segregation statutes in order to challenge white supremacist social norms. Paradoxically, however, it was the very success of the civil rights movement that created an incentive for its opponents to take crime tropes to the national level. Agitation for racial justice helped birth a national consensus condemning the frank espousal or brute enforcement of racial hierarchy, even as it generated opposition and anxiety among whites. With the moral triumph of the movement, such anxiety could no longer legitimately be expressed in openly racist terms. Quickly enough, however, political leaders mobilized white opposition to civil rights through a proxy language: "crime" became a coded vocabulary capable of marshalling racial fears without violating newly dominant egalitarian norms.

In 1964, Barry Goldwater in his quest for the White House took the law and order meme national, warning the country that "[c]rime grows faster than

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41. BECKETT, *supra* note 12, at 30.

population, while those who break the law are accorded more consideration than those who try to enforce the law. . . . Our wives, all women, feel unsafe on our streets.”<sup>42</sup> With success among southern whites suggesting the power of his message, other politicians echoed and amplified Goldwater’s theme. Linking civil rights to crime, in 1965 J. Edgar Hoover denounced nonviolent civil disobedience as a catalyst for lawbreaking and even violent rioting:

“Civil disobedience,” a seditious slogan of gross irresponsibility, has captured the imagination of citizens. . . . I am greatly concerned that certain racial leaders are doing the civil rights movement a great disservice by suggesting that citizens need only obey the laws with which they agree. Such an attitude breeds disrespect for the law and even civil disorder and rioting.<sup>43</sup>

That same year, President Lyndon Johnson also took up the crime issue, delivering his first presidential address specifically on crime, and sending a legislative anticrime agenda to Congress.<sup>44</sup> By the late 1960s, “law and order” had become a surrogate expression for concern over the increasing power of the civil rights movement.<sup>45</sup> In national politics, Richard Nixon made law and order a de facto campaign slogan, and rode it to victory in the 1968 presidential election.<sup>46</sup>

The contest pitting law and order against civil rights found especially momentous expression in the legislative arena. The 1964 Civil Rights Act provided a head-to-head contest, with civil rights advocates eventually overcoming determined opposition expressed forcefully in the language of crime control.<sup>47</sup> After 1965, however, “[c]rime became an excuse for not expanding civil rights and social justice. Civil rights and crime were inversely related on [Congress’] agenda; as action on civil rights withered, criminal justice was expanded.”<sup>48</sup> The crime rhetoric of the mid-1960s evolved into anti-

42. Weaver, *supra* note 12, at 243 (footnote omitted).

43. *Id.* at 248 (footnote omitted).

44. *Id.* at 243.

45. In a recent comment on *District of Columbia v. Heller*, 544 U.S. 570 (2008), Reva Siegel documents that the modern understanding of the Second Amendment as a guarantee of gun rights for protection against crime in the domestic sphere, as opposed to for protection against the state, emerged in tandem with the new racialized discourse of crime in the late 1960s. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism*, in Heller, 122 HARV. L. REV. 191, 202–07 (2008). She also documents the close, and enduring, connection between guns as protection against crime and minorities as criminals. *Id.* at 233–35.

46. President Johnson had understood that the Democratic Party would pay for its support of civil rights, wryly observing upon signing the 1964 Civil Rights Act that he had “delivered the South to the Republican Party for a long time to come.” THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 37 (1991). As it turns out, after 1964 the Democrats lost the white vote not only in the South but across the whole country, and, notwithstanding Obama’s victory, have yet to regain it. *Overcome*, *supra* note 15.

47. Weaver, *supra* note 12, at 242.

48. *Id.* at 258.

crime legislation and programs that revolutionized federal, and subsequently state, approaches to crime control. Federal legislative hearings on crime increased dramatically starting in 1968 and stayed at historic highs through 2000.<sup>49</sup> Federal spending increased four-fold by 1990 before falling back a bit,<sup>50</sup> and state spending on corrections increased three-fold between 1980 and 2008.<sup>51</sup> The statutory laws that structured racialized mass incarceration seem firmly rooted in a politics of hostility toward civil rights.

## 2. *Beyond Crime: The Racial State*

A focus on race and the carceral system remains incomplete, however, without tying the racial politics of crime to the racial politics of antiwelfarism. Beginning in the 1960s, conservative political elites also sought to use social anxiety generally and racial anxiety in particular to gain support for broader antistatist politics. Despite having been discredited by the Great Depression and repudiated by the New Deal, libertarianism recrudesced through the semiotics of criminality.<sup>52</sup> In stark contrast to a social consensus dominant since the creation of the modern welfare state that large-scale forces immune to personal effort largely trapped the poor, the language of lawbreaking relied on and promoted a social vision of individual failure rooted in moral depravity.<sup>53</sup> Invocations of criminality conjured the specter of the undeserving poor.<sup>54</sup>

On the hustings in 1965, then Speaker of the House and later President Gerald Ford demanded to know:

How long are we going to abdicate law and order—the backbone of any civilization—in favor of a soft social theory that the man who heaves a brick through your window or tosses a firebomb into your car is simply the misunderstood and underprivileged product of a broken home?<sup>55</sup>

49. BECKETT, *supra* note 12, at 241 fig.3.

50. *Id.*

51. ONE IN 31, *supra* note 6, at 11.

52. See BECKETT, *supra* note 12, at 28–61 (compellingly tracing how during the civil rights era “crime” emerged as a leading political issue designed to respond to both the empowerment of minorities and the proliferation of social programs aimed at reducing economic inequality).

53. To be sure, from the New Deal until the 1960s the great social welfare transfers credited with creating the American middle class served primarily whites. Under the influence of Southern Democrats, redistributivist programs of virtually every sort, from welfare to social security to farm and home mortgages to the GI Bill, discriminated racially. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 17 (2005). President Lyndon Johnson and his Great Society program sought to end this exclusion, and to finally use the public fisc for the benefit of all poor Americans of whatever color. The rise of a crime discourse, however, upended that effort, linking poor faces to black faces and causing public opinion to turn against the very state interventions most necessary to break the legacy of racial stratification.

54. See generally JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

55. Quoted in EDSALL, *supra* note 46, at 51.

“Crime” conjoined minorities and the poor into a single, socially dysfunctional monolith, beyond the duty of the rest of society to care and certainly beyond the ability of government to help. Gerald Ford’s philippic did not need to emphasize the racial identity of those who tossed bricks and firebombs and then hid behind the excuse of broken families. Daniel Moynihan left no doubt about their race in his famous 1965 report on blacks and welfare:

[A] community that allows large numbers of young men to grow up in broken families, dominated by women, never acquiring any stable relationships to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, disorder, are not only to be expected, but they are very near to inevitable. And they are richly deserved.<sup>56</sup>

Michael Omi and Howard Winant theorize about the “racial state,” a concept useful here both as they use the term, and in a quite different sense as well. For Omi and Winant, the notion of a racial state refers to the idea that “the state *is* inherently racial. Far from *intervening* in racial conflicts, the state is itself increasingly the preeminent site of racial conflict.”<sup>57</sup> That is, for Omi and Winant, the state does not stand above the racial fray, but is itself thoroughly immersed in racial contests: “The racial order is equilibrated by the state—encoded in law, organized through policy-making, and enforced by a repressive apparatus.”<sup>58</sup> This vision illuminates the state’s central yet contradictory roles in the 1960s. Mediating the demands of justice advocates, the state accommodated challenges to racial oppression through civil rights legislation and moderately enhanced governmental services to theretofore neglected nonwhite communities. Simultaneously, mired in backlash politics, the state defended the privileged position of whites through punitive criminal and welfare policies. The racial state formed a principal site of social contestation, constituted a crucial resource in struggles over group position, and emerged as the most powerful actor modulating change and stasis in racial hierarchy.

There is, in addition, another way of seeing the state as racial: disputants may present the state itself as having a racial identity. In this vein, the backlash against the civil rights movement and against statist efforts to promote social welfare suggests a quite different notion. Rather than seeing the state as immersed in racial conflicts, including the defense of a racial status quo of relative white privilege, conservatives depicted the state, and certainly the Democratic Party, as captured by nonwhites. The state became a racial state in the sense of being tarred as by and for blacks. It ostensibly coddled persons of

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56. Quoted in BECKETT, *supra* note 12, at 33. Illustrating the conflation of crime and welfare, Richard Nixon insisted on the 1968 campaign trail that the “solution to the crime problem is not the quadrupling of funds for any governmental war on poverty but more convictions.” Quoted in *id.* at 38.

57. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 82 (2d ed. 1994).

58. *Id.* at 84.

color through civil rights laws; refused to hold them accountable out of tender regard for the rights of criminals; spent massively on their welfare, education, and other needs; and provided incompetent nonwhites with public sinecures under the guise of affirmative action. Caricatures of the local welfare office—with persons of color not only standing before but also sitting behind the counter, outnumbering and displacing whites—became the image of the dysfunctional state promoted by racial reactionaries. The right promoted its antistatism as, in large part, opposition to the black state.

### 3. *Beyond Race: Governing Through Crime*

One should also conceptualize racialized mass incarceration as partly the product of political and cultural forces other than race. Once institutionalized and available as a form of social ordering, crime control and the carceral state more generally achieved ever-greater autonomy from race, and indeed from traditional areas of criminal justice. In part through support from new vested interests, mass incarceration took on a life of its own, gaining legitimacy as a seemingly obvious framework for managing diverse problems and eventually permeating our social architecture, metaphorically but also literally.<sup>59</sup>

As a modality of governance, mass imprisonment found allies in newly powerful interest groups, including the private prison industry and correctional workers unions.<sup>60</sup> Such groups pursued their own ends in lobbying for an ever-larger prison sector. Simultaneously, fighting crime became a seemingly “obvious” framework for responding to social problems as diverse as juvenile justice<sup>61</sup> and unsanctioned immigration.<sup>62</sup> With welfarist approaches discredited

59. Cf. Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 240–41 (2009) (arguing that the American carceral system has “taken on a life of its own” insofar as incarceration produces criminality and “thereby guarantees a steady supply of offenders whose incarceration the public will continue to demand”).

60. The war on crime as interest-group politics is discussed *infra* at notes 105–10 and accompanying text.

61. Like other state efforts to provide services to populations conceptualized as primarily composed of racial minorities, the juvenile justice model increasingly emphasizes not only the constraint and punishment of its wards, but their formal integration into the prison system.

[T]he overrepresentation of minority youth in these institutions is so widespread that juvenile justice researchers and policy makers refer to it by its acronym—“DMC” (for “disproportionate minority confinement”). African American and Latino children are overrepresented at literally every stage of juvenile justice system processing . . . [and] placed at even greater risk of subsequent incarceration as a result of this form of early state intervention. . . . [T]he increasingly punitive juvenile justice policies that “impose harsh sanctions disproportionately on minority youths” have, in turn, transformed the very nature of the juvenile court system in the United States, blurring the differences in procedures and substantive goals between it and the adult criminal courts.

CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* 197–98 (2005) (citation omitted). A recent report documents the particular vulnerability of Latino youth:

Latino youth are overrepresented in the U.S. justice system and receive harsher treatment than white youth. In order of rising disparities, Latino youth are: 4% more

and social problems laid at the feet of dysfunctional individuals and communities, a punitive approach seemed the appropriate state response to a range of national ills.<sup>63</sup> Gradually, the fear of crime so permeated the popular consciousness that society's architecture increasingly reflected, and engendered, a deeply felt need for security—for walled and gated communities in lieu of open, accessible neighborhoods; for malls and mall cops instead of public parks.<sup>64</sup> Welcome, in the compelling formulation offered by Jonathan Simon, to a hydra-headed, socially penetrative system of “governing through crime.”<sup>65</sup>

Yet to switch to the language of governing through crime is not to suggest that race disappeared as an animating force behind mass incarceration. Instead, over the last forty years, racial politics continually contributed to crime control's expansive nature. The imperialism of the governing-through-crime regime, expanding into areas ever more distant from traditional crime concerns, reflects the significant overlap between crime politics and race politics. Race provided a unifying theme across areas theretofore thought unrelated and deserving of distinct modes of governmental intervention, including crime, welfare, education, and immigration. The rapid expansion of a crime-control model was substantially eased to the extent that race made disparate domains and social ills seem fundamentally similar. Race helped make security and punishment seemingly obvious goals of government across a stunning array of

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likely than white youth to be petitioned; 16% more likely than white youth to be adjudicated delinquent; 28% more likely than white youth to be detained; 41% more likely than white youth to receive an out-of-home placement; 43% more likely than white youth to be waived to the adult system; and 40% more likely to be admitted to adult prison.

NEELUM ARYA ET AL., *AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE* (National Council of La Raza & Campaign for Youth Justice, May 2009), available at [http://www.campaignforyouthjustice.org/documents/Latino\\_Brief.pdf](http://www.campaignforyouthjustice.org/documents/Latino_Brief.pdf).

62. Immigration laws over the last three decades have moved so dramatically in the crime control direction that some scholars now urge that we talk in terms of “cimmigration” law—“parallel systems in which immigration law and the criminal justice system are merely nominally separate.” Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006); see also MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 6–7 (2004); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007). This shift has led to a rapid browning of the federal penal system: in 2007, Latinos constituted fully 40 percent of newly sentenced offenders in federal prisons, and accounted for nearly one in three of all federal inmates—with nearly half of all Hispanics sentenced in federal court for immigration offenses. A RISING SHARE: HISPANICS AND FEDERAL CRIME i, iii, iv (Pew Hispanic Center, 2009), available at <http://pewhispanic.org/files/reports/104.pdf>.

63. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4–5 (2007) (“[T]he technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions, where they can easily gravitate into new opportunities for governance.”).

64. *Id.* at 7.

65. *Id.*

disparate contexts.

Further, whatever autonomy from race the war on crime achieved over time, it remained partial to the extent that crime (and antistatist rhetoric more generally) persistently both echoed and stirred racial anxiety. Witness Bill Clinton's aggressive engagements with crime and welfare during the 1990s: he too responded to the southern strategy by pandering to white voters through coded racial appeals.<sup>66</sup> Since the late 1960s, Republicans and Democrats have competed by punishing criminals and welfare queens. Posturing through ever-more punitive crime policies and ever-more restrictive social programs, federal and state party politics drove mass imprisonment and simultaneously dismantled the social safety net.<sup>67</sup> A racialized fear of crime and a racialized distaste for the poor have remained central elements of American electoral politics for the last four decades. Racial politics have refashioned the state, building an enormous carceral system while hamstringing the willingness and even the ability of government to provide for the health, safety, and welfare of the public.

#### *D. Hope amid Crisis*

This Essay opened by wondering whether Obama's election might presage an end to the war on crime because it possibly represents the demise of the pernicious contest for white votes through the coded language of crime and welfare. Freed from the felt need to compete through tough-on-crime muscle flexing, perhaps elected officials may soon reassess the current carceral catastrophe. This historical moment may be additionally propitious, at least from the point of view of ending mass imprisonment, because of the confluence of Obama's election and a major economic crisis. Within the last few years, states had begun to question the wisdom of dedicating so much of their finite resources to incarceration.<sup>68</sup> In the wake of the harrowing economic news of the immediate past, this trend will likely accelerate; already, the *New York Times* reports that half a dozen states or more may abolish the death penalty

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66. BECKETT, *supra* note 12, at 60–61; MAUER, *supra* note 5, at 68–78.

67. Over the last two decades, state allocations to corrections have increased by 303 percent; meanwhile, state spending on public assistance has increased by just 9 percent. ONE IN 31, *supra* note 6, at 11. Note that “[s]tate corrections costs now top \$50 billion annually and consume one in every 15 discretionary dollars.” *Id.* at 1; see also Solomon Moore, *Study Shows High Cost of Criminal Corrections*, N.Y. TIMES, March 3, 2009, at A13.

68. Simon et al., *supra* note 11, at 1. In addition to the fiscal consideration, religious considerations may also be spurring a shift in how some view the war on crime. According to a *New York Times Magazine* article, “the culture war of the 1970s and 1980s that revolved around race has been replaced by one that revolves around religion. A side effect has been a radically different crime debate.” Chris Suellentrop, *The Right has a Jailhouse Conversion: How Conservatives Came to Embrace Prison Reform*, N.Y. TIMES MAG., Dec. 24, 2006, at 46, 49. The author pithily suggests that some conservatives embrace reform in order “to save souls and also to save money.” *Id.* at 50.



because of costs.<sup>69</sup> Separate from the cost savings associated with winding down the war on crime, the deepening economic crisis may also once again lead to a national repudiation of libertarian policies. The tax cut and small government mantras may be losing popular resonance. Thus, the gathering economic calamity may make unsustainable the cost of continued mass incarceration, and in addition may also contribute to an end to the antistatist politics associated for the last four decades with racial backlash.<sup>70</sup> Perhaps, then, we have finally come to the end of the war on crime. Late and sorry, maybe at last we can expect fundamental shifts in the relationship between criminal justice and race.

Or perhaps not. The remainder of this Essay advances a racial stratification model that suggests a deeper, more enduring connection between race and criminal justice than that implied by the story of racial backlash.

### III

#### TOWARD A THEORY OF RACIAL STRATIFICATION: EXPLOITATION AND EXCLUSION

The “racial politics” explanation of the war on crime helpfully moves the conversation on racism forward by introducing an often neglected element: the extent to which race serves as a means toward larger interests. The current legal debate about racism largely drops this functional element.<sup>71</sup> Intentional theories of discrimination emphasize malice, as if the intent behind deploying race reduces to a bare desire to harm.<sup>72</sup> Rational choice models of racism posit that the use of race involves nothing more solid, or sordid, than a desire to increase efficiency—race allows rational actors to lower information costs by relying on easily observed characteristics as proxies, however rough, for traits that are

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69. Ian Urbina, *In Push to End Death Penalty, Some States Cite Cost-Cutting*, N.Y. TIMES, Feb. 25, 2009, at A1. Seeking to capitalize on the fiscal argument, a major 2009 report on crime control by the Pew Center on the States pitched its call for reform in the language of dollar discipline: “The current budget crisis presents states with an important, perhaps unprecedented opportunity,” the report avers. “Rather than trying to weather the economic storm with short-term cost saving measures, policy leaders should see this as a chance to retool their sentencing and corrections systems.” ONE IN 31, *supra* note 6, at 2–3.

70. Discussing the racial dynamics in Obama’s election, one pollster quipped that “[t]he most important color is green.” John Harwood, *Level of White Support for Obama a Surprise*, N.Y. TIMES, Nov. 3, 2008, at A20 (quoting Peter Brown). This may mean that immediate economic peril inclined voters to look beyond race in the election. But it may also mean, in a more portentous and far-reaching development, that a renewed popular desire for activist government has for the foreseeable future reduced the utility of the racial state as wedge issue.

71. For a survey of legal theories of racism, especially those associated with law and economics on the one hand and critical race theory on the other, see Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN’S L. REV. 899, 901–11 (2005).

72. The leading expositions of the malice approach can be found in case law, for instance in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), and *McCleskey v. Kemp*, 481 U.S. 279, 292 n.10 (1987).

more costly to detect directly.<sup>73</sup> Cognitive theories of racial discrimination shift attention altogether from conscious motive and intent.<sup>74</sup> Finally, institutional accounts go even further in eliminating strategic action, offering theories that lack not only intent, but even actors.<sup>75</sup> Whatever the version, these various theories have largely dropped the question of whether and to what extent race serves important cultural, political, or material interests. The political narrative, in contrast, places the electoral interests and policy preferences of party officials at center stage. Race emerges not simply as an emotional eruption, efficient shortcut, cognitive habit, or institutional tic, but as a central means of ordering and rationalizing the distribution of resources, broadly conceived.

The insight that race facilitates the strategic misallocation of resources forms a core element of racial stratification theory. Douglas Massey explains stratification in terms of two fundamental components that together produce “categorical inequality”: the creation of social categories and the misdistribution of resources between those groupings.<sup>76</sup> The present Part

73. Dinesh D’Souza writes:

[T]here are many indications that black cultural pathology has contributed to a new form of discrimination: rational discrimination. High crime rates of young black males, for example, make taxi drivers more reluctant to pick them up, storekeepers more likely to follow them in stores, and employers less willing to hire them. Rational discrimination is based on accurate group generalizations that may nevertheless be unfair to particular members of a group.

DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 24 (1995). Richard Posner employs this model when he postulates that

[t]o the extent that race or some attribute similarly difficult to conceal (sex, accent, etc.) is positively correlated with the possession of undesired characteristics, or negatively correlated with desired characteristics, it is rational for people to use the attribute as a proxy for the underlying characteristic with which it is correlated.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 725 (5th ed. 1998).

74. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1165 (1995).

75. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841, 1852 (1994) (“[E]ven in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism . . . . There is no racist actor or racist policy in this model, and yet a racially stratified society is the inevitable result.”); see also Note, “*Trading Action for Access*”: *The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 *HARV. L. REV.* 2156, 2159 (2008) (“Structural discrimination is the consequence of institutional or organizational practices and policies that have unequal effects on certain groups though they are neither designed nor intended to have such effects.”).

76. MASSEY, *supra* note 7, at 5–6. In advancing this insight, Massey draws upon the work of Charles Tilly. CHARLES TILLY, *DURABLE INEQUALITY* 10 (1999). Interestingly, Tilly rejects the use of the term “stratification” as sociologically misleading:

Although analysts sometimes apply the term loosely to all sorts of inequality, *stratification* properly designates the rare form of disparity that clusters social units by layers, or *strata*, which are homogenous with respect to a wide range of goods (both autonomous and relative) and which occupy a single, well-defined rank order.

*Id.* at 27. Nothing in Massey’s analysis suggests subscription to such a rigid understanding of stratification. Massey’s conception seems much closer to the notion of a loose but powerful,

addresses the misallocation of resources, while the next takes up racial construction.

Massey distinguishes between “exploitation,” the expropriation of resources from one group by another, and “hoarding,” the exclusion of one group by another from previously acquired resources.<sup>77</sup> The two necessarily blur into each other, yet distinguishing exploitation from exclusion helps advance our understanding of structural racism’s evolution. For much of American history, racial stratification principally rationalized exploitation, for instance through slavery, the expropriation of Native American lands, and wars of territorial acquisition against Mexico and Spain. In the post-civil rights era, though, racial stratification seems principally concerned with protecting the wealth, power, and prestige already secured. To be sure, wealth extraction continues today, and not just through inertia, but also in newly innovated guises such as the increasing exploitation of undocumented workers, a process Massey describes as “building a better underclass.”<sup>78</sup> But ever since the late-stage civil rights movement set its sights on breaking down entrenched patterns of inequality, significant segments of the white electorate have sought to defend their privileged access to market, state, and cultural resources. Vigilance for instances of hoarding, in addition to direct exploitation, helps bring contemporary racial dynamics more clearly into view.

This Part first demonstrates criminal law’s deep involvement in racial exploitation, focusing on the convict leasing system that arose in the post-bellum South. It then returns to the present to discuss racialized mass incarceration as a form of racial exclusion.

### A. *Convict Leasing and Exploitation*

The convict lease system that flourished in the South constitutes a direct and horrific example of exploitation through criminal law. The Civil War broke the slave economy of the South, and threatened to upend white-over-black racial hierarchy. Within a very few years, however, the rudiments for reestablishing economic order on the basis of racial domination emerged within the penal system. The Thirteenth Amendment prohibited involuntary servitude *except upon criminal conviction*, inviting the manipulation of criminal law in the remaking of slavery.<sup>79</sup> In Alabama, blacks went from 2 percent of the

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constraining but evolving hierarchy of social categories.

77. MASSEY, *supra* note 7, at 6.

78. *Id.* at 113; cf. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008) (describing the different positions typically occupied by blacks and Latinos, especially those lacking legal documentation, when confronting exploitative labor practices).

79. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

prison population in 1850 to 74 percent by 1870.<sup>80</sup> This jump reflected the drive by southern states to use criminal law as a weapon of racial domination, including through selective prosecution, increased penalties for minor offenses, and the expansion of the criminal code to cover offenses deemed likely to be committed by freedmen, for instance not being gainfully employed or not completing a seasonal agricultural work contract.<sup>81</sup>

The heart of the system, though, lay not in the brute fact of incarceration, but in the leasing out of convicts as laborers. As Douglas Blackmon records in his 2009 Pulitzer prize-winning exposé of the convict leasing system, *Slavery by Another Name*: “By the end of the 1880s, at least ten thousand black men were slaving in forced labor mines, fields, and work camps in the formerly Confederate states. The resubjugation of black labor was a lucrative enterprise, and critical to the industrialists and entrepreneurial farmers amassing capital and land.”<sup>82</sup>

As an economic matter, the states and their subdivisions as well as individual sheriffs and judges on the one hand, and private capital on the other, profited handsomely. In a single year, for instance, the state of Alabama earned nearly 12 percent of its total annual revenue from the leasing of convicts to private enterprise.<sup>83</sup> In Mississippi, two sheriffs reported making between \$20,000 and \$30,000 each in just one year from the sale of black convicts to white planters.<sup>84</sup> “Revenues from the neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina.”<sup>85</sup>

Those leasing convicts ranged from local farmers and regional industry to the great corporate titans of the age. In 1907, U.S. Steel acquired ownership of a coal-mining interest that was then the largest customer of the Alabama convict slavery system. It quickly ramped up mining and the use of slave labor—paying one county \$60,000 to acquire every prisoner arrested in 1908, and entering into similar contracts with twenty other counties in an effort to

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80. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 269 (2007); cf. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 12 (2007) (“[D]uring most of the modern history of prisons, those officially devoid of rights—indigenous and enslaved women and men, for example, or new immigrants, or married white women—rarely saw the inside of a cage, because their unfreedom was guaranteed by other means.”).

81. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 202 (2005).

82. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 90 (2008); see also DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

83. BLACKMON, *supra* note 82, at 95.

84. *Id.* at 375.

85. *Id.* at 7–8.

secure a steady supply of convict labor through at least 1912.<sup>86</sup> Neo-slavery not only provided inexpensive labor, it also afforded an answer to unionizing efforts. Employers used extraordinary physical abuse to coerce the convicts to work under any conditions, including as strike breakers.<sup>87</sup>

To give further context to the \$60,000 paid by U.S. Steel, consider the sliding rate charged by Alabama for prisoners forced to work in dangerous coal mines. “First-class” prisoners were leased out at \$18.50 a month, with the understanding that they would cut and load four tons of coal a day, or be subject to whipping. The weakest inmates, rated as “dead hands,” were charged out at \$9 a month, and lashed if their chthonian labors failed to produce a ton of coal each day.<sup>88</sup>

The reference to “dead hands” was tragically apt, as the new masters faced a different economic calculus than under formal slavery. In its antebellum form, humans as property were minimally protected because of their long-term financial value.<sup>89</sup> But under convict leasing, a man’s value did not exceed what the employer paid the state monthly. If the laborer died in custody, the employer suffered only trivial financial inconvenience, as another convict could be readily procured at the same tariff. “If they died while in custody, there was no financial penalty to the company leasing them,” reports Blackmon.<sup>90</sup> Within the logic of race-based wealth extraction, “[t]here was no compelling reason not to tax these convicts to their absolute physiological limits.”<sup>91</sup> A former slave owner, lamenting slavery as a more humane relationship, bemoaned convict leasing in the following terms: “Before the war, we owned the negroes . . . If a man had a good negro, he could afford to keep him. . . . But these convicts, we don’t own ‘em. One dies, get another.”<sup>92</sup> The historian Eric Foner says of convict leasing, “‘One dies, get another’ was the motto of the system’s architects.”<sup>93</sup> Alabama state inspectors reported horrendous mortality rates in the mines in particular—of the 684 forced laborers employed at one mine in 1888 and 1889, over one-third did not survive the ordeal.<sup>94</sup>

86. *Id.* at 295, 312–13.

87. *Id.* at 320–21.

88. *Id.* at 95.

89. ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (1974) (providing a leading economic analysis of slavery).

90. BLACKMON, *supra* note 82, at 96.

91. *Id.*

92. MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928* 2–3 (1996) (citation omitted). Mancini commented: “One dies, get another: no apothegm could better capture the distinctive feature of convict leasing, the origins of its brutality, or, for that matter, the most salient difference between it and slavery.” *Id.* at 3.

93. FONER, *supra* note 81, at 202.

94. BLACKMON, *supra* note 82, at 98. Among convicts, the black mortality rate greatly exceeded that of whites. One prison in Mississippi presided over the death of 126 out of 735 black inmates in a single year, compared to the demise of 2 out of 83 white inmates. OSHINSKY, *supra* note 82, at 44.

In order to work men to near-death, physical violence and torture were routinely employed. The same inspectors found that in one two-week period, 137 floggings were administered to the 165 forced laborers then at the mine.<sup>95</sup> In addition to the whip, various apparatuses and techniques of torture helped to manufacture hell on earth. Included among these were “come-alongs,” steel bracelets attached to a prisoner’s wrists and fastened to a cross bar such that a twisting of the bar drove the victim to his knees in excruciating pain; the “pick shackle,” a heavy pick-head riveted point-side up to an inmate’s ankle, making it impossible to run or even walk normally, and often affixed for the duration of a prisoner’s sentence; and, further reprising the horrors of slavery, various combinations of weighted chains and barbed collars. Blackmon reports that convict camp records are littered with notations regarding “amputations of feet and lower legs as a result of blood poisoning from the injuries” caused by iron shackles abrading bare skin into raw lesions.<sup>96</sup> In addition, Blackmon documents the prevalence of sundry forms of water torture, from pinning a man down and then pouring water on his face so as to effectively stop his breathing, to repeatedly plunging laborers head first into barrels of water and holding them there until their spasms subsided, then reviving and forcing them again to endure the paroxysmic terror of drowning.<sup>97</sup> Destroyed by the hopelessness and Sisyphean pain of their situation, many men begged their wardens to kill them, while others, to reduce their economic value and so possibly gain their freedom, mutilated themselves by “slicing their heel strings, hacking off their hands, or gouging out their eyes.”<sup>98</sup>

The life-wasting brutality of convict leasing exceeded what an algorithm of exploitation alone would predict. Rather, the prison as charnel house reflected profit coupled to racial supremacy. Human degradation and group subordination were not manifestations of madness incidental to the pursuit of mammon; they were not a coldly commercial system’s accidental dross. Instead, group terror and oppression rivaled profits as central goals of convict leasing. The penological imposition of involuntary servitude was designed to exploit laborers and, relatedly, to reestablish in a new form the society-wide racial stratification of antebellum slavery.

It did so directly in the form of convict laborers held under the terror of the lash in fields, factories, and mines. But it also reconstituted pre-Civil War racial dynamics by undergirding the rise of debt peonage across the rural South. Those men swallowed alive by the prisoner leasing system were almost always “convicts” only as a thin, cruel subterfuge, arrested by self-serving sheriffs and

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95. BLACKMON, *supra* note 82, at 99.

96. *Id.* at 318–19.

97. *Id.* at 71, 319. In some slave camps water torture “supplant[ed] whipping as a preferred method of punishment. Many convict managers chose this terrifying method because the convict was able to more quickly recover and return to work than after a severe flogging.” *Id.* at 71.

98. *Id.* at 92.

tried before venal judges for trivial offenses. The system's ubiquity and caprice assured that virtually no African American was safe unless under the protection and control of a white landowner or employer.<sup>99</sup> The mortal threat of convict leasing and the chain gang subjugated African Americans to an agricultural peonage system at least up until the mid-1940s.<sup>100</sup>

The convict leasing system did not end until World War II, at which point the federal government took note that "enemy propagandists" were publicizing southern horrors, and thereupon finally exerted itself in earnest to end the renewed enslavement of African Americans.<sup>101</sup> Just how many blacks the convict slavery system ultimately ensnared is difficult to establish, but the scale seems astonishingly vast. In Alabama in 1927 alone, 27,701 men were arrested on misdemeanor charges and offered for sale by county sheriffs.<sup>102</sup> "Roughly half of all African Americans—or 4.8 million—lived in the Black Belt region of the South in 1930, the great majority of whom were almost certainly trapped in some form of coerced labor . . ." <sup>103</sup> Between roughly 1870 and 1945, criminal enforcement stood at the deadly core of white supremacy and racial exploitation in the South.

### *B. Mass Imprisonment and Exclusion*

The contemporary carceral system more forcefully contributes to preserving racial stratification through exclusion rather than through direct exploitation. In this context, recognize that the resources misallocated along racial lines may be political and cultural as well as material. Whether one or the other of these will predominate, or even be in conflict with the others, will vary. Typically, the functional aspect of racial stratification involves various combinations of political, cultural, and material goods. Racial stratification does not posit a crude link between dollars and racism, but instead emphasizes the wide range of interests frequently calibrated at least partly in racial terms. Returning to mass incarceration, for analytic purposes its contemporary functionality can be disaggregated along the lines of profit, politics, culture, and population control.

#### *1. Mass Incarceration and Profit*

Beginning with the pecuniary question, it should be clear that today the directly exploitative aspect of the carceral system is much diminished. This is

99. *Id.* at 100.

100. *Id.* at 234; see also William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 32 (1976) (providing an overview of the various regimes from peonage to convict leasing to chain gangs that, together, formed part of a "comprehensive system of involuntary servitude having its roots in laws").

101. BLACKMON, *supra* note 82, at 380; cf. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

102. BLACKMON, *supra* note 82, at 375.

103. *Id.*

principally because of the end of convict leasing but also due to New Deal-era restrictions on the interstate sale of goods produced by prison labor.<sup>104</sup> Even so, “prison industries” currently generate roughly two billion dollars annually in revenues, while work extracted from prisoners to run the prisons themselves annually consumes the equivalent of another six to seven billion dollars in unpaid labor.<sup>105</sup> At the same time, exploitation of the prison system if not the individual prisoner is a boom industry, so much so that Angela Davis warns of a rising “prison industrial complex.”<sup>106</sup> Prison construction represents an attractive proposition for big capital, as does the private management of prisons.<sup>107</sup> At the other end of the economic spectrum, prisons hold out the allure of unionized work with decent pay and benefits for those with a limited education, the sort of job increasingly rare in the United States, particularly in the rural areas that have campaigned so aggressively for new prisons to be built in their communities.<sup>108</sup> Prisons, even more so than prisoner labor, have emerged as a source of tremendous profit in the last few decades.

## 2. Mass Imprisonment and Politics

At the most prosaic level, mass incarceration is tightly linked to the disenfranchisement of nonwhites. Felon disenfranchisement laws barring persons convicted of certain crimes from exercising the right to vote hark back to Reconstruction, when they emerged as yet another weapon in the war to reestablish racial supremacy.<sup>109</sup> Such laws, when combined with disproportionate nonwhite confinement, devastate minority voting power.<sup>110</sup> On a more

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104. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 869 (2008).

105. *Id.* at 869, 870 n.45.

106. Avery F. Gordon, *Globalism and the Prison Industrial Complex: An Interview with Angela Davis*, 40 RACE & CLASS 145 (1998).

107. Ironically, the paradigm case striking down state affirmative action programs arose in the context of competition over access to contracts for building the carceral institutions that predominantly house nonwhites. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 481 (1989).

108. GILMORE, *supra* note 80, at 148–57. Gilmore not only notes the extensive lobbying for prisons by rural counties, but also observes that after bitter experience “we now know the fiscal benefits to prison towns are difficult if impossible [sic] to locate.” *Id.* at 23.

109. See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (holding unconstitutional an Alabama disenfranchisement provision because it had been adopted during a 1901 constitutional convention held with the avowed aim to establish white supremacy). See generally JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

110. A 2008 Brennan Center report warns: “Given current rates of incarceration, three in ten of the next generation of African-American men can expect to lose the right to vote at some point in their lifetime.” ERIKA WOOD, *RESTORING THE RIGHT TO VOTE 7* (Brennan Center for Justice at New York University School of Law, 2008), available at [http://brennan.3cdn.net/5c8532e8134b233182\\_z5m6ibv1n.pdf](http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf). Disenfranchisement represents part of a broader effort to diminish the political power of nonwhites, including through limitations on the practical authority of any minorities nevertheless elected. *Cf. Presley v. Etowah County Comm’n*, 502 U.S. 491 (1992) (refusing to apply the Voting Rights Act to reductions in the authority of elected officials enacted in conjunction with the first election of African Americans to the diminished positions); LANI



fundamental level, though, the war on crime has figured as a weapon in fights over the control of the state itself. It is here that one might integrate the story of racial backlash adumbrated earlier into a larger theory of racial stratification. Urging upon the American polity the image of a leering black rictus, conservative politicians gained power over the state by persuading voters to replace civil rights and social welfare with crime control.

### 3. *Group Degradation and a Culture of Denial*

The contesting of resources in racial terms includes myriad fights, small and large, about social position and cultural meaning.<sup>111</sup> On the most obvious level, the war on crime has helped misallocate social presumptions about criminality and law-abidingness. Consider the cultural meanings associated with the “consensual encounters” that occur when officers question minorities about their presence in certain neighborhoods.<sup>112</sup> As Bennett Capers observes, “law-abiding minorities in predominantly white communities face disproportionate stops by and encounters with the police.”<sup>113</sup> The overwhelming number of these encounters end when “[t]he ‘suspect’ explains his presence and is let go.”<sup>114</sup> Yet Capers makes clear that even such minimally intrusive stops amount to group denigration:

The suspect, sensing that he may have been singled out at least in part because of race, may feel humiliation, even rage, but is unlikely to seek legal recourse. . . . These stops are a dressing down, a public shaming, the very stigmatic harm that the Court has often, but not often enough, found troubling.<sup>115</sup>

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GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 49 (1994) (arguing that debates over electoral fairness must include attention to effective representation and policy responsiveness).

111. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) (advancing a “comprehensive theory of racial harm” built upon the “problem of negative social meaning, of dishonorable meanings socially inscribed on arbitrary bodily marks such as skin color, of spoiled collective identities”) (citation and internal quotation and bracket marks omitted). See generally J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321–24 (1997) (promoting a Weberian conception of status conflict as centrally concerned with “cultural struggles” over “different degrees of respect and esteem in society”).

112. See *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Of course, cynicism regarding the description of such encounters as “consensual” is warranted, for few would acquiesce to interrogation about their identity and presence absent an implicit threat of force.

113. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68 (2009).

114. *Id.*

115. *Id.* at 68–69 (notes omitted). The Ninth Circuit recognized the stigmatic potential of traffic stops in a case involving border patrol enforcement aimed at Hispanics:

The danger of stigmatic harm of the type that the [Supreme] Court feared overbroad affirmative action programs would pose is far more pronounced in the context of police stops in which race or ethnic appearance is a factor. So, too, are the consequences of “notions of racial inferiority” and the “politics of racial hostility” that the Court pointed to. Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such

In contrast, the tendency rarely to stop whites reflects and also extends a presumption of belonging and law-abidingness frequently taken for granted by its beneficiaries. Racial stratification involves conflicts over status, over the cultural meanings tied to racial categories. The war on crime has partly been a cultural battle over full and equal social citizenship.<sup>116</sup>

More subtly, by obfuscating the full social impact of racial stratification, mass incarceration has also facilitated a culture of denial about the continuing salience of race. Status conflict has a history as long as that of race; in contrast, the supposed racial egalitarianism of recent decades has engendered a different sort of cultural dispute, one centered on whether race remains a significant social problem or instead has been successfully transcended. In the post-civil rights era, one of the most contested cultural questions remains the nation's commitment to eradicating racism's effects "root and branch."<sup>117</sup> In this context, the imprisonment of broad segments of nonwhite communities has hidden from view the full devastation still visited on such communities—immiseration partly the result of mass imprisonment and declining social services, but also stemming from other macro phenomena such as globalization and deindustrialization. Consider that at the start of the new century, almost half of all African American men with neither a high school degree nor a job were incarcerated.<sup>118</sup> Yet most government measures of joblessness and poverty fail to include prisoners. When this population is included in the unemployment rate calculation, "we see that fully two out of three young black male dropouts were not working at the height of the 1990s economic expansion."<sup>119</sup> The invisibility of significant facets of continued nonwhite poverty and unemployment leads to false comfort about racial progress and undercuts calls for needed social reform.<sup>120</sup> The seeming resolution of the extreme poverty and severe unemployment afflicting nonwhite communities has permitted a social consensus that racial inequality lies in the receding past. But this resolution may be no more than a figment of

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stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.

United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) (citations omitted). See generally UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 16–24 (Southern Poverty Law Center, 2009), available at <http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf> (discussing racial profiling of Latinos).

116. Cf. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989) ("The *McCleskey* decisions exemplified and reinforced a pattern of hierarchical judgment predicated upon race. . . . *McCleskey* [falls within a larger pattern of] microaggressions—stunning, automatic acts of disregard that stem from unconscious attitudes of white superiority and constitute a verification of black inferiority.").

117. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968).

118. WESTERN, *supra* note 5, at 91.

119. *Id.*

120. As Bruce Western gloomily concludes, "much of the optimism about declines in racial inequality and the power of the U.S. model of economic growth is misplaced once we account for the invisible poor, behind the walls of America's prison [sic] and jails." *Id.* at 87.

mass incarceration, a “solution” to poverty and unemployment bought at the price of interring broad swaths of our population.

#### 4. Prisons as Population Control

A theory of racial stratification highlights how race forms a basis for misallocating diverse resources, extending its tentacles in manifold directions and with ever more attenuated effects. At root, however, race remains embedded in systems of exploitation. Mass imprisonment affirms this, for on the most basic level it involves the exertion of direct control over exploited populations. Loïc Wacquant argues for understanding

the astounding upsurge in black incarceration in the past three decades as a result of the obsolescence of the ghetto as a device for caste control and the correlative need for a substitute apparatus for keeping (unskilled) African Americans ‘in their place,’ i.e. in a subordinate and confined position in physical, social, and symbolic space.<sup>121</sup>

Along similar lines, Christian Parenti posits that, while the initial shift to mass incarceration reflected a backlash against the civil rights movement, “the Reagan revolution kicked off a new round of criminal justice militarization . . . [aimed at] managing and containing the new surplus populations created by neoliberal economic policies.”<sup>122</sup> In 1997, over a third of black men were not working when they were sent to prison, and median income for both African Americans and Latinos at the time of their incarceration averaged just nine hundred dollars a month.<sup>123</sup> Mass imprisonment, Parenti contends, “has become, intentionally or otherwise, a way to manage rising inequality and surplus populations.”<sup>124</sup>

Wacquant and Parenti offer an explanation for mass incarceration in some tension with the political story told by Beckett, Weaver, and others. The racial politics story seems to rest on contingency—the race-crime nexus just happened to be available as a means of manipulating an anxious electorate. The population

121. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 82, 83 (David Garland ed., 2001). Wacquant identifies mass imprisonment as the fourth stage in a system of racial domination initiated by slavery and succeeded by Jim Crow and the urban ghetto. *Id.* at 85; see also Loïc Wacquant, *The Place of the Prison in the New Government of Poverty*, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION, *supra* note 11, at 23, 28.

122. CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 45 (1999).

123. WESTERN, *supra* note 5, at 111.

124. PARENTI, *supra* note 122, at xii. Notice that to identify “the restructuring of the American state to suit the requirements of neoliberalism” as an impetus for mass imprisonment “is not to negate or even minimize the special office of race in its advent.” Wacquant, *Deadly Symbiosis*, *supra* note 121, at 84. Rather, “the ‘great confinement’ of the rejects of market society, the poor, the mentally ill, the homeless, the jobless and the useless, can be painted as a welcome ‘crackdown’ on *them*, those dark-skinned criminals issued from a pariah group still considered alien to the national body.” *Id.*; see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2009).

control thesis, in contrast, hints at historical determinism—ghetto riots and declining urban jobs necessitated a new technology of physical restraint. Without judging the level of contingency or determinism assumed by these authors, it is important to reiterate the point on which they agree: race is not merely an occasional basis for irrational malice or cognitive error, but a core mechanism by which we order our society. From wealth, to politics, to culture, and down to physical population control through segregation and incarceration, race facilitates exploitation and exclusion.

### C. Analyzing Race and Class

Mass incarceration, and even more convict leasing, demonstrate one of the core insights promoted by a theory of racial stratification: the inseparable connection between race and class in the United States. This point should not be misconstrued. As the foregoing discussion demonstrates, by tying race to resources, structural racism does not imply that race merely serves class interests: it does not posit that economic struggle constitutes the basic form of social engagement, relegating race to a superstructural expression of this deeper conflict.<sup>125</sup> Rather, race and class constitute systems of social stratification in the Weberian, not Marxist, sense. Separately and together, race and class shape the terrain in contests over material wealth, but also over state power and social status.<sup>126</sup> On all of these levels, race and class interact.<sup>127</sup> Reconsider the examples provided above regarding resources contested in racial terms: profits from the prison system; political power (especially regarding control over state efforts to provide for the general welfare); the cultural meaning of the black and brown presence in white neighborhoods; and the restraint of surplus populations. Each of these conflicts is as much about “class” as about “race.”

Despite this entwined relationship, progressives now commonly suggest that, for politically strategic reasons, the focus should be on more “universal” approaches aimed at assisting society’s most disadvantaged, without a distracting and politically unpopular focus on “particular” races. “An emphasis on universal, as opposed to race-specific programs isn’t just good policy,” the *New York Times* quotes Barack Obama as saying, “[i]t’s good politics.”<sup>128</sup> In

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125. Cf. OMI & WINANT, *supra* note 57, at 42–44 (critiquing Marxist theories of race as applied to the United States).

126. The operation of race over multiple domains has been discussed above. Regarding class, though commonly understood as a financial condition, it is also constituted through state action and, perhaps even more powerfully, through a cultural discourse that stresses the fictions of extreme social mobility and a broadly shared “middle-class” identity. See generally JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* (1995).

127. See, e.g., Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler AntiBlack Ideology*, in *RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE* 15 (Steven A. Tuch & Jack K. Martin eds., 1997) (describing how attitudes toward meritocracy now function as the basis for racial prejudice).

128. Rachel L. Swarns, *Obama Walks a Delicate Path On Class and Race Preferences*,

rejoinder, a stratification analysis makes clear that no division between a universalistic focus on class versus a particularistic emphasis on race is tenable: race and class in the United States inextricably interdigitate such that neither can be engaged without sustained attention to the other. A focus on class as a complement to a close engagement with race would be quite helpful; but a focus on class as a substitute for race, as part of an evasion of race, will prove counterproductive. Class should not be used to obfuscate the interrelated yet distinct issues associated with race, nor vice-versa. Whether one privileges class or race, focusing on their interconnection will advance justice, while stressing one to the exclusion of the other will lead to failure along both fronts.<sup>129</sup>

#### IV

##### MECHANISMS OF RACIAL STRATIFICATION AND THE CONSTRUCTION OF RACE

Thus far, the discussion of structural racism in the crime control system has focused on the misallocation of resources, whether achieved through exploitation or hoarding. This Essay now assesses the other foundational aspect of racial stratification, the construction of racial categories. It does so in the context of examining mechanisms that perpetuate structural racism. Among these, one might count individual malice, rational discrimination, cognitive dynamics, and institutionalized practices, the various forms of racial discrimination commonly postulated in legal scholarship.<sup>130</sup> All of these contribute, to different degrees in varying contexts, to racial stratification.<sup>131</sup> Without slighting their importance, this Part gives particular attention to three often neglected processes: violence, cumulation, and racial ideology.

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N.Y. TIMES, Aug. 3, 2008, at A1; *see also* RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

129. *See* LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355 (2007); *cf.* CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 151–56 (1996) (rejecting the class-rather-than-race argument in the affirmative action context).

130. *See supra* notes 71–75 and accompanying text.

131. Cognitive psychology in particular powerfully demonstrates a heuristic connection between race and criminality. *See, for example,* the compelling work of Jennifer Eberhardt. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. PERSONALITY & SOC. PSYCHOL.* 876 (2004). As should be evident, the underlying psycho-social categories and associations are not random, but derive from and in turn legitimate settled social patterns. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 *CONN. L. REV.* 931, 962 (2008); *see also* David Wellman, *Unconscious Racism, Social Cognition Theory, and the Intent Doctrine: The Neuron Fires Next Time*, in *HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS* 39 (Hernan Vera & Joe R. Feagin eds., 2007).

### A. Violence

Racial stratification must be forcibly imposed, for none voluntarily submit to debasement and oppression. Criminal law has played a dual role in this regard, as both a direct instrument of that violence, and as an abettor, passively authorizing private atrocities.

Anticipating the violence of convict leasing, state criminal codes once sanctioned slavery by specifying much more severe penalties for the enslaved, and by prescribing gruesome deaths for those implicated in uprisings. The Maryland legislature in 1729, alarmed by “several Petit-Treasons . . . lately committed by Negroes,” condemned slaves convicted of arson or murder “to have the right Hand cut off, to be hang’d in the usual Manner, the Head severed from the Body, the Body divided into Four Quarters, and Head and Quarters set up in the most publick Places of the County where such Fact was committed.”<sup>132</sup>

Violence in the penological regime today seems mild in comparison, but this is partially an effect of its sanitation and obfuscation, rather than simply of diminished levels of pain and death.<sup>133</sup> Disproportionate sentences for nonwhites

132. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 105 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

133. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is one of the few cases to pull back the veil on the routine violence used by police—but only in dissent, for the majority upheld the continued use of chokeholds even on persons stopped for minor traffic infractions. *Id.* at 110. Justice Marshall described the facts that gave rise to the case, details elided by the majority:

Adolph Lyons is a 24-year-old Negro male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons’ hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

*Id.* at 114–15 (Marshall, J., dissenting) (citation omitted). Lyon’s physiological reaction was typical of what the LAPD officers expected when using chokeholds.

An LAPD officer described the reaction of a person to being choked as “do[ing] the chicken,” in reference apparently to the reactions of a chicken when its neck is wrung. The victim experiences extreme pain. His face turns blue as he is deprived of oxygen, he goes into spasmodic convulsions, his eyes roll back, his body wriggles, his feet kick up and down, and his arms move about wildly.

*Id.* at 117–18 (citation omitted). In addition to its seeming indifference to the above, the majority also passed over evidence that the police had killed sixteen persons through the use of chokeholds—of whom three-quarters were African American males in a city where that demographic accounted for only 9 percent of the population. *Id.* at 115–16.

are no longer written into legal codes, but as the Baldus study at issue in *McCleskey* as well as the statistics on mass imprisonment irrefragably demonstrate, they remain lodged at the core of criminal enforcement. Likewise, executions no longer involve public displays of dismembered corpses, but as ever, “death is the bottom line of it,”<sup>134</sup> and our country more than any other modern democracy carries on killing with astounding ferocity.<sup>135</sup> To the extent criminal law enforces racial stratification, it continues to do so in large measure directly through violence.<sup>136</sup>

The crime control system is also implicated in the violence that it refuses to control. Rather than principally through punishment of the enslaved, the criminal system supported slavery in largest part by disclaiming any power to police it. The North Carolina Supreme Court in *State v. Mann* famously rejected the imposition of criminal liability for violence committed against persons held in bondage.<sup>137</sup> Weighing whether an indictment could be brought against a master for shooting an enslaved woman, the court announced: “We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped.”<sup>138</sup> Or in still more chilling language: “The power of the master must be absolute, to render the submission of the slave perfect.”<sup>139</sup> The criminal system has a disgraceful history of abetting white

134. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* x (2005).

134. THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 4 (Austin Sarat ed., 2001).

136. This violence is direct even when its effects are primarily psychological. This includes the mind-destroying damage done to the many thousands of prisoners held in almost complete social isolation in America’s supermax prisons. Atul Gawande, *Annals of Human Rights: Hellhole*, *NEW YORKER*, Mar. 30, 2009, at 36, 42; cf. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1607 (1986) (“The act of sentencing a convicted defendant is among these most routine of acts performed by judges. Yet it is immensely revealing of the way in which interpretation is distinctively shaped by violence. . . . If convicted, the defendant customarily walks—escorted—to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the civil facade is ‘voluntary’ except in the sense that it represents the defendant’s autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.” (citations omitted)).

137. *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829).

138. *Id.* at 267.

139. *Id.* at 266. The opinion’s author, Judge Thomas Ruffin, had his own experience with the interests of masters as well as violence against the enslaved:

Ruffin owned two plantations and a substantial number of slaves (thirty-two in 1830), but he was not active in their management, leaving the plantations to be run by overseers under his wife’s general supervision. Like other overseers, Ruffin’s were sometimes brutal. In 1824 Ruffin’s mentor Murphey wrote him of “the evil and barbarous Treatment of your Negroes by your overseer,” who “worked [the slaves] to death” and punished one in a grotesque “barbecue.” Ruffin’s wife confirmed these accounts.

MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: State v. Mann* IN HISTORY AND LITERATURE 90 (2003) (brackets in original).

dominance by refusing to intercede against private customary violence used to forcibly subordinate nonwhites.<sup>140</sup>

Not all of the violence ignored by law directly enforces racial hierarchy. In addition, and perhaps of greater significance today, criminal law enforcement systematically under-protects nonwhite communities from crime within their neighborhoods.<sup>141</sup> Here too racial stratification is implicated, for the selective indifference to minority victims at least partly reflects a longstanding tradition of diminished regard for nonwhites.<sup>142</sup> The under-policing of violence against minorities, including by other minorities, indirectly buttresses racial stratification, partly by symbolically reinforcing the message of devalued identities, though in greater degree by abrading the quality of life of those caught in impoverished, crime-plagued barrios and ghettos.

As is true with all of the processes discussed here, violence does more than enforce social position; it also creates and defines social categories, in this case race itself. After the Civil War, the spectacle-violence of the sort evident in the Maryland slave code shifted location, emerging as what David Garland terms “public torture lynchings.”<sup>143</sup> Between 1893 and 1937, southern whites resorted to repeated spasms of collective violence, including several thousand lynchings, designed to overthrow the reforms of Reconstruction and to buttress the

140. This is so not only in the context of slavery, but in the lynchings of blacks and Mexicans, the local campaigns of extermination against Native Americans, the pogroms to drive out Chinese miners in the West, the “race riots” that burned out blacks seeking to move into Northern and Western neighborhoods, the assault and murder of civil rights activists, and most recently vigilante violence against those who “look” Muslim. Regarding the latter, see Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004) (providing a historical and cultural analysis of the recent upsurge in racialized violence against persons perceived to be “Muslim-looking,” an upsurge encouraged rather than restrained by state action). See also Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOC. TEXT 101 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 25–36 (2007); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

141. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

142. The Baldus study at issue in *McCleskey v. Kemp*, 481 U.S. 279 (1987), documented racial disparities both in terms of the race of the perpetrator as well as the race of the victim. For instance, the study showed that persons charged with killing whites received the death penalty eleven times more often than persons charged with murdering blacks. *McCleskey*, 481 U.S. at 286; cf. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424–25 (1988) (“The phenomenon of racial subordination without racial animus is exemplified by race-of-the-victim disparities in Georgia. There was a time when, as a matter of policy, the state directly devaluated the lives of blacks by making the murder of a Negro a less severely punished crime than the murder of a white. Now, however, . . . underenforcement emerges ‘naturally’ from the underlying structure of the institutions, ideas, and sentiments that constitute Georgia society.” (citation omitted)); Charles J. Ogletree, Jr., *Black Man’s Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 32 (2002).

143. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC’Y REV. 793 (2005).



imposition of a Jim Crow regime.<sup>144</sup> Of these several thousand lynchings, four-hundred to five-hundred had a more public, more ritualized aspect, involving the torture and dismemberment of blacks before holiday crowds of hundreds of cheering whites.<sup>145</sup> These lynchings terrorized the black community and helped reestablish and solidify white supremacy.

More than this, though, public ritualized torture helped define the black and white races. As Dorothy Roberts observes, “it is not only that race produces torture; torture also produces race—by physically forcing black victims into the utmost subservient posture, inscribing their political position in the racial order.”<sup>146</sup> The infliction of barbarous pain on black bodies, followed by their corporeal annihilation, figuratively dismembered the humanity of blacks, even as by stark comparison it seemed to make the bodies of the white audience sacrosanct, inviolate vessels of their intrinsic humanity. We should hesitate to believe that nothing similar occurs today.<sup>147</sup> The pervasive acceptance of police brutality against minorities, the virtual encouragement of violence as part of the punitive regime within prisons, indeed the willingness to blithely force so many millions into shackles and behind bars, at once reflects and encourages social acceptance of the worthlessness of nonwhite bodies and lives.<sup>148</sup>

### B. Cumulation

The power of race as a system of social stratification resides not only in the violence that lies just beneath the surface but also in its cumulative impact. Charles Lawrence uses the term “cumulative causation,” which he attributes to Gunnar Myrdal, to describe “the circular self-perpetuating nature of racial prejudice and discrimination.”<sup>149</sup> Certainly racism constructs much of the social

144. The Supreme Court implicitly authorized such violence, hampering federal efforts to provide statutory protection. See *United States v. Cruikshank*, 92 U.S. 542 (1876).

145. Garland, *supra* note 143, at 798.

146. Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 233 (2008).

147. Certainly, this seems to be an aspect of the widespread support for “extraordinary measures” against those denominated terrorists. “The depictions of torture in the Abu Ghraib detention center, particularly those of hooded figures posed with a noose around the neck, mirror the imagery of lynchings. In both instances, violence by whites against men of color produces an abject racialized body.” Liz Philipose, *The Politics of Pain and the Uses of Torture*, 32 SIGNS: J. WOM. CULTURE & SOC’Y 1047, 1049 (2007). So too does water torture. See *supra* note 97 and accompanying text.

148. Cf. IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (exploring the informal legal construction of race by the crime control system, in particular the influence of legal violence by the police and trial courts in helping to convince Mexican Americans in Los Angeles during the civil rights era that they were racially brown rather than white).

149. Charles R. Lawrence III, *Segregation “Misunderstood”: The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 38 n.96 (1977). As Lawrence explains, “Once blacks are labeled as inferior, they are denied access to equal societal opportunities. The resulting inadequate educational preparation, poverty of cultural backgrounds, and lack of experience constitute real limitations on their ability to contribute to society and the prophecy of their inferiority is

reality it purports to explain. Yet, this Essay does not use cumulation in the sense of circularity, but rather in the double-sense of something that is at once aggregative and combinative, heaping up advantage and disadvantage and thereby creating dynamics that transcend the sum of the parts. Race's full force cannot be grasped by examining the consequences of particular discriminatory episodes, but must be measured in the folds and knots of a whole social fabric woven and re woven with reinforcing racial bands.<sup>150</sup> Likewise, race gains meaning not from color or category without more but in the collective differences marking the lives of those racially favored and disfavored.

### *1. Cumulation Across Domains*

The spread of a crime control model across an otherwise surprising breadth of state sectors has been discussed above, under the rubric offered by Jonathan Simon as governing through crime.<sup>151</sup> To a certain extent, crime control's rapid dissemination reflects a more general pattern in which successful modes of social organization are frequently emulated across disparate domains, as they offer lower transaction costs and higher levels of legitimacy compared with untested innovations.<sup>152</sup> In other words, even if disconnected from race, crime control would show imperial tendencies. Yet crime control also spread widely because race has proved an especially adaptable modality of social organization. Race organizes broad and disparate domains of cultural, political, and material life. Thus, when individuals and groups are disadvantaged—or privileged—by race, this stems not only from particular instances of discrimination but from race's cumulative weight.

Consider a criminal record. A prior criminal conviction makes finding and keeping a job much more difficult, so much so that one expert estimates that black men who have been incarcerated suffer a lifetime income loss that averages \$86,000 per individual, a 42 percent reduction in expected lifetime earnings.<sup>153</sup> Another study puts the estimated loss of lifetime income of all offenders at a staggering three hundred billion dollars.<sup>154</sup> Meanwhile, the

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fulfilled." *Id.*

150. To be clear, the distinction between violence and cumulation is not meant to correspond to the difference between purposeful and institutional forms of discrimination. Violence often flows from unconscious beliefs or institutional habits, while accumulating disadvantage frequently betrays purposeful design.

151. See the discussion of Simon, *supra* notes 63–65 and accompanying text.

151. CHARLES TILLY, *DURABLE INEQUALITY* 95–96 (1998).

152. WESTERN, *supra* note 5, at 127. According to Western, incarceration [is] a key life event that triggers a cumulative spiral of disadvantage. Incarceration reduces not just the level of wages, it also slows wage growth over the life course and restricts the kinds of jobs that former inmates might find. . . . Men tangled in the justice system become permanent labor market outsiders, finding only temporary or unreliable jobs that offer little economic stability.

*Id.* at 109.

154. Donald Braman, *Race, Poverty and Incarceration*, 16 *POVERTY & RACE* 1, 9 (2007).

criminal system removes and returns inmates in concentrated patterns that hit the poorest nonwhite neighborhoods particularly hard, imposing devastating economic losses on those communities least able to bear such loads.<sup>155</sup> Racial stratification organizes virtually every aspect of quotidian existence, vertically from the family to the state and the market, and horizontally across seemingly distinct arenas like employment, housing, education, agriculture, public safety, and so on. As a result, racial forces rarely work alone, and instead operate in concert with similar pressures across almost every social arena.<sup>156</sup>

## 2. *Cumulation Across Time*

Racial stratification is also cumulative across time, built into our social architecture's literal and metaphorical concrete. Police stations and prisons can be conceptualized as physical incarnations of past racial practices, built to last in poured concrete, steel bars, and razor wire. Less solidly but no less powerfully, past decisions and practices become social institutions, channeling culture, public policy, and market decisions in certain directions, while making other options unlikely, even unthinkable. At the meta level, race today constitutes a hard sociological fact only because the cumulation of past beliefs and behaviors shape present interests and actions. More narrowly, reconsider neighborhoods: to be sure they are physical places, but more profoundly they represent an assemblage of ways of living built up over time—patterns of social relations, accretions of power and powerlessness, access points to other social opportunities, or to further social ills.<sup>157</sup>

Prominent criminal law scholars have argued that minority neighborhoods prefer more, not less policing, using this to build the case for ordinances allowing the police to aggressively target nominal offenses such as curfew violations and loitering.<sup>158</sup> But it seems reasonable to suppose that such preferences primarily reflect the constrained options such neighborhoods confront because of the cumulation of structural racism across time. In the

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155. See TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271 (2004); cf. ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008) (promoting the nascent effort to focus public policy on the problem of prisoner reintegration).

156. A leading race scholar identifies this cumulative dynamic as the defining feature of structural racism: "From a structural perspective, causation is understood as cumulative within and across domains. It is a product of reciprocal and mutual interactions within and between institutions." John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 *N.C. L. REV.* 791, 796 (2008).

157. Powell, *supra* note 156, at 800–05; see generally John A. Powell, *Opportunity-Based Housing*, 12 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 188 (2003).

158. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 *U. CHI. LEGAL F.* 197 (1998).

absence of any real likelihood for an effective jobs program, affordable day care, decent schools and after-school programs, markets offering employment or selling healthy products at fair prices, access to mainstream financial institutions, or efficient transportation links to the broader metropolis, the sorts of things that would surely reduce crime and violence without increased policing and incarceration, what alternatives do the residents of these neighborhoods have? Forced into a “choice” between governmental neglect versus neglect combined with aggressive policing, it seems cruel to defend such policing on the ground that it is “preferred” by those trapped in impoverished nonwhite neighborhoods.<sup>159</sup> The logic of the past, ossified in heavily policed ghettos and barrios, becomes today’s logic too: poor brown and black communities harbor criminals and welfare cheats; social programs would be expensive and probably futile. The police are already there, the prisons are already built; keep them busy, keep them full.

### 3. *Cumulation Across Hierarchies*

The earlier point that in the United States race and class inevitably shape each other merits reiteration, as well as generalization. In addition to crossing domains and time, race is also cumulative across socially constituted hierarchies such as class, gender, and sexual orientation. Just as class dynamics cannot be fathomed without an appreciation of race, so too these other hierarchies fundamentally alter and are altered by race.<sup>160</sup> The point is not simply that identities overlap—it is that *hierarchies build each other*. Cumulation across hierarchies shapes the very forms taken by constructed identities. Race burdens and benefits people by setting the contours of their class, gender, and sexual identities, just as these provide benefits and burdens partly by giving content to race. Cumulation defines what it means to be black and poor, Latino and gay, white and male; there’s simply no such thing as an essential racial (or class, gender, or sexual) identity unaltered by its imbrication

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159. One might also take issue with the supposition that nonwhite communities are sufficiently monolithic as well as sufficiently politically empowered that they can, within the existing political milieu, express coherent, widely-shared views on policing. For a critique of Meares and Kahan emphasizing this objection, see DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 99–101 (2008).

160. This insight is frequently expressed in the vocabularies of “intersectionality” and “essentialism.” See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244 n.9 (1991) (“In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990) (describing “gender essentialism [as] the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”).

with other pervasive stratification systems. Racial stratification never functions in isolation, instead accumulating across social domains, time, and other hierarchies.

#### 4. *Cumulation and Causality*

Many contemporary criminological studies of bias seek to isolate exact quotients of racial discrimination by controlling for differences among individuals in levels of education, income, work experience, prior criminal record, presence of mitigating evidence, and so forth. This is the approach taken, for instance, by the Baldus study cited in *McCleskey*.<sup>161</sup> This methodology implies that one can isolate race as an independent cause of social outcomes. Whether in reliance on this implicit promise or not, the Court has sometimes demanded proof of the exact increment of causality that can be attributed to race and race alone.<sup>162</sup> However powerful its results, though, the Baldus report systematically understated the cumulative role of racism in Georgia's criminal apparatus; likewise, the Court errs when it imposes a requirement that racial impact be demonstrated in isolation from other social factors. Because stratification occurs cumulatively, racism cannot be fully measured when treated as a residual, as the correlation left over once individual variation has been eliminated. On the contrary, individual differences such as education, income, or prior criminal record are not exogenous, nonracial attributes; they are, in aggregate, themselves partly the products of structural racism.<sup>163</sup>

In a related vein, some scholars have suggested that, insofar as they are able to both discount the role of direct, animus-based racism, and identify alternative, seemingly nonracial explanations for contemporary penological dynamics, racism plays a minimal role in causing mass incarceration. William Stuntz, for instance, in a 2008 article in the *Harvard Law Review*, rejects the idea that mass imprisonment stems from “[o]fficial discrimination,” and attributes it instead to supposedly nonracially inflected shifts in the locus of control over policing and prosecution away from the local level and to regional,

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161. *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (noting that the Baldus study took “account of 230 variables that could have explained the disparities *on nonracial grounds*” (emphasis added)).

162. For instance, in *McCleskey* the Court drew into question the Baldus study because, among other reasons, “the high correlation between race and many of the nonracial variables diminished the weight to which the study was entitled.” *Id.* at 289 n.6. A stratification approach, in contrast, not only predicts but insists upon correlations between race and other seemingly nonracial variables. See also *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995) (limiting school desegregation orders to remedying “*the incremental effect* that segregation has had on minority student achievement” (emphasis added)).

163. Cf. Ian Haney López, *Introduction: On the Necessity and Challenges of Race Scholarship*, in *RACE, LAW AND SOCIETY* xi (Ian Haney López ed., 2007) (assessing methodological issues in scholarship on race and law).

state, and federal governments as well as distant appellate courts.<sup>164</sup> These two claims—the absence of racism and the race-neutral nature of the identified causal explanation—are related, for, by narrowly conceptualizing racism, Stuntz neglects to inquire whether racial politics played some role in moving power over policing from the cities to the suburbs.<sup>165</sup> Though he describes in great detail the role of race in fueling a “symbolic politics” in which Democrats and Republicans competed over who was tougher on crime, he fails to see this as involving race more than tangentially.<sup>166</sup> In Stuntz’s analysis, racial inequality results from, but does not significantly contribute to, changes in the criminal justice system.<sup>167</sup> A cumulative theory of racial stratification suggests a different take: race may operate on myriad levels, with or without the presence of animus or caste-like structures; and race frequently both produces and is produced by social, political, and market dynamics that often may seem initially to have little direct bearing on race. Racism simply cannot be discounted solely because “official discrimination” is lacking. Even absent malice, race remains a powerful astringent that thoroughly suffuses American society—one that especially continues to distort those major institutions in American life steeped in racial oppression, such as the crime control system.

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164. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1972–73 (2008).

165. Stuntz does not define what he means by “official discrimination,” but his comment that this seems an unavailing explanation comes immediately after he recounts what he terms a “strange set of patterns.” *Id.* at 1972. Stuntz mentions that “[a] mere thirty-five years ago, imprisonment rates across the Northeast and Midwest . . . of African American prisoners was one-eighth today’s figure. Even now . . . the justice system solves (and hence punishes) violent crimes most often in places with the *fewest* poor people and black people.” *Id.* at 1971 (citations omitted). Stuntz implies that for racism to be a credible explanation of current practices, rates of nonwhite incarceration must be high at each historical point and in every geographic region, and the criminal justice system must also subordinate all other tasks, including solving crimes, to its interest in repressing minorities. It’s as if, to count as influenced by racism, the criminal justice system must make racial oppression its highest (sole?) mission, historically as well as contemporaneously.

166. *Id.* at 1998 (“The political response was the bidding war that broke out beginning in the late 1960s between politicians on the right and those on the left, as the two sides sought the votes of blue-collar whites by vying to see who could punish black crime most severely. Each of these trends reduced the power of urban voters over crime and punishment close to home.”); *see also id.* at 2007–10. Stuntz’s symbolic politics argument seems close to that advanced by Beckett and Weaver, *supra* note 12 and accompanying text.

167. Not coincidentally, Stuntz cites Marc Mauer’s groundbreaking book, *Race to Incarcerate*, as “the classic account of racism as the cause of America’s punitive turn.” Stuntz, *supra* note 164, at 1972 n.15. Mauer, however, never claimed that racism was “the cause” of mass incarceration, and Stuntz provides no page citation suggesting the origins of this read of Mauer. Rather, Mauer’s racial analysis somewhat resembles Stuntz’s own: though Mauer provides much more detail, he too largely argues as if racial disparities flow from, and bias superficially infects, but racism does not in any substantial way shape, crime control policy and practices. Mauer dedicates two chapters to discussing the impact of recent crime policy on African Americans and the presence of racial bias in the war on drugs, MAUER, *supra* note 66, at 118–61, but only a couple of pages to evaluating the role of racism in setting in motion the war on crime generally. *Id.* at 52–53.

### C. Racial Ideology and Colorblindness

One can understand (racial) ideology as a normatively laden framework for understanding and acting in the world. To a certain extent, political entrepreneurs seeking to preserve or challenge the status quo forthrightly manufacture such ideological systems. When most successful, however, ideologies achieve the status of commonsense: an accepted, taken-for-granted ideational matrix that operates as an unconscious baseline for judging what is normal, moral, and legitimate in the world.<sup>168</sup> In turn, ideologies become built into social architecture, for instance as bureaucratic defaults or as settled distributions of power. These structures then buttress the underlying ideology, as material arrangements take on an aura of naturalness, seeming to demonstrate that the world, rather than reflecting contingent ideas and contextual power relations, instead is simply as it must be.<sup>169</sup>

Until recently, white supremacist theories performed much of the intellectual and emotional work of justifying racial stratification, and were in turn built into and sustained by American social structures.<sup>170</sup> White supremacy reassured whites that nature, not their willingness to commit violence in service to their self-interest and in derogation of the humanity of others, ordained their privileged position as well as the degradation and exploitation of nonwhites.<sup>171</sup> Today, colorblindness may be emerging as a new racial ideology capable of legitimating continued white racial dominance.<sup>172</sup>

Colorblindness portrays every explicit use of race as morally and hence also politically and legally wrong. For many, colorblindness serves as a form of commonsense—the idea that even remedial uses of race are wrong has become a contemporary bromide in little need of explanation or defense. This taken-for-granted quality is a hallmark of a successful ideology: it performs sense-making, problem-solving work while seeming unquestionable and obvious. Nevertheless, contemporary colorblindness has remarkably shallow roots, taking its current form only in the 1970s, when the repudiation of white

168. See HANEY LÓPEZ, *supra* note 148, at 110–33 (elaborating a theory of racism as commonsense).

169. In this way, no sharp distinctions exist between conscious and unconscious behavior, or between agent-driven and institutional dynamics. Instead, there are only complicated combinations of intentional and unintentional acts that are shaped by, and in turn shape, larger social and institutional patterns.

170. See generally GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* (2002).

171. See generally REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981).

172. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 156–162 (rev. and updated, 10th anniversary ed.) (2006) (arguing that contemporary colorblindness harnesses the antiracist norms of the civil rights movement to the continued defense of white dominance). Note the distinction between “dominance,” which invokes a sociological understanding of group social, economic, and political positions, and “supremacy,” which justifies dominance on the basis of explicit beliefs about group racial superiority and inferiority. White supremacy, as a set of ideas and practices, has been overwhelmingly rejected; white dominance remains a potent sociological reality.

supremacy made the defense of continued white dominance intellectually treacherous. Colorblindness responded to this conundrum by offering its adopters a modicum of racial expiation. By rigidly insisting that race can never be considered, its partisans used the values of the civil rights movement to defeat its most promising—or as they saw it, most threatening—reforms, those calling for race-conscious efforts to restructure American social and institutional patterns.<sup>173</sup> Today, this reactionary version of colorblindness reassures those who deploy it that they are blood brothers with Martin Luther King because they steadfastly denounce racism—even if they do so most vociferously at the very instant they repudiate affirmative action or integrated schools.<sup>174</sup>

### *1. Colorblindness and Not-Racism*

Most critiques of colorblindness focus on its role as a weapon against race-conscious remediation. But in the law enforcement context, colorblindness serves more as a shield than a sword. In defining racism as any use of race, colorblindness simultaneously defines what counts as “not-racism”: all interactions not expressly predicated on race, no matter how closely correlated with racial hierarchy. *McCleskey* epitomizes this defensive flip-side of colorblindness. Neither Georgia’s dual system of criminal enforcement stretching back to slavery nor the undeniable correlation between the excessive punishment of blacks and the persistence of a white-black hierarchy mattered to the majority. Ensnared behind colorblindness, the Court insisted upon “exceptionally clear proof” of racial bias by a particular bad actor in that specific case.<sup>175</sup> The majority reasoned as if racial discrimination did not exist unless the record included a racial epithet or a confession of evil intent.<sup>176</sup> Failing an explicit use of race, no basis existed for concluding that the glaring bias in the Georgia criminal system was “invidious.”<sup>177</sup> Colorblindness in equal protection jurisprudence makes two moves: the first, and more widely critiqued, involves striking down virtually every explicit use of race, now overwhelmingly confined to remedial efforts. The second, less often noted but key to the criminal law context, entails upholding as “not-racism” gross racial disparities corresponding directly to longstanding racial hierarchies, today typical of structural racism.<sup>178</sup>

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173. For a fuller elaboration of this argument, see Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007).

174. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (government set-asides); *City of Richmond v. Croson*, 498 U.S. 469 (1989) (government set-asides); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school integration).

175. *McCleskey v. Kemp*, 481 U.S. 279, 292, 297 (1987).

176. Cf. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (violation of equal protection depends on whether the use of race is “inherent” in prosecutor’s explanation of preemptory challenge).

177. *McCleskey*, 481 U.S. at 313.

178. To be clear, colorblindness does not describe the actual operation of the criminal law



## 2. Refusing to See Race in Cultural Attacks

Colorblindness operates hand-in-hand with the criminal system on a broader cultural level as well. The insistence that race plays no role unless openly invoked ultimately facilitated the emergence of crime control as a proxy language for race. Fear of crime could serve as a coded sop to white voters only because colorblindness provided a cover, however thin, for a patently racist narrative.<sup>179</sup> Eduardo Bonilla-Silva in his work on colorblindness identifies “cultural racism” as a key feature of what he terms “color-blind racism”: “*Cultural racism* is a frame that relies on culturally based arguments such as ‘Mexicans do not put much emphasis on education’ or ‘blacks have too many babies’ to explain the standing of minorities in society.”<sup>180</sup> Colorblindness cases exhibit this dynamic: Justice O’Connor, for instance, famously dismissed the dramatically low participation of blacks in Richmond, Virginia’s construction industry by speculating that “[b]lacks may be disproportionately attracted to industries other than construction.”<sup>181</sup> Under the semiotics of colorblindness, only open references to skin color or the use of explicitly derogatory racial epithets count as racism. In contrast, alarmism about the cultural or behavioral deficiencies of minorities—recall the evolving vocabulary: super-predators, gang bangers, welfare queens, illegal immigrants, terrorists—ostensibly bears no relation to racism and xenophobia.<sup>182</sup>

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system in this country. On the contrary, crime control is often quite explicitly racialized, as both police and prison guard culture emphasize the irreducible importance of race. Indeed, police and prison routines are in many ways *formally* race-conscious, as suspect descriptions, profiling, and prison segregation demonstrate. R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause*, in CONSTITUTIONAL LAW STORIES 223 (Michael C. Dorf ed., 2004). Notably, when the Court recently struck down California’s express policy of racially segregating incoming prisoners, Justices Scalia and Thomas, the Court’s two most strident proponents of colorblindness, abandoned their prior racial principle and argued for evaluating the racial regulation under a standard of review distinctly lower than strict scrutiny. *Johnson v. California*, 543 U.S. 499, 524 (2005).

179. In 1970, John Ehrlichmann, then special counsel to President Nixon, described a core element of his successful campaign strategy this way: “We’ll go after the racists. That subliminal appeal to the anti-black voter was always present in Nixon’s statements and speeches.” BECKETT, *supra* note 12, at 42 (footnote omitted).

179. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 28 (2003) (emphasis in original).

181. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989); *see also id.* at 507–08 (“[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.”) (quoting *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring and dissenting)).

182. To the extent that race becomes translated into the language of culture, the explicit engagement with culture in the criminal law, for example when defendants proffer cultural explanations to exculpate conduct or mitigate a sentence, takes on a powerful racializing role. *See* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007).

Colorblindness is a form of racial jujitsu: co-opting the moral force of the civil rights movement, it uses that power to attack racial remediation and simultaneously to defend structural racism. In the criminal context, it does so directly by insisting that massive racial disparities are “not racism”; and indirectly, but still more powerfully, by providing cover for transparent invocations of racial stereotypes, so long as expressed in cultural or behavioral terms rather than attributed to innate dispositions.<sup>183</sup>

### 3. *Emphasizing Race, Entrenching Stratification*

Just as colorblindness rationalizes the continuation of stark racial inequalities in the death penalty context, so too does it help ensure that racialized mass incarceration has largely escaped opprobrium. None of the numerous racial disparities in the crime control context demonstrate racism, we are told, unless and until they can be blamed on an express and malicious use of race. Yet, the lack of social outcry concerning pervasive racial inequalities in the penological context reflects more than the insulating properties of colorblindness. Perhaps even more fundamentally, there exists a longstanding perception, traceable to the days of white supremacy, that racial inequality reflects the natural order of things. The seeming naturalness of racial inequality may support, and in turn be supported by, the colorblind proscription on race-talk, but it seems to be an independent, powerful aspect of racial commonsense.

For many Americans, racial disparities in the criminal justice system not only fail to evoke a sense of moral outrage, but engender instead a belief in the basic fairness of the world as currently organized. Recent polling data confirms a prodigious gap between whites and blacks in their perception of whether the American criminal machinery is basically fair.<sup>184</sup> When asked whether “[t]he justice system in this country treats people fairly and equally,” 56 percent of whites agreed, compared to only 26 percent of blacks.<sup>185</sup> Pointedly emphasizing race, the same poll also described a hypothetical traffic encounter that involved the police “brutally beating a [white/black] motorist who had been stopped for questioning.”<sup>186</sup> As the brackets indicate, the pollsters variously described the

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183. Richard Ford has argued against the tendency to define race expansively to include aspects of cultural difference. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 4 (2005); see also Richard T. Ford, *Race as Culture? Why Not?*, 47 *UCLA L. REV.* 1803 (2000). Ford does so largely because he opposes the idea of legally protecting group culture per se. However, the strongest argument for understanding race as constituted through cultural referents turns not on the protection of minority group culture, but on the manner in which colorblindness over the last few decades has facilitated a discourse of nonwhite inferiority that principally relies on a coded language of cultural deficiencies.

184. Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 *J. POL.* 762, 763 (2005).

185. *Id.* at 769 (footnote omitted). When queried whether “[t]he courts in your area can be trusted to give everyone a fair trial,” 61 percent of blacks lacked such confidence, while only 26 percent of whites said no. *Id.*

186. *Id.* at 770.

motorist-victim as white or black, and then asked whether a fair investigation was likely.<sup>187</sup> Black respondents were “much less likely” to think there would be a fair investigation when the scenario involved a black motorist; but among white respondents, there was virtually no difference.<sup>188</sup> The authors conclude: “Whites (who tend to assume that the system is color-blind) apply their fairness beliefs as if the race of the victim has no bearing on whether the police would conduct a fair investigation”<sup>189</sup>—even in the context of police brutality.

These numbers reveal a sociologically enormous difference in how whites and blacks view the criminal system. In addition, they raise a troubling implication: emphasizing race in the crime control system may not sensitize many whites to the existence of racial bias. As it turns out, the situation might be worse than this. Perversely, emphasizing racial unfairness may *increase* white support for discriminatory policies.

In a separate study, pollsters asked whites about their support for the death penalty. In one iteration they asked simply whether “you favor or oppose the death penalty,” while in another they prefaced this question with the statement that “[b]lacks are about 12% of the U.S. population, but they are almost half (43%) of those currently on death row.”<sup>190</sup> When informed of its racially disproportionate effect, there was no significant reduction in the proportion of whites who supported the death penalty.<sup>191</sup> Testing whether this finding was anomalous, the authors measured support for the death penalty against information suggesting actual bias, rather than simply disproportionate impact. Respondents were asked either about their support for capital punishment absent any other information, or after first hearing a prefatory statement that “[a]t present, someone who murders a white person is much more likely to be sentenced to death than someone who murders a black person.”<sup>192</sup> Again, the racial information failed to diminish support among whites for capital punishment. As the study’s authors concluded, “[w]hatever else these results may show, emphasizing the persistent bias in application of the death penalty to those who murder Whites does nothing to enhance or reduce how many or even which Whites support the death penalty.”<sup>193</sup>

Reacting to this result, another set of scholars attempted to test whether “more direct and argumentative messages are necessary to move support for capital punishment.”<sup>194</sup> Replicating the earlier format, the pollsters asked about

187. *Id.*

188. *Id.* at 771.

189. *Id.* at 773.

190. Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 160 tbl.1 (2004).

191. *Id.*

192. *Id.* at 162 tbl.3.

193. *Id.* at 163.

194. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty*

the death penalty without more, as well as after an introductory statement that “Some people say that the death penalty is unfair because most of the people who are executed are African Americans.”<sup>195</sup> At last, those hearing the prefatory claim shifted their views on the death penalty—by *increasing* their support. When simply asked about capital punishment, 65 percent of whites somewhat or strongly favored it, but when informed that it was “unfair” to African Americans, support surged by 18 percent.<sup>196</sup> Among those who claimed to “strongly favor” the death penalty, support leaped a precipitous 44 percent.<sup>197</sup> Whites were far, far more likely to strongly favor execution when told it is “unfair” to blacks. In the words of the study’s authors, “our most startling finding is that many whites actually become more supportive of the death penalty upon learning that it discriminates against blacks.”<sup>198</sup> Startling, indeed.

This conclusion runs directly counter to the dominant belief that the polity will turn against policies shown to be racially unjust. To explain the dramatically counterintuitive finding, the authors delved deeper. They showed that those more likely to support the death penalty were also more likely to ascribe crime to dispositional factors such as violent temperaments, versus embracing structural explanations such as poverty or limited work opportunities.<sup>199</sup> The authors hypothesized that respondents, convinced that criminals committed crimes because they were bad, not only rejected claims of unfairness as patently wrong, but actually reacted to such claims in a “backlash” or “boomerang” fashion by increasing their support for punitive measures.<sup>200</sup>

While this explanation seems entirely plausible, I suggest an additional, deeper possibility. Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral *and* that these institutions produce vast racial disparities. If this is so, then simply informing whites about dramatic race-correlated differences will not challenge, let alone change, their beliefs, because they already recognize and accept such inequalities as a legitimate feature of social reality. Indeed, with racial injustice

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*in America*, 51 AM. J. POL. SCI. 996, 999 n.4 (2007).

195. *Id.* at 1002 tbl.1.

196. *Id.*

197. *Id.*

198. *Id.* at 1006.

199. *Id.* at 999, 1004.

200. *Id.* at 1006 (“Many whites begin with the belief that the reason blacks are punished is because they deserve it, not because the system is racially biased against them. So when these whites are confronted with an argument against the death penalty that is based on race, they reject these arguments with such force that they end up expressing more support for the death penalty than when no argument is present at all.”); *cf.* HANEY LÓPEZ, *supra* note 148, at 129–30 (“Because race operates as common sense, challenging racial inequality becomes tantamount to attacking orthodoxy—rather than being heard and debated, the challenger is more likely to be dismissed and possibly judged insane.”).

seemingly a natural condition, an emphasis on numbers alone will tend to *solidify* rather than destabilize dominant understandings of society's basic fairness.<sup>201</sup>

What does this naturalization of injustice imply for efforts to reign in the war on crime? Because whites may increase their support for the current criminal system when lectured about racial injustice, one could argue that references to race should be eschewed in favor of "stealth" strategies that do not mention race at all. "Our results," one set of authors argue, "suggest that a more effective argument for encouraging opposition to the death penalty is one that frames the unfairness of the policy more generally, without focusing on race, thereby avoiding whites' resistance to more direct racial appeals."<sup>202</sup> There is something to this argument, especially if "racial appeals" mean nothing more than providing data on racial disparities or, apparently worse, coupling such data with a sermon on fairness.<sup>203</sup> But exactly because racial injustice has become commonsense, simply dropping race from the discussion hardly helps over the long term. Just the reverse, this approach leaves the seeming naturalness of racial hierarchies undisturbed and unchallenged. The effort to challenge racial inequality cannot be conducted by accepting the basic methodology of colorblindness, its principal legitimating ideology. Racial reconstruction requires more race talk, not less—it requires, in fine, a concerted effort to demonstrate how racism continues to operate in our post-racial context.<sup>204</sup> We must proceed by developing and disseminating a countervailing

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201. For a specific illustration of this dynamic, see Alycee Lane, "Hang Them If They Have to Be Hung": Mitigation Discourse, Black Families, and Racial Stereotypes, 12 NEW CRIM. L. REV. 171, 171 (2009) (arguing that "mitigation discourse fails to address the racial implications of presenting to white jurors a narrative of a black capital defendant's dysfunctional family life. Given the plethora of racist configurations in the public sphere of 'the black family'—signified most perniciously through the figure of the 'welfare queen'—the telling of a black defendant's dysfunctional family life may in fact reinforce what white jurors 'already know' about black families. Indeed, since 'the black family' figures not as an object of sympathy but of contempt, presenting uncritically mitigating evidence of a black capital defendant's family story may, in the end, provide to a white-dominated capital jury an opportunity to punish not only the black defendant but also 'the black family' writ large").

202. Peffley & Hurwitz, *supra* note 194, at 1009; cf. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 247 (2006) ("Rightly or wrongly, white guilt has largely exhausted itself in America; even the most fair-minded whites, those who would genuinely like to see racial inequality ended and poverty relieved, tend to push back against suggestions of racial victimization—or race-specific claims based on the history of race discrimination in this country.").

203. But note that one study found a significant drop in white support for the war on drugs when information on the white-black disparity in crack and powder cocaine prosecutions was provided to respondents. Bobo & Jonson, *supra* note 190, at 167.

204. Even the authors who conclude that their study implies an argument for adopting race-free challenges to racially unjust practices in the criminal system limit the force of that conclusion. Peffley & Hurwitz, *supra* note 194, at 1009 n.18 ("We do not wish to push the argument for a 'stealth' strategy too far. We examine only one racial argument against the death penalty in a 'one-shot' survey experiment; alternative wording or framing repeated over the long haul could produce more opposition . . .").

narrative about race as a form of social stratification—a narrative that pushes far beyond the numbers and the disparities to explain how racism actually functions in today’s society.

#### CONCLUSION: WHY “POST-RACIAL RACISM”?

Few would deny that the 2008 election of Barack Obama to the U.S. presidency is racially momentous. But after four decades of political reaction against the civil rights movement, what exactly does Obama’s elevation portend? Coming in the midst of a wrenching economic crisis, there is reason to worry that perhaps financial gloom rather than moral enlightenment prevented voters from fixating on Obama’s color. One must fear too that lost jobs, homes, and savings will prompt, as it has in the past, a rise in racism and xenophobia. Nevertheless, there remains considerable reason to hope. Obama’s election broke the electoral pattern established after the signing of the major civil rights acts of the 1960s, in which Democrats only won the presidency by nearly splitting the white vote in half. This alone may promise a fundamental political shift, for it suggests that Democrats no longer need compete so aggressively for the votes of an anxious white electorate through racially coded antiwelfarist and tough-on-crime appeals. And then there is the sheer fact of a black man standing in front of the seal of the President of the United States of America. The power of race stems almost as much from its cultural meaning as its material impact, making the symbolism of a black presidential visage enormously forceful.

So dare we predict an end to racism, or more concretely, to some of the major features of contemporary racial subordination, such as racialized mass incarceration? If one accepts the political story tracing current penal policy to electoral competition conducted in the racial proxy language of crime, there is reason to anticipate a slowing down and perhaps even a dismantling of the carceral state, especially given its high costs in a time of increasing fiscal constraint. A theory of racial stratification tempers such optimism, however, for it emphasizes how deeply race structures our society. Race forms a basis for the exploitation and hoarding of material, political, and cultural resources; in turn, the same processes that facilitate racial stratification continually reconstitute race. I do not discount the possibility of racial progress, nor do I diminish the agency of those seeking racial justice.<sup>205</sup> My point is that racism is deeply rooted and highly flexible, not that it is completely immune to amelioration. To the question of whether to expect progress, the answer must be yes and no, for

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205. On the agency question, Paul Butler has been especially powerful in advocating what progressive individuals might do to end racism in the enforcement of criminal law “with dispatch.” Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 724 (2003); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); see also BUTLER, *supra* note 26.

surely there will be both transformation and preservation of the racial status quo.<sup>206</sup> The forms will evolve, and likely some further degree of emancipation will result, but just as surely racial stratification will perdure, succumbing only incrementally, and sometimes worsening. As it has for hundreds of years, race—or, more accurately, “racism”—will remain a principal means through which our society structures and justifies inequality.

Despite this, most Americans seem to believe a halcyon post-racial era has arrived. The current consensus among whites seems to be that contemporary racial inequalities flow from nonracist factors, whether private choices aggregated by the market, cultural predilections, or real racial differences that form inescapable facts of life. Fewer minorities so cavalierly accept that race no longer matters, much less that they, their culture, or their innate nature underlie the myriad ills that befall them and their communities—but still, most struggle to explain cogently how race continues to function so deleteriously in American life.<sup>207</sup>

This sense that, whatever might explain continued racially correlated inequalities, it is not racism, reflects a pinched conception of racism as the discrete acts of individual malefactors. When conceptualized as bad acts by bad persons, racism surely is far more rare than previously and obviously cannot explain the bulk of racially disparate social outcomes. But this conception of racism is neither natural nor obvious—it is, instead, a contrivance of the same backlash against the civil rights movement that produced the war on crime and the turn to colorblindness. More particularly, the individual perpetrator model repudiated and ultimately supplanted a developing structural conception of racial hierarchy.

“Structural racism” as a popular concept reaches back to the late 1960s, when activists and scholars sought to move away from an earlier focus on individual prejudice and toward an examination of how racism operated throughout society.<sup>208</sup> In 1967, for instance, Stokely Carmichael and Charles Hamilton in *Black Power* pointedly contrasted the “individual racism” of those who bombed a Birmingham church killing five children, with the “institutional racism” that killed five hundred Birmingham children through lack of adequate food, shelter, and medical care.<sup>209</sup> As Carmichael and Hamilton correctly

206. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119, 2178–87 (1996) (explaining the limited success of progressive social movements in terms of a dynamic of “preservation through transformation” in which new justifications arise to preserve established hierarchies).

207. Cf. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (exploring the cognitive bases for differences in nonwhite and white perceptions of discrimination).

208. For a fuller discussion of this history, see Haney López, *supra* note 173, at 996–1000, 1005–06.

209. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967).

concluded, an exclusive focus on individual dynamics missed the far greater misery routinely imposed through established social patterns, impersonal bureaucratic policies, and the market's indifferent hand. One did not need to read *Black Power* to learn this lesson, however, for it was widely understood and promoted by leading political figures. President Lyndon Johnson, in a watershed address at Howard University in 1965, insisted that freedom, understood as formal equality,

is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.<sup>210</sup>

Faced with an emergent view of racism as endemic to American life, the backlash against the civil rights movement focused just as much on truncating this emancipatory analysis as on more immediate policy questions.<sup>211</sup> The politics of this project can be seen in microcosm in the writings of Justice Powell, the author of the majority opinion in *McCleskey*. In his early years on the Court, he understood racial discrimination in institutional terms, as in his concurring opinion in a northern school integration case lacking de jure segregation:

[T]he familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities.<sup>212</sup>

Given this systemic understanding, Powell rejected the notion that intentional discrimination should stand as a prerequisite for constitutional remediation: "School board decisions obviously are not the sole cause of segregated school conditions. But if, after . . . detailed and complete public supervision, substantial school segregation still persists, the presumption is strong that the school board, by its acts or omissions, is in some part responsible."<sup>213</sup> Powell did not arrive on the Court with the parsimonious vision of racism that he pushed in the Georgia death penalty case. Instead, whether as a leader or a follower, he moved to this view in keeping with a broader reactionary shift

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210. Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965).

211. Haney López, *supra* note 72, at 1006–11. See generally LEE COKORINOS, THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE (2003).

212. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 222–23 (1973) (Powell, J., concurring in part and dissenting in part).

213. *Id.* at 227.



repudiating institutional accounts of racism in favor of a restricted view of discrimination as episodic bigotry. In short, the current consensus that racism encompasses no more than the bigot's intentional acts reflects the triumph of a political project to define narrowly the source of the problem, and hence the scope of the remedy.<sup>214</sup>

This Essay's effort to advance a racial stratification thesis should be understood in this larger context. It is not simply that this Essay is one among an increasing number of recent efforts to promote a structural view of racism.<sup>215</sup> Rather, these efforts reflect a concerted effort to resurrect an institutional view of racism that has been politically and culturally pushed to the margins for the last four decades. The invocation of "racism" is, in this sense, both an analytic and a political decision.<sup>216</sup> As a political matter, the "racism" in "structural racism" is meant to invoke a sense that, even in the face of obvious improvements in race relations, normatively illegitimate practices continue. Though lynching campaigns and Jim Crow lie in the past, Justice Brennan spoke the truth when he insisted in *McCleskey* on the important connections between current dynamics and a history of racism dating back to slavery, and when he remonstrated that the striking statistical disparities were not stochastic but correlated precisely with a continuing racial hierarchy of white over black.<sup>217</sup> Referring to "racism" aims to evoke a sense of moral repugnance and social duty by vivifying the fundamental injustice of

214. Cf. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("[T]he scope of the remedy is determined by the nature and extent of the constitutional violation.").

215. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Beyond legal academia, an interdisciplinary group of scholars, in which I participated, put a structural racism argument before the Supreme Court in the recent Seattle and Louisville school integration cases, albeit under the more politically cautious name of "structural equity." Brief of the Caucus for Structural Equity as Amicus Curiae Supporting Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915). In addition, in the philanthropic world, the Aspen Institute has produced a booklet distributed widely among foundations promoting both the term and the underlying concept of "structural racism." See Keith Lawrence et al., *STRUCTURAL RACISM AND COMMUNITY BUILDING* (Aspen Institute Roundtable on Community Change, 2004), available at [http://www.aspeninstitute.org/sites/default/files/content/docs/roundtable%20on%20community%20change/aspen\\_structural\\_racism2.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/roundtable%20on%20community%20change/aspen_structural_racism2.pdf).

216. Cf. Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 229 (2004) ("If contemporary history teaches us anything about our racial dilemma, it is that conflicts over the forms and substance of racial injustice have been first and primarily contests about access to the means of political power, about social relations of domination, subordination and resistance. These distinctively political dimensions of race in America resist the normative logic of the moral view that continues to predominate in public debates about racial justice.").

217. *McCleskey v. Kemp*, 481 U.S. 279, 339 (Brennan, J., dissenting).

entrenched racial inequalities. When the *McCleskey* majority balked at recognizing the import of racial disparities because their pervasive scope implied a thoroughly tainted system, Brennan accused them of fearing “too much justice”<sup>218</sup>—and it is exactly justice, in its legal as well as moral and political senses, that structural racism degrades.

Justice Anthony Kennedy, who currently seems to hold the swing vote on race and equal protection, recently endorsed the notion that “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity.”<sup>219</sup> To call current racial patterns “racism” is to make a claim on that national moral obligation; in contrast, to relinquish the notion of racism, and even of race, is to cede one’s claim on the nation’s conscience. Some will object that “racism” is a controversial, and therefore counterproductive, word. The response must be that of course “racism” is controversial. Exactly because it carries so much normative power, challenges to and defenses of the status quo will be fought first in terms of the meaning and applicability of “racism” as a descriptor and as a moral indictment. Put another way, when “racism” ceases to elicit strong cultural and political reactions, that will be sure evidence that racism is largely past. One should be careful to wield this term in an analytically thoughtful, politically strategic, and morally defensible manner. But one should not cede the vocabulary of “racism” merely because it elicits shrill reactions among those otherwise largely comfortable with the racial status quo.<sup>220</sup>

The basic message of racial stratification—of structural racism—is powerfully simple: the vast racial disparities that mar our society, and in particular our criminal system, result from continuing patterns of racism, and we have a national moral obligation to respond. True, the labyrinthine interconnections of structural racism prove difficult to disentangle and still more challenging to explain to a broad audience. In comparison to the clearly stenciled “Whites Only” signs of the Jim Crow era, today’s racism seems more diffuse, less obvious, harder to distinguish from the unfairness of everyday life. In addition, today’s reigning ideology of colorblindness insists that racism is all but vanquished, except of course among minority opportunists who continually stoop to “playing the race card.”<sup>221</sup> Nevertheless, racism remains an enormous

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218. *Id.*

219. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part).

220. *Cf.* TAEKU LEE, *MOBILIZING PUBLIC OPINION: BLACK INSURGENCE AND RACIAL ATTITUDES IN THE CIVIL RIGHTS ERA* 152 (2002) (“The quest for social and political change . . . involves a clash of both physical and moral forces. Thus protest movements . . . involve struggles over the values and meaning that we give to our experiences and the issues at stake. As a result, insurgent campaigns also entail conflict over the content and contours of mass opinion.”).

221. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 17 (2008) (“Today the rhetoric of racism is a national patois.”). Ford reserves special ire for racial progressives who, Ford claims, deploy “the influence of large and powerful bureaucracies and the coercive power of government.” *Id.* at 31.

issue of social justice we must address. In the 1930s and 1940s, Jim Crow did not strike most Americans as a self-evident outrage, but instead persisted as quotidian routine. Indeed, in those decades “racism”—the word, the concept itself—was only just beginning to enter the national vocabulary, and it would not be until the 1950s that it was first applied to the white-black hierarchy.<sup>222</sup> Only through years of dedicated struggle against the injustice of settled patterns did the civil rights movement make “racism” a forceful epithet for condemning group debasement. In the decades to come we will look back on *McCleskey* as a stain on the reputation of the Supreme Court, and on racialized mass incarceration at the turn of the twenty-first century as a national shame. But we will only get there if, today, we recognize and protest against structural racism.

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222. FREDRICKSON, *supra* note 170, at 167.

