

FREEDOM, MASS INCARCERATION, AND RACISM IN THE AGE OF OBAMA

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The title of my talk is “Freedom, Mass Incarceration, and Racism in the Age of Obama.” Let us start with freedom. Who—other than law professors asked to riff on the topic—actually talk at length about freedom anymore? Two groups come to mind: marketing types and militia members. (I would have said “Tea Party” instead of “militia” members, but the alliteration of marketing and militia was irresistible.) From the marketer’s point of view, freedom is understood as freedom to do something—specifically, to consume. From the militia member’s viewpoint, it is understood as freedom *from*: freedom from government. This conjures a disturbing image of the freest person in the United States: the militia militant with a gun strapped to his hip standing at a Subway counter trying to decide which foot-long sandwich to buy for just five bucks. This is a frivolous image, but also a telling one. Obviously in a talk about mass incarceration I am going to be deeply sympathetic to the idea of freedom as freedom from government-imposed constraint. Yet there are lessons in the freedom to consume that also go to the relationship between government and liberty. Freedom to consume has two inseparable aspects: choice and constraint. Choice—in the sense that you are empowered to choose what you want, in domains as trivial as sandwich fixings, and, more profoundly, in terms of exercising autonomy and volition to craft a full sense of self and to shape your relationship with others—is essential to full human flourishing.¹ But choice is almost always constrained—without that five bucks, you get no foot-long sandwich. Choice is invariably partially a function of constraint: the illusory ideal of full choice presupposes the absence of constraint. Here, the five bucks symbolizes a significant source of constraint in the modern world, where so much of our lives has been commodified and translated into dollar terms. Five bucks barely seems

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1. Cf. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”)

like any constraint at all, until it is. Food becomes both a subject of choice and an element of constraint. Human flourishing is hardly possible when you are hungry. There are, of course, other notable necessities that quickly emerge as basic prerequisites for the meaningful exercise of autonomy and volition in defining the self and relationships with others. Shelter and education come to mind, as does health care—yes, health care, that current boogeyman of the Tea Party and our militia member.

Now *there* is something likely to get our locked and loaded Subway Minute Man riled up: government involvement in ensuring adequate health care for all. How can this be? There is a resurgent idea today that freedom can only mean freedom *from* government, and that freedom to consume, or more generally to flourish, cannot in any way be aided *by* government. This notion, so dear to the right, holds that there is a single relationship between freedom and government, and that it is an inimical one. This notion that government is always a threat to our freedom should come as something of a shock in 2010, for it has been a century since its heyday in American law and, since then, the country has learned some hard lessons that many are trying hard to suppress. The notion that government has no role in aiding us in our efforts to be free takes us back to late-nineteenth century libertarianism, to a view of autonomous individuals jealous of their prerogatives to struggle and thrive (or for the masses struggle and starve) in a supposedly naturally-ordained market.² This Spencerian vision of society foundered in the face of rising national markets and increasing wealth inequality at the turn of the last century and finally failed in the tumult of the Great Depression.³ The New Deal represented the ascendance of the notion that government could be both a threat as well as an aid to freedom, that by arranging market relations and providing fundamental goods like education and food, government could help individuals overcome embedded impediments few or none would be able to surmount on his own.⁴ The question then becomes: why has the primitive vision of old-fashioned libertarianism recrudesced? What impels this atavistic conception of freedom when so many—and indeed so many of those rallying around it—desperately need the help of government?

To understand how a vision of government as a source of freedom has come to be tarnished, we must look to those to whom the state has denied freedom most forcefully—the imprisoned. As a society, we deny freedom to the imprisoned most prosaically on the physical level, through the simple expedient of caging them. Beyond the brute fact of incarceration, the

2. This political philosophy found its clearest legal expression in cases such as *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and *Lochner v. New York*, 198 U.S. 45 (1905).

3. The legal retreat from libertarian philosophy is epitomized by *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

4. See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955).

shift from rehabilitation toward a punitive regime within prisons can be understood as a massive denial of freedom. We deny prisoners today virtually all opportunities for self-improvement, be that through education or job training or counseling. Their fates are to sit in a barred room and waste away, cut off from society—many of them cut off from family and community contact. Consider, as just one tiny facet of this, the decision on the part of many states to allow predatory pricing on collect phone calls made from prison.⁵ States (and, with their acquiescence, private industry) generate tremendous revenue by imposing exorbitant rates on the phone calls that prisoners make to their families.⁶ Social contact, so crucial to human flourishing, has been monetized in a fashion designed to extract from the most vulnerable—those with the fewest choices and the scantest resources—revenue the states otherwise refuse to raise through taxes on the wealthiest and most privileged. The imprisoned are condemned, in the words Orlando Patterson used to describe slavery, to social death and, as a final insult, to exploitation of their need to talk to family.⁷

What is the connection between mass incarceration and libertarianism? You know, and I know, that it is not the seemingly obvious connection someone from another country might guess. It is emphatically *not* the case that those rallying around the battle cry of freedom also clamor against the prison complex and the dramatic rise of the carceral state. On the contrary, and oh so perversely, those likely to fly the Tea Party banner are also likely to vote for tough-on-crime measures that increase the prison population. The resurgence of antipathy toward government overreaching is not fueled by mass imprisonment; on the contrary, it fuels the war on crime and, more recently, the war on illegal immigrants as criminals.⁸ Today, libertarianism and mass incarceration share the same roots: racism.

I do not mean by this that racism is an autonomous social force driving antipathy toward the government and also encouraging the criminalization of nonwhites. That is, I do not argue that racism is the root of the problem. Instead, my claim is that racism has operated for the last four decades as a way to stimulate hostility toward the welfare state. By the welfare state, I mean the state that emerged more than a century ago, geared toward regulating the market on behalf of the public, rather than solely the powerful, and dedicated to redistributivist transfer policies that

5. See, e.g., *Miranda v. Michigan*, 141 F. Supp. 2d 747, 749–50 (E.D. Mich. 2001); see also Madeleine Severin, Note, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469 (2004).

6. See Severin, *supra* note 5, at 1470.

7. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 38 (1982); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

8. See generally Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

use taxes on the wealthy to help provide basic services for the poor. State efforts to help the poor were recast during the Civil Rights Movement as efforts to help nonwhites—and nonwhites, simultaneously, were cast as undeserving, and more pointedly, as cheats and criminals.⁹ We cannot understand what happened to modern liberalism, from the New Deal to the New Society to the end of welfare as we know it, without focusing on how racism has been manipulated to distort our sense of connection with one another. Appeals to racism have been used to deny freedom to hundreds of thousands of nonwhites immured in our prisons and caught up in the war on crime. But it has also denied freedom to the poor and middle class in America—nonwhite and white alike—insofar as it has justified a war against progressive government. To rescue modern liberalism, we must deeply engage with persistent racism in American society, including pervasive race-baiting in American politics.

In this talk, I proceed in four parts. The first part addresses the recent turn away from all open discussions of race, especially by liberals. I highlight this aspect of the racial present both because it makes more unlikely the prescription that we save the welfare state by more thoroughly engaging race. I next discuss racialized mass incarceration, explaining its origins in terms of a backlash against the Civil Rights Movement. Third, I use this description of backlash to advance a theory of racism—what I term here racial stratification—as a way to better comprehend how race distorts our society today. Finally, by way of conclusion, using racialized mass incarceration and racial stratification, I return to the claim that in order to recover a meaningful sense of modern liberalism, we need to forthrightly engage continuing racial dynamics.

Part one. We are now ostensibly and happily a post-racial society. Or put differently, Barack Obama is our president. Obama seems to mark the arrival of a post-racial society on several different levels. To begin with, Obama signifies the end of race as a caste system.¹⁰ For most of this country's history, and certainly in the south, race operated along lines of caste in the sense that almost every member of the dominant group stood in a position of superiority relative to almost every member of the subordinate group.¹¹ Today, though, when you have a black man as President, it is clear that race is no longer operating as caste. This is not to say caste has entirely disappeared, of course. As Justice Brennan warned in the early 1980s in *Ptyler v. Doe*, we continue to stand in danger of erecting a new

9. See generally JILL QUANDAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1996); Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1026 (2010) [hereinafter Haney López, *Post-Racial Racism*].

10. Cf. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

11. Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 399–401 (1999).

caste system that relegates to the bottom a “shadow population” of undocumented immigrants.¹² I will come back to this in the conclusion, this sense that caste has yet to be fully eradicated in American life. Even so, however, by and large race no longer functions as a caste system in the United States.

Pursuing the significance of the 2008 election a bit further, Obama marks the arrival of a post-racial society in the sense that he is multiracial. His multiracial identity points us to demographic changes that have significantly altered the calculus of race in the United States. Those demographic changes extend beyond the rapid rise of a multiracial group whose presence and politics challenge the idea that races are monolithic, discrete, biologically distinct groups.¹³ Perhaps the most significant demographic change, from a racial point of view, is the rapid rise of the Latino population. Latin Americans for several decades have composed the largest immigrant group in the United States, and this trend will continue, if not accelerate.¹⁴ “Not even closing the border would significantly disrupt this development, [since] [d]omestic births currently outpace immigration as the primary source of Latino population growth.”¹⁵ The Latino population in the United States increased 58% between 1990 and 2000, and this group, the largest minority in the country, now accounts for more than one of every eight Americans.¹⁶ This growth de-centers blacks, as they are now outnumbered by Latinos. And it helps de-center whites as well. Demographically, the United States will not for very much longer be a white-majority country, at least numerically speaking. One sees, then, a sustained erosion of the white-black dynamic in terms of race in the United States.

We are, in addition, post-racial in the important sense that this seems to describe liberal politics toward race. In *The Audacity of Hope*, his 2006 book, Obama argued that “[a]n emphasis on universal, as opposed to race-specific, programs isn’t just good policy; it’s also good politics.”¹⁷ To explain this position, he recounted a formative experience sitting in the Illinois senate, listening to a black colleague representing an inner-city district decry racism, only to have a liberal white colleague lean over to him and whisper, “You know what the problem is with John? Whenever I

12. 457 U.S. 202, 218 (1982).

13. Susan Saulny, *Black? White? Asian? More Young Americans Choose All of the Above*, N.Y. TIMES, Jan. 30, 2011, at A1.

14. Ian Haney López, *Race on the 2010 Census: Hispanics and the Shrinking White Majority*, 134 DAEDALUS 42, 43 (2005).

15. *Id.*

16. BETSY GUZMAN, U.S. CENSUS BUREAU, THE HISPANIC POPULATION, CENSUS 2000 BRIEF 2 (May 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>.

17. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 247 (2006).

hear him, he makes me feel more white.”¹⁸ Calling his white colleague’s comments “instructive,” Obama drew the following lesson: “Rightly or wrongly, white guilt has largely exhausted itself in America; even the most fair-minded of 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.”¹⁹ The implication, for Obama, was that social justice should be pursued not through “proposals that solely benefit minorities and dissect Americans into ‘us’ and ‘them,’” but through “universal appeals . . . that help all Americans (schools that teach, jobs that pay, health care for everyone who needs it, a government that helps out after a flood) . . . even if such strategies disproportionately help minorities.”²⁰ In a recent interview with a group of black-owned radio stations, Obama explained his stance this way: “I can’t pass laws that say I’m just helping black folks. I’m the president of the United States. What I can do is make sure that I am passing laws that help all people, particularly those who are most vulnerable and most in need. That in turn is going to help lift up the African-American community.”²¹ Obama here advocates a post-racial politics, a politics that treats race as if it is irrelevant to the discussion and resolution of important public policy issues.

Finally, we are post-racial in the sense that we live in a society in which the dominant ideology of race is colorblindness.²² Colorblindness constitutes the dominant way in which we engage race—whether legally, politically, or in everyday discourse. But what does colorblindness entail? On one level, colorblindness demands that government not make distinctions on the basis of race—this is the standard equal protection version of colorblindness that prohibits affirmative action.²³ More importantly for our purposes, colorblindness at the level of public discourse tells us that the first person to mention race is the racist, an indictment frequently made through the claim that someone is “playing the race card.”²⁴ The result is a striking unwillingness on the part of liberals to talk openly about race. Think for a moment about Hurricane Katrina. The images from that epic

18. *Id.*

19. *Id.*

20. *Id.* at 248.

21. Sheryl Gay Stolberg, *For Obama, Nuance on Race Invites Questions*, N.Y. TIMES, Feb. 9, 2010, at A14.

22. EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* 137 (2001) (arguing that “color-blind racism” is now the central ideological formation that has emerged to support and reproduce the new racial structure in the United States).

23. See Ian Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (tracing the rise of “reactionary colorblindness” as an argument for disallowing race-conscious remedies).

24. Haney López, *Post-Racial Racism*, *supra* note 9, at 1072 (quoting RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 17 (2008)).

tragedy could not have more clearly laid bare the continuing racial torsion in America. Yet few if any political leaders dared to speak out about the enduring problem of race. For his part, Obama dismissed the notion that race played any role, saying of the chronic delays that multiplied the misery of the hurricane and its aftermath, the “incompetence was colorblind.”²⁵ There has been a flight from race on the part of liberals that corresponds with a conservative attack on anyone who dares to speak about the continuing relevance of race.²⁶ So to sum up, there have been dramatic improvements in the nature of racial subordination in the United States. There are, in addition, rapidly changing demographics that are eroding a white-black dynamic. On top of that, we live in an era in which conservative and liberal politicians alike urge us to eschew any mention of race. In this context, we must confront the reality of racialized mass incarceration.

Part two. 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.²⁷ These two facts—extremely high rates of subjection to the carceral system and the highly disproportionate targeting of non-whites—form the essence of racialized mass incarceration.

Even when expressed in the cold nomenclature of statistics, the toll of racialized mass incarceration is deeply disturbing. 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.²⁸ 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.²⁹ Putting these numbers to-

25. Janny Scott, *A Biracial Candidate Walks His Own Fine Line*, N.Y. TIMES, Dec. 29, 2007, at A1.

26. Ian Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 *Cardozo L. Rev.* 807, 825 (2011) (discussing Obama’s post-racial politics); see also STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* (1995) (documenting the flight from engagement with race by many liberal intellectual and political leaders); TIM WISE, *COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY* (2010) (arguing that President Barack Obama’s avoidance of any engagement with race cedes ground to conservatives and allows the continuation of oppressive racial practices).

27. PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 7* (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSP_1in31_report_FINAL_WEB_3-26-09.pdf.

28. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 3 (2007).

29. *Id.*

gether leads to the harrowing truth that in 2003 the correctional system held under its coercive thumb *more than one in every twenty adult males* in the United States.³⁰ This incarceration rate, the highest in the world, exceeds the highest rate in Europe by five hundred percent.³¹ The United States has five percent of the world's population, but immures twenty-five percent of the planet's prisoners.³²

This "rage to punish"³³ targets primarily poor African-Americans and Latinos.³⁴ It does not, of course, entirely spare whites, who have also seen their rate of incarceration rise, if not as precipitously.³⁵ 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. This is especially so for young black men who fail to complete high school: their incarceration rate stands at a 32.4%, meaning that at any given point nearly one in three languishes behind bars.³⁶ 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 going to prison for at least a year; for men in that cohort who dropped out of high school, the risk of imprisonment surged to a staggering 59%.³⁷ Note that these last numbers *understate* the full reach of the criminal system, as they do not count the hundreds of thousands jailed for less than a year.³⁸ Nor do they count the dramatic increase in the number of incarcerated women, again primarily African-American. The crime control system, as Glenn Loury argues, is a "monstrous social machine that is grinding poor black communities to dust."³⁹

This is racialized mass incarceration. It is the right place from which to consider what has happened with freedom, not just in terms of imprisonment, but also in terms of a modern liberal conception of a state willing to help people. It is the right place because of the justice dimension and the human rights dimension for those put behind bars. And at the same time, the origins of racialized mass incarceration tell us about what happened to the New Deal consensus about the role of the government.

30. *Id.*

31. *Id.* at 15.

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

33. LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 1 (1994).

34. *Id.* at 8.

35. See WESTERN, *supra* note 28, at 27. Among white men with no high school degree born between 1945 and 1949, the cumulative risk of incarceration was 4.0%. *Id.* The risk of incarceration for this same group born at the end of the baby boom was 11.2%. *Id.*

36. *Id.* at 17.

37. *Id.* at 26–27.

38. *Id.* at 24.

39. GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 27 (2008).

Sociologists and political scientists have recently persuasively argued that the rise of mass imprisonment reflects a backlash against the Civil Rights Movement.⁴⁰ The legislation that laid the groundwork for the war on crime first appeared in the mid-1960s, a time during which the country experienced a surging sense of social disorder.⁴¹ To a certain extent, popular anxiety about social disorganization reflected numerous non-racial factors, including the economy, protests against the Vietnam War, political mobilization on college campuses, the counter-culture movement generally, and the sense of social crisis engendered by the demands for women's and gay rights. Perhaps most potently, though, rapidly shifting race relations spurred a sense of social breakdown. Across the country, political mobilization by multiple nonwhite communities, whether African-American, Latino, Native American, or Asian, destabilized a settled racial hierarchy and concomitantly contributed to an escalating sense of social crisis.⁴²

Many elected officials opposing civil rights used the language of "law and order" to respond to and, in turn, stoke racial anxiety among whites. This rhetoric partly reflected the ready availability of this frame. From the inception of the mass Civil Rights Movement in the 1950s, southern politicians had disparaged racial activists as "lawbreakers"—as indeed they were.⁴³ 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.⁴⁴ Paradoxically, though, the very success of the Civil Rights Movement created an incentive to take this vocabulary of crime to new levels. The Civil Rights Movement made the frank espousal of white supremacy unacceptable. A different language was needed to express racial anxiety without seeming to contravene ascendant norms of racial egalitarianism. The stage thus set, "crime" became the new lexicon of race.

In 1964, Barry Goldwater, in his quest for the White House, warned the country that "[c]rime grows faster than 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."⁴⁵ With success among southern whites suggesting the power of his message, other politicians echoed and amplified Goldwater's theme. In 1965, President Lyndon Johnson took up the crime issue, delivering his first presiden-

40. See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1999); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. IN AM. POL. DEV.* 230 (2007).

41. See BECKETT, *supra* note 40, at 85; Weaver, *supra* note 40, at 244–45.

42. See BECKETT, *supra* note 40, at 83; Weaver, *supra* note 40, at 244–45.

43. BECKETT, *supra* note 40, at 30.

44. See *id.*; Weaver, *supra* note 40, at 240–41.

45. Weaver, *supra* note 40, at 243.

tial address specifically on crime and sending a legislative anti-crime agenda to Congress.⁴⁶ By the late 1960s, “law and order” had become a surrogate expression for concern over the increasing power of the Civil Rights Movement.⁴⁷ In national politics, Richard Nixon made law and order a de facto campaign slogan and rode it to victory in the 1968 presidential election. “Crime” served as a potent synonym for the threatening presence and demands of nonwhites. In viewing one of his own campaign advertisements, Nixon once exulted: “[It] hits it right on the nose. It’s all about law and order and the damn Negro-Puerto Rican groups out there.”⁴⁸ Rather than challenging the politics of racial fear mongering, Democratic politicians almost immediately acceded to it. They sought to out-do Republicans in symbolic pandering to the white electorate. This translated into a competitive bidding war to prove who was tougher on crime.⁴⁹ The result, after several decades, is the carceral state we know today.

A focus on race and the carceral system remains incomplete, however, without tying the racial politics of crime to the racial politics of welfare. Beginning in the 1960s conservative leaders also sought to use racial anxiety, and social anxiety in general, to gain support for anti-welfare politics.⁵⁰ Despite having been discredited by the Great Depression and repudiated by the New Deal, libertarianism came back by linking the poor to people of color, and nonwhites to crime.⁵¹ The New Deal witnessed the rise of a social consensus that large-scale forces, largely immune to personal effort, frequently trapped the poor.⁵² The welfare state aimed to help the poor overcome those structural barriers. This consensus came under attack under the guise of opposition to civil rights.⁵³ The language of law-breaking promoted a social vision of individual failure rooted in moral depravity. Suddenly we confronted the specter of the undeserving poor.⁵⁴

Stumping in 1965, then-Speaker of the House 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

46. *Id.*

47. See BECKETT, *supra* note 40, at 38, 42–43.

48. Weaver, *supra* note 40, at 259 (quoting PHILLIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 292 (1999)).

49. See BECKETT, *supra* note 40, at 85–86; Weaver, *supra* note 40, at 261–62.

50. BECKETT, *supra* note 40, at 42–43.

51. See *id.* at 45–52.

52. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422–25 (1987).

53. See THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 51 (1991).

54. See generally QUANDAGNO, *supra* note 9.

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?⁵⁵

Ford 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.⁵⁶

Richly deserved!

Since the late 1960s, Republicans and Democrats have competed by punishing criminals and welfare cheats. Posturing through ever-more punitive crime policies and ever-more restrictive social programs, federal and state party politics drove mass imprisonment and, at the same time, dismantled the social safety net.⁵⁷ 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; we have simultaneously built an enormous carceral system and dismantled our ability to provide for the health, safety, and welfare of the public.

Here I want to start using a term that was first introduced by Michael Omi and Howard Winant. They refer to the “racial state.”⁵⁸ They use the term to emphasize that the state does not stand above the racial fray, but is itself thoroughly immersed in racial contests.⁵⁹ There is, though, another way of seeing the state as racial: disputants may present the state itself as having a racial identity. Consider in this vein the backlash against the Civil Rights Movement and against state efforts to promote social welfare. Rather than seeing the state as immersed in racial conflicts, conservatives depicted the state (and certainly the Democratic Party) as captured by

55. See EDSALL & EDSALL, *supra* note 53, at 51.

56. BECKETT, *supra* note 40, at 33.

57. Over the last two decades, state allocations to corrections have increased by 303%; meanwhile, state spending on public assistance has increased by just 9%. PEW CENTER ON THE STATES, *supra* note 27, at 11; see also Solomon Moore, *Prison Spending Outpaces All but Medicaid*, N.Y. TIMES, March 2, 2009, at A13.

58. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* 82 (1986).

59. See *id.* at 82–83.

nonwhites. The state became a racial state in the sense of being by and for blacks. It supposedly coddled persons of color through civil rights laws. It refused to hold them accountable out of tender regard for the rights of criminals. It spent massively on their welfare, education, and other needs. And it hired and promoted incompetent nonwhites 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.⁶⁰

The right has promoted a libertarian anti-statist agenda that is, in large part, opposition to the black state. This is not your typical 19th century libertarianism deeply concerned with the coercive power of the government, especially as wielded through the criminal apparatus (think of the values that animate the Fourth, Fifth, Sixth, and Eighth Amendments—four out of the ten amendments constituting our Bill of Rights aim to protect individuals from government overreaching in the criminal law area). True, the new libertarianism has dismantled the welfare state. But it also has dramatically increased the power and reach of the carceral state. What links these? It is not opposition to the state in the traditional sense. It is opposition to the black state.

Part three. Perhaps at this point we are ready for some good news: Obama won. And this is very good news indeed, especially if you take seriously the backlash story. 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.⁶¹ 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 anti-welfarist 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

60. See EDSALL & EDSALL, *supra* note 53, at 202–07.

61. Timothy Noah, *What We Didn't Overcome*, SLATE (Nov. 10, 2008, 8:05 PM), <http://www.slate.com/id/2204251>. Whereas Jimmy Carter won the presidency by coming within four percentage points of his opponent's white vote, and Bill Clinton won twice by inching within two points, Al Gore lost with a 13% deficit in white votes and John Kerry fell short with a 17% gap. *Presidential Candidate's Share of White Vote, 1968-2008*, SLATE, <http://www.slate.com/id/2204251/sidebar/2204308/>. Obama's 12% 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.

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.

Or maybe not. Maybe the electoral pattern of the last four decades has not been so much broken as temporarily suspended, in large part because of the economic crisis that preceded Obama's election. In turn, as that crisis continues to linger, perhaps hard times will again, as they have in the past, spur resurgent racism and xenophobia. Indeed, perhaps this helps explain the explosive growth of the Tea Party movement. So should we be optimistic that racialized mass incarceration is over?

Let me conceptualize racism in a way that may help us get a better handle on the current moment. The backlash story introduces an element that is otherwise missing in legal theories of racism: that racism is functional, that racism is helpful, that racism helps people achieve something. If you think about the dominant theories regarding racism, they largely neglect this basic fact.⁶² Intentional theories of discrimination emphasize malice, as if the intent behind deploying race reduces to a bare desire to harm.⁶³ 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 more costly to detect directly.⁶⁴ Cognitive theories of racial discrimination shift attention altogether away from conscious motive and intent.⁶⁵ Finally, institutional accounts go even further in eliminating strategic action, offering theories that lack not only intent, but even actors.⁶⁶ Whatever the ver-

62. 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).

63. The leading expositions of the malice approach can be found in case law. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

64. Richard Posner advanced a theory of rational discrimination in 1973 in his text on law and economics. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 294–97 (1973). For a critique of rational choice theories of discrimination, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1761–69 (2000), and JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 8 (1997) (stating that “rational discrimination” is unreasonable and racist). Dinesh D'Souza has exported this logic to the larger culture:

[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).

65. 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).

66. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal*

sion, these various theories have largely dropped the question of whether race serves important cultural, political, or material interests. The backlash 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.

To develop a model of racism that takes seriously the insight that race is often used as a means to an end, I have drawn on the insights proffered by Douglas Massey, one of the leading contemporary scholars of social inequality. Massey explains group 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.⁶⁷ In terms of the misdistribution of resources, 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.⁶⁸ Applying Massey’s insights to race, I have proposed that we talk about racism as a system of “racial stratification.” Following Massey, racial stratification should be understood to rest on two pillars: first, race is constructed, and second, this construction occurs in the context of efforts to justify exploitation broadly conceived.⁶⁹

Skipping a detailed elaboration of the theory, here’s what I like about this model. First, it tells us that race and power constitute each other. Race is not a natural phenomenon. Races exist because we as a society have created races.⁷⁰ Second, this model emphasizes that race is functional—it is geared toward the misallocation of resources. How should we conceptualize these resources? Most crudely, of course, one should think of material resources, of brute dollars. I will circle back to that, but it is important to emphasize that racial stratification is not built on material exploitation alone. Instead, it encompasses struggles over control of the state. Think of the discussion of the backlash dynamics in which elections—and more fundamentally state policies toward wealth redistribution and welfare—were conducted in the proxy language of crime and race. It also encompasses resources understood as group position. Reflecting further on race and crime, partly what is at stake is a sense of group status:

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.”).

67. DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 5–6 (2007).

68. *Id.* at 6.

69. I develop this argument in Haney López, *Post-Racial Racism*, *supra* note 9.

70. See generally Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

which group is law abiding and deserving of respect; which group is threatening and shot through with criminal tendencies. Even more fundamentally, race becomes a means to contest the legitimacy of the social order. Thus, we can comprehend Moynihan's report: his rhetoric paints a social order trapping the poor in ghettos as fair, as deserved, and ultimately, as warranted.⁷¹

Now, back to the notion that racial stratification involves contests over material resources. Slavery arose as a brutal system of labor extraction that required some sort of justification; that justification was race.⁷² Also consider the dispossession of Native Americans; taking others' lands again required some type of rationalization and race offered a legitimating story. To be sure, those sorts of nakedly exploitative practices are not typical today. Nevertheless, race remains centrally concerned with resource allocation, though more typically in the form of hoarding.⁷³ By hoarding I mean efforts to protect the resources previously and illegitimately arrogated by whites. Consider the demands of the late-stage Civil Rights Movement. The call was for more than just formal equality. The movement demanded, in effect, access to schools, access to places of employment, access to political power, the redistribution of wealth through effective welfare programs. It is against those demands that we see the language of black criminality deployed. Put differently, what we have so far described as a backlash toward civil rights can also be conceptualized as racial hoarding, as the effort of whites to use race to explain why they should get to keep the resources—material, state, and cultural—that they had previously taken for themselves.

Here is the last thing I like about racial stratification. It tells us that race and class are inseverably connected, as race is bound to poverty and tied to prosperity. We tend to think of race and wealth as only accidentally correlated, but of course they are not linked merely because, by some accident, nonwhites are disproportionately poor. The whole point of racial stratification lies in justifying practices of exploitation, so necessarily race and class are connected.⁷⁴ This interrelationship is not only material, it is also cultural. Consider the bromide that we are all middle class; race lies just below the surface. Who makes up the "we" in that statement? Or consider the Horatio Alger myth of upward mobility.⁷⁵ Race is implicitly there too; for the myth of easy upward mobility explains success in terms of individual effort rather than in terms of structural advantage—in terms,

71. See *supra* text accompanying note 56.

72. See, e.g., MASSEY, *supra* note 67, at 23–24.

73. See *id.*

74. See e.g., John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 356 (2007).

75. See HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 127–36 (1995).

that is, of white effort absent white privilege.⁷⁶ What, then, of those denied upward mobility, whether through the structural impediments built up over decades and centuries of group exploitation or through barriers of race and class prejudice? When we talk of class in the United States, we inevitably also talk of race—perhaps only implicitly but always inescapably.

Part Four. Now, how should we think about racialized mass incarceration if we take seriously racial stratification? Certainly the backlash story suggests an optimistic outlook. But this depends on conceptualizing race as a handy rhetorical tool lying around ready to be picked up and used as a superficial group divider which can be easily manipulated. The stratification model tells us that race is not superficial at all, but is instead deeply embedded in our society. The conjunction of race and resources gives race daily meaning. Moreover, race remains functional, meaning people (and politicians) constantly turn to race as a weapon in competition over resources.

Try this another way. On March 24, 2010, two articles in the *New York Times* appeared side by side.⁷⁷ One of them reported that in the wake of the fiscal crisis California was opening its prison doors.⁷⁸ This sounds like the culmination of the backlash story, with fiscal crisis thrown in. Not only is racialized mass incarceration over as politics, but it is also, for fiscal reasons, spreading pain among the states. The other article focused on Arizona and reported that it stood poised to pass a law making it criminal trespass for any undocumented immigrant to be present in the state.⁷⁹ Here we see another set of racial dynamics. After 9/11, we developed a national panic around the notion that the United States was under attack by foreigners or, more particularly, by nonwhite foreigners. This led to a particular hysteria with respect to people understood as Muslims or Arabs. In turn, though, this has bled over into a notion that undocumented workers represent a threat to the national security of the United States. Meanwhile, these immigrants play an important role in our economy as a source of low-wage labor—at least in part, of course, because they lack documentation. Racialized mass incarceration of the sort that was born four decades ago may (or may not) be easing. Whatever the case, a new racial politics seems to be emerging, one in which the nation fears not just

76. *Id.*; cf. Lawrence Bobo, James R. Kluegel & Ryan Smith, *From Jim Crow Racism to Laissez-Faire Racism: The Crystalization of a Kinder, Gentler, Antiblack Ideology*, in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 15, 16 (Steven A. Tuch & Jack K. Martin eds., 1997).

77. Randal C. Archibold, *Driven to the Financial Brink, a State Opens the Prison Doors*, N.Y. TIMES, March 24, 2010, at A14; Randal C. Archibold, *Immigrants Are Focus of New Curbs*, N.Y. TIMES, March 24, 2010, at A15.

78. Randal C. Archibold, *Driven to the Financial Brink, a State Opens the Prison Doors*, N.Y. TIMES, March 24, 2010, at A14.

79. Randal C. Archibold, *Immigrants Are Focus of New Curbs*, N.Y. TIMES, March 23, 2010, at A15.

blacks, but also Latinos, especially when constructed as illegal aliens. In 2007, among people sentenced to go to federal prison, 40% were Latinos.⁸⁰

What does “racial stratification” tell us about a new national campaign to provide health care, or to invest in schools or the national infrastructure, or more generally, about the reappearance of a robust modern liberalism? It means we cannot go forward, we cannot respond to the new libertarianism without understanding that this new libertarianism is not hostile toward the state in general. No, it conjures a frightening specter of a state that is by and for nonwhites. That too helps us understand the reaction to Obama’s election. The folks who are up in arms are responding to forty years of propaganda teaching them to be afraid of the black state—which is now personified by a black president.

Let me return, at last, to our gun-toting militia member standing in a Subway. That person would surely benefit from a robust commitment to freedom on the part of the state, a commitment by the state to reign in the use of coercive force and the burgeoning carceral system, and also a commitment on the part of the state to take seriously its unique ability to facilitate full human flourishing. But though our militant would benefit, he is burdened by the incredible impediment of race, the impediment of seeing and fearing the black state. With the militant we might agree, it is time to dismantle the black state. But by that we should intend not to dismantle government, but to breakdown the racial ideology that has painted the state as black. Freedom today, in its modern, liberal sense, requires a deep engagement with race. It requires this in order to understand and respond to racialized mass incarceration. And it requires a deep engagement with race, rather than its post-racial avoidance, if we are to recuperate liberalism in general.

80. MARK HUGO LOPEZ & MICHAEL T. LIGHT, PEW HISPANIC CENTER, *A RISING SHARE: HISPANICS AND FEDERAL CRIME i* (2009), available at <http://pewhispanic.org/files/reports/104.pdf>.