

“Too often we stop at knowing the good without doing it because we also know the better without being able to do it. Yet here and there a victory is achieved nevertheless, and for the fighters who use critical history for life there is even a remarkable consolation: namely, to know that this first nature also was, at some time or other a second nature and that every victorious second nature becomes a first.”

- Friedrich Nietzsche. *On The Advantage and Disadvantage of History for Life*

The Story of Racial Subordination: Three Images and Two Case Studies

Thurgood Marshall, the first black to serve on the Supreme Court, was skeptical of celebrating the bicentennial of the U. S. Constitution. In fact, it might be said he lamented its celebration. In a speech before the San Francisco Patent and Trademark Law Association, he stated:

“[...] in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled.¹

In the above statement, and throughout the body of the text, Marshall employs temporality in two distinct ways.

First, Marshall locates lack of moral vision at a particular point in time. Failing to “find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound,” Marshall indicts the founders as devising institutional design that “was defective from the start.”² Thus, “When contemporary Americans cite ‘The Constitution,’

¹ Thurgood Marshall, “Reflections On The Bicentennial of the United States Constitution,” *Harvard Law Review* 101, no 1 (1987): 5.

² *Ibid.*, 2.

they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.”³

Second, and which I take as forming the primary basis for the reluctance to capitulate to what was surely the standard felicitous disposition towards the bicentennial, Marshall highlights that the moral tradeoffs made for the sake of maintaining the Union are not frozen in the past, but remain with us today. And they do so not merely as memories but as active factors in determining the racial landscape, factors which arise “from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.”⁴ Here, the idea is that racial disadvantage embodied by institutions due to some inconsistency in moral acuity or lack of will to sustain the arc of justice is not relegated to the time of its embodiment.

Indeed, Marshall is troubled that such disadvantage can endure and resist formal institutional reform. He observes that besides the initial contradiction between the values of the founding and the explicit exclusion of blacks (and women), Chief Justice Taney reaffirmed America’s commitment to the racial caste system in his *Dred Scott* opinion. Though the Civil War eradicated slavery and the fourteenth amendment made equal protection national law, “almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education.”⁵ It is clear that one question haunts Marshall’s ability to share in the euphoria surrounding what should rightly be considered a landmark event: how is it that a nation founded on the ideals of rights and equality continues to bear

³ *Ibid.*

⁴ *Ibid.*, 4.

⁵ *Ibid.*

witness to disadvantages which expresses continuity with those of two centuries ago? There is a second question more implicit in Marshall's oratory, and one which may be more disturbing: why aren't more people equally concerned with not only the inconsistencies of the founders but the ways our founding has more or less set the stage for continued struggle of persons of color two centuries hence?

In what follows I provide a narrative argument that crystallizes Marshall's concerns.⁶ In the above, Marshall essentially expresses a powerful intuition – contemporary racial disadvantage can't be merely incidental to our historical moment. Rather, it is substantively entwined with our past. Below, I give the intuition analytic grounds by tracing out a single, but powerful thread in the story of racial inequality.

We recall that chapter two offered historically evolved socially embedded power the first aspect of which offers power as historically evolved just in case society witnesses systemic inequalities that express continuity with historically significant prior patterns of unjust distribution and social asymmetries. Much of the continuity of racial disadvantage can be explained by the historical relationship between our institutions and persons of color. More precisely, as argued through our earlier engagement with Charles Tilly and Paul Pierson, institutions' initial explicit embodiment of norms established by asymmetrically positioned groups can set precedents for the continual disadvantage of subordinate groups within society. Below, I seek to trace out how this has played out historically with respect to race. Further, we concluded that determining the grounds for

⁶ The history of slavery and oppression in America is well-documented. Therefore, I do not aim to retell a well-told story. Instead I intend on analyzing the institutional relationship between blacks, oppression, and progress in America. This helps capture how racial disadvantage has adapted itself resulting in a society where racial injustice is a fact though social norms seem opposed to it, as well as detaching the genealogy of that injustice from its historical roots.

normatively theorizing racial justice required a more than cursory engagement with the historical record to give shape to our prescription – if it is the case that racial inequality persists, but our discussions, so I argue, look past the fundamental problems of racial inequality, then it seems history can help us get our bearings on what is at issue. The model of power is meant to help us focus in on certain moments and developments in history by specifying the ways in which the relationship between blacks and institutions developed into a dynamic which would provide for systemic racism in an era of formal equality.

I present below what I term three historical images and two case studies. The historical images provide an historic-analytic snapshot of the development of racial norms before the founding, the instantiation of those norms at the time of and around the founding, and the persistent, evolved expression of those norms with the failure of Reconstruction. These suggest a pervasive and significant impact on the design and evolution of America's institutional relationship with race. The two case studies, welfare policy and crime policy, move us into the 20th century and are meant to provide analytic traction on how we understand the continuity of racial disadvantage, how it developed and adapted yet again with the advent of formal equality beginning in the mid-20th century. This chapter seeks to move us closer to specifying justice as democratic partnership and grounding the social bases of self-respect as its proper aim.

It might be useful to ground the methodological and substantive choices embodied in the below study by highlighting two issues raised by the literature on history's relation to historical disadvantage and by responding to one possible concern. First, Robert Lieberman has recently expressed concern over the failure of American political development scholarship to establish historical causality for contemporary racial

outcomes.⁷ He believes these outcomes are related to our legacy of slavery but argues we must do more to establish this link. My account below eschews a concern with causality. Race has too long a history, with a great deal of intertwining factors, to legitimately establish causality in an analytically or prescriptively useful way. The implicit argument of the investigation below is that we *can* reasonably establish that institutions operate under powerful historical precedents due to their design and proclivity to carry forward certain legacies. Notice, that we achieve what the idea of causality achieves – namely explaining racially disparate outcomes – without the need to trace out numerous strands of historical development leading to outcomes in various social, political, and economic domains. This is essentially a way of grounding a moral mandate without the burden of strict scrutiny across each arena into which racial disadvantage has insinuated itself.

Second, Desmond King and Rogers Smith seek to expand our historical analytic tool kit by introducing the idea of racial orders, which argues that the history of racial development with respect to our institutions can be understood as a contest between a white supremacist order and a transformative egalitarian order.⁸ The shortcoming with this view is that it seems to be very appropriate for a particular period in history, but only that period since it posits two distinct competing interests. However, we would be hard pressed to say that there is a white supremacist order looking to pursue its interests in politics today. But how, then, to explain continuing racial inequality? My objection here is that to invoke history with regard to race entails modeling for continuity. Just as seeking

⁷ Robert Lieberman, “Legacies of Slavery? Race and Historical Causation in American Political Development” in *Race and American Political Development*. Eds, Joseph Lowndes, Julie Novkov, and Dorian T. Warren (New York: Routledge, 2008): 206-233.

⁸ Desmond King and Rogers Smith “Racial Orders in American Political Development” in *American Political Science Review* 99, no. 1 (2005): 75-92.

causality poses rather formidable obstacles to moving forward a project linking racial inequality to history, positing specific racist interests in a time where we have admittedly moved past the prevalence of explicit racism in politics seems to not get us far enough in explaining contemporary racial disadvantage..

Last, some might object to my omission of black counter-struggles and counter-movements, most notably the Civil Rights Movement. It might be said to omit this important aspect of history is to ignore a powerful force in the development of freedom and equality. Didn't this struggle succeed after all? I would respond that this depends on what one counts as success. If the establishment of formal equality and some material progress counts as success then this objection stands. However, the premise of this project is, rather, that something has fundamentally failed – we remain witness to systemic racial inequality, a form of inequality more troubling precisely because of its inability to be located in specific practices of particular power interests. On my view then, it is not that the black counter-struggle is unimportant – so far as the persistence of racial inequality is concerned, it offers no contribution in explaining that persistence. Thus, since the below investigation is intended on focusing on the factors that explain racial inequality, rather than provide a thorough history of racial struggle, counter-movements have no role here in explaining institutional continuity and complicity.

Image #1

I believe it uncontroversial to say that slavery – the owning of humans as property to be dispensed with as pleased – is motivated by a significant premise on the worth of

persons. That is to say, persons ‘fit’ for slavery are not to be considered as a class of worthy or inherently valuable humans. This observation states a foundational conceptual and normative point of reference for the first one hundred and seventy years of American history and contemporary racial inequality. More than a ‘peculiar institution,’ slavery was unambiguously derogatory in its estimation of blacks. Slaves quickly came to be dominantly comprised of blacks, and they were not viewed as merely economic tools but as inferior and undeserving of decent treatment. To underscore how remarkable this development was, Winthrop Jordan highlights that slavery had initially two separate motivations and constituencies in the North and South respectively.

For Jordan, “The question with New England slavery is not why it was weakly rooted, but why it existed at all. No staple crop demanded regiments of raw labor.”⁹ Puritans settling the northern colonies in New England brought with them a set of religious and social values which placed emphasis on the religious virtues of others. Specifically, the worthiness of a person turned on whether he expressed goodness in being a committed Christian. In the event that one was a heathen, one was also marked as in need of salvation and as alien to the community.¹⁰ With Africans qualifying as both heathen and Alien, the Massachusetts Body of Liberties expressed a particular disposition around the middle of the 17th century: “the Puritan settlers were seeking to guarantee in writing their own liberty without closing off the opportunity of taking it from others whom they identified with the biblical term ‘strangers.’”¹¹ Given such norms, it was probably slight coincidence that New York’s slave population grew quickly when the English took it from the Dutch in

⁹ Winthrop Jordan, *White Over Black: American Attitudes Towards the Negro, 1550-1812* (Baltimore: Penguin Books), 66.

¹⁰ *Ibid.*, 67-8.

¹¹ *Ibid.*

1664, or that Massachusetts' first law recognizing slavery was passed in 1641, with it becoming an inheritable condition by law in 1670.¹²

A different set of circumstances obtained in the South. While the Puritan embrace of slavery seemed to have turned on a set of religiously grounded normative commitments, the South appears to have embraced slavery in response to economic considerations. Though colonies in both the North and South required labor, the opportunity to grow tobacco among other staple crops on an abundance of land ensured that the South would have a need for and be able to make use of a greater number of productive bodies that could be obtained on a reliable basis. Michael Levine indicates that blacks were seen as a viable source for many reasons. Among these was the ability of indentured servants (a class of laborer that had over time become associated with white Europeans as slavery became the domain of blacks) to leave the workforce and acquire their own land in addition to a decline of white workers beginning around 1660.¹³

There are questions provoked by both set of circumstances. Why blacks? How did slavery become so deeply imbued with derogatory racial norms? These are questions that historians have yet to settle, yet it is undeniable that indeed blacks, as slaves, became less than human in the eyes of both whites and institutions. While we cannot answer these questions with much precision in this space, we ought to take note of three precedents which likely played a role in informing early American race relations.

First, there was historical precedent. As David Brion Davis notes: "From the twelfth to the mid-fourteenth century, the iconography of western European churches became

¹² Michael L Levine, *African Americans and Civil Rights: From 1619 to Present* (Phoenix: Oryx Press, 1996), 26; 29.

¹³ *Ibid.*, 17.

stocked with the images of unmistakable black Africans as torturers, tempters, and executioners, often in scenes of the Passion of Christ.”¹⁴ Davis concludes that it is “probable that most Europeans received their first subliminal impressions of so-called Negroes in a local church or cathedral.”¹⁵ On Davis’ view, apart from religious concerns, the church was one social site at which persons received images and developed perceptions of a group they had little personal interactions with. From this we are meant to surmise that a negative view of blacks obtained at sites like the church had been introduced to English culture, which might be imagined as informing a precedent for racial beliefs.

Second there was religious precedent. In the Genesis “Curse of Ham” narrative Noah curses Canaan’s son, Ham, to slavery for looking upon him while naked. The status of slavery as perpetual servitude was not linked to skin color in the original narrative. However, Jordan’s scholarship suggests two developments that likely converged to link slavery with color in religious thought with respect to the Curse of Ham narrative. First, the writings of St. Jerome and St. Augustine suggest that Africans are descendants of Ham, hence persons of dark skin are ancestrally linked to the stigma of slavery.¹⁶ Second, around the same time, Talmudic and Midrashic writings assert that Ham’s skin was “smitten,” and that Noah declared “your seed will be ugly and dark-skinned.”¹⁷ Importantly, this line of thinking had an open avenue into wider European culture since Renaissance Christian scholars closely studied Talmudic writings. If we keep in mind the Puritans’ commitment to

¹⁴ David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006), 59

¹⁵ *Ibid.*

¹⁶ Winthrop Jordan, *White Over Black*, 18

¹⁷ *Ibid.*

religious judgment of aliens and heathens it seems reasonable to suppose that religious preconditions for racial subordination were operative.

Last, there is cultural precedent the value of which depends on two convergent factors. First, England emerged from the 100 Years War as a naval power superior to Spain. This new status motivated England to seek a greater role in world affairs and trade, leading it to actively engage in empire building. Second, during Elizabethan times, England began to develop a sense of ethnic and national superiority prompted it to see itself as the pinnacle of social, political and economic civilization. There developed a certain kind of ethnic chauvinism which informed a disposition to others, white or not. For instance, well-documented but less discussed was the English's trade in Irish slaves.¹⁸ However, Jordan offers an interesting perspective on how one reconciles English feelings of superiority vis-à-vis all other groups and the development of black slavery while the Irish gain more equal status. Jordan argues that the English moved away from a binary to a concentric worldview, of which they populated the center with those considered more alien in the surrounding rings of valuation.¹⁹ Around the same time, skin-color becomes racialized; the identifying term for most colonists before the end of the 17th century was 'Christian,' but by the 1680's the term 'white' takes its place which necessarily broadened who was to be considered an insider based on an easily observable marker, whiteness.²⁰ Simultaneously, the most numerous and increasingly subservient non-whites were blacks, hence the beginning of America's racial divide. In effect, while other Europeans may have been seen as not occupying the same place as the English in their concentric worldview, the development of

¹⁸ See Audrey Smedley, *Race in North America: Origin and Evolution of a Worldview*. 3rd ed. (Boulder: Westview Press, 2007).

¹⁹ *Ibid.*, 86.

²⁰ *Ibid.*, 95.

racial distinctions would play a role in relegating blacks to the outermost ring, if not to another sphere of valuation altogether.

There developed an opportunity for these normative developments to synthesis with institutional practices – the emergence of an explicitly racialized worldview is roughly contemporaneous with its institutional acknowledgment and embodiment. A number of institutional arrangements come into force synthesizing norms with practice. For example, Virginia, by way of a 1661 bill, becomes the first colony to recognize and institutionalize slavery as lifetime service, inheritable, and based on race.²¹ Thirty years later, Virginia abolishes Indian slavery, thus “Only for blacks, then, was slavery considered the normal condition.”²² In the same year, seemingly in an effort to achieve total control over the now officially subjugated black population, Virginia passes legislation requiring freed slaves to leave the state.²³ In South Carolina “the planters demanded that their legislative assemblies regulate Negro slavery, but what they wanted and got was unfettering of their personal power over their slaves and the force of the state to back it up.”²⁴

Developments of this nature were not limited to the Southern colonies. In 1671 Massachusetts passes legislation making slavery an inheritable condition. In New York, as Levine notes, “Under English rule, the slave laws were in many ways as severe as the regulations in the plantation colonies.”²⁵ Moreover, the status of blacks as a general matter seemed to indicate race based disadvantage: “The poverty of free blacks is...explained by the fact that New York, like all of the colonies, treated [freed slaves] as outcasts and fenced

²¹ Michael L. Levine, *African Americans and Civil Rights*, 17

²² *Ibid.*, 18.

²³ *Ibid.*, 20.

²⁴ Winthrop Jordan, *White Over Black*, 85

²⁵ *Ibid.*, 26.

them in with numerous restrictions.”²⁶ For instance, though agriculture remained a primary way for one to earn a living, blacks could not own property, denying them productive entry into the economy. Thus, the emergence of race as a normative category of human valuation converges with the institutional will to reify and sanction racial norms to result in state supported racial subordination. Moreover, whether by way of making slavery inheritable or by way of limiting the property rights of free blacks, the end result would be the same: not only would blacks be disadvantaged at a particular moment in time, but institutional commitments ensured that that disadvantage would be enduring since the means by which any person attains true agency is not only a function of one’s will but also the ability to reliably acquire and mobilize resources. It became apparent that by the end of the 17th century, not only would blacks be socially marginalized, but that the machinery of government would willingly mobilize to make that marginalization, born out of social norms, a political and economic reality.

Image #2

By the middle of the 18th century, America, as a collection of British colonies, had established a social caste system in which blacks were increasingly positioned as the lowest in the order. This system came complete with a means of social control and oppression. Whether by fiat of slavery or suppression of the rights of free blacks, it became clear that blackness and lowliness were to be considered one and the same. Moreover, as

²⁶ *Ibid.*, 29.

we saw above, this estimation increasingly found voice in legislation that would sanction the oppression of blacks as a class of persons.

It is often and understandably believed that as the 18th century moved towards America's revolution against British rule, slavery's status encountered a normative challenge. While many abolitionists sincerely internalized the stated moral principles of the revolution, two problems shed light on the relationship between normative ideals and the presence of slavery. First, there is the question of the degree to which the revolution was truly motivated by ideals of human rights and equality. Some scholarship dispels the romantic notion of a revolution fought in the name of the rights of man. In chronicling the proceedings of the Articles of Confederation convention, Donald Robinson writes that despite differences between Northerners and Southerners on the question of slavery, all "were in perfect agreement with the general opinion that the fundamental purpose of government was the protection of property."²⁷ More recent work shows this concern with property carried forward to the Constitutional convention.

"Thus, whether motivated by personal financial gain or by more public-spirited reasons, the primary concern of those behind the drafting of the Constitution was not to realize further the egalitarian promise of the Declaration of Independence. It was to foster commercial development, the explicit aim of the call for the Philadelphia convention, by creating a government that could establish and maintain social order and protect the rights of property owners. Moreover, these concerns were so paramount that, almost to a man, the delegates from the ostensibly anti-slavery North would make common cause with those Southerners who sought to stop or roll back the racial progress of the previous decade."²⁸

²⁷ Donald Robinson, *Slavery In The Structure of American Politics, 1765-1820*. (New York: Harcourt Brace Jovanovich, 1971), 25.

²⁸ Philip A. Klinkner with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Inequality in America* (Chicago: University of Chicago Press, 1999), 24.

In all, while surely colonists felt their rights were infringed upon by British government, this feeling either was inspired and/or further motivated by the Lockean concern of the degree to which one was at liberty to dispose of one's property. Though some in the North certainly took issue with the presence of slavery on moral grounds, the prevailing concern, as illustrated above, was whether the Union would economically cohere and make manifest the liberties revolving around property sought by the revolution.

The second problem is rooted in what Orlando Patterson identifies as a complementary relationship between slavery and freedom. On his view, slavery represents an extreme dynamic of interpersonal power relations.²⁹ The conditions for the development of this power relationship were fertile given both the nascent qualities of America's federal government and its needs as an emerging independent economic entity. Further, more than an interpersonal power relationship, slavery moved from being a relationship "where a right to things is realized through a hold on a person to one where a hold on persons is realized through a right to things," or, put yet another way: while we may think that slavery was about slaves as a mere means to economic production and augmenting one's property claims and wealth, slavery is better conceived of as being legitimated by the right to property.³⁰ On this view, slavery, and by extension, suppression of blacks was framed by an array of property claims such that slaves were one class of objects to be owned by a society primarily concerned with the idea of property and committed to the liberty of possessing, disposing, and utilizing as deemed fit.

²⁹ Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), 1.

³⁰ *Ibid.*, 27-28.

In the process, the idea of blacks as ownable and saleable quantities became accepted in the spheres of politics, economics and social norms, and embodied in national law. Thus, we cannot easily write slavery off as incidental to American economic development for it was too closely and completely tied to blacks as a demographic in the midst of prevailing and widely accepted norms of their value and worth. Maybe no policy of the U.S. at the time captures the convergence of racist norms with institutional sanction than the idea of embodying in law the idea of blacks as property rather than as human agents. The U.S. first expressed its institutional willingness to embrace this idea in the Treaty of Paris which included a clause stipulating that the British were not to withdraw from U.S. territory without ““carrying away any negroes or other property of the American inhabitants,”” prompting Fehrenbacher to comment: “Thus, almost casually, in the founding document that confirmed American independence, Negro slaves were recognized as property by the United States government.”³¹

While the peace treaty with England might be seen as important given its role in establishing American independence, it is in the 3/5th's compromise where the acceptance of blacks as property belonging to (overwhelmingly white) slave masters became domestic public policy. The sectional difference resulting in the compromise, which was concerned to settle issues of taxation and representation, seemed to indicate a moral difference over the role and place of slavery in the newly formed republic. However, scholarship has firmly established that the dominant motivation behind challenging slavery was a matter of political expediency rather than egalitarian concern with the status of blacks. With Southerners concerned about losing power as a function of smaller free populations as

³¹ Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relation To Slavery* (New York: Oxford University Press, 2001), 25.

compared to the North, they argued vigorously to have each slave counted as one free person. When the North resisted acknowledging slaves for the purposes of representation, it was motivated by a concern of the political power through legislative representation Southern states would acquire by dint of owning slaves. Their counter-offer was not a principled denial of blacks being exploited in this way. Rather, they acquiesced to the South by offering the 3/5th's solution, allowing their property claim in blacks to count for some political advantage. On the other hand, the North gained the concession that if the South's property could be acknowledged for purposes of representation it could also be acknowledged for purposes of taxation. So, simultaneously, the property claim in blacks was legitimized by way of providing a federal revenue stream.

This disposition ought not be seen as surprising when we consider that no less a contemporary intellectual and political luminary than Thomas Jefferson was making a strong case for the inherent inferiority of blacks. In his *Notes on the State of Virginia*, Jefferson considered America's race problem and concluded, simply, that while blacks were to be admired for their vigorous biological fortitude and a surprising level of moral sense, it was without question, according to Jefferson, that blacks were in no way the equal of whites – formal differential treatment of blacks in the law, on Jefferson's view, reflected the reality of black inferiority, the natural order of things – a substantive, fundamental, thus, hierarchy justifying difference between the races.³²

Ironically, the political implications of the presence of this widely held belief became only more problematic with what Jordan identifies as the secularization of equality. He writes: "This shift toward a political, even legalistic, conception of proper social relations

³² Philip Klinkner, *The Unsteady March*, 24.

had the most far reaching effects upon attitudes toward the Negro. It refocused attention from his inner condition as a human being with an imperiled soul to his outward condition as a constituent member in the political community of men.”³³ The interest in subordinating blacks only became easier to satisfy, for if it was the case that as a matter of natural fact blacks were not the substantive equals of whites, that they inherently lacked the ability to govern and intelligently deliberate, denying them formal equality actually followed from this condition. While the idea of natural rights intuitively appeared to many as justification in itself for the inclusion of blacks, advocates of slavery and black subordination argued that inherent inferiority precluded considerations of political equality. The idea of the social contract and political community was premised on a conception of persons as social and political agents naturally possessing certain deliberative, reflective, and purposeful capacities, hence, as deserving the benefits of government. However, blacks represented a new element in the consideration of exactly who fell under the purview of this approach to government. Moreover, it was argued, government was a responsibility not to be trifled with, thus not to be left in the hands of those who apparently lacked the ability to think in a politically sophisticated manner.

While Jefferson’s stature and opinions are suggestive of the degree to which prevailing norms among individuals impacted the formation of U.S. institutions, we need not rely upon generalization from such individual accounts. To understand Jefferson’s disposition is to understand the modal disposition toward blacks at the time. When we consider that seven of the fifteen of what we might consider principals of the Constitutional Convention were Southerners, and that racial attitudes were not radically different among

³³ Winthrop Jordan, *White Over Black*, 295.

Northerners, it is easy to see the ways in which social norms informed legislative deliberation as evidenced in 1790 by the first Congress' refusal to hear Benjamin Franklin's petition calling for the end of slavery.³⁴

Maybe one of the most important ways the prevalence of these norms helped shape the political future of blacks was when it came to the idea of political inclusion. In the same year, Congress restricted naturalization of immigrants to free white persons in the Naturalization Act. When the law was replaced by an amended version in 1795, it still restricted the possibility of citizenship to free whites. Judith Shklar³⁵ has argued that a core conception of citizenship in American history has been of citizenship as standing. On this view, being a citizen transcends the importance of the formal rights which attend citizenship. The added importance is that to be a citizen is to attain standing and respect among fellow members of political society premised on two foundational American ethics. Suffrage indicates one's ability and worthiness to have a say in political rule, not only over oneself but also over others. The ability to work and earn a wage embodies the ideal of self-ownership and the virtue of productivity. Racial oppression denied suffrage by way of outright non-recognition of blacks as potential authors of their political destiny. As a mode of production premised on wholly owning the means of production, blacks, slavery specifically denied the self-satisfaction and external recognition of productive participation in the economy. Slavery, in a qualified denunciation of Locke's principles, denied blacks ownership of their production precisely because they did not own themselves.

³⁴ Philip Klinkner, *The Unsteady March*, 26

³⁵ Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1995). See also Rogers Smith *Civic Ideals* (New Haven: Yale University Press, 1997), 2-9.

The denial of the benefits to be gained from citizenship provided an avenue for the continuity of social control exercised over blacks. The slave codes of the 18th century more than limiting the liberties of blacks, instructed whites in the ways of suppressing slaves in a precise fashion.³⁶ No social gathering was to go unsupervised and no act of defiance was to go unpunished in severe fashion. Additionally, any and every white was authorized and encouraged to become an agent of social control. Jordan goes on to note that segregation was more or less meaningless under a regime of complete subordination in the form of slavery.

However, by the early 19th century, the American Revolution, while not approximating an emancipatory moment for slaves, did result in a brief respite with processes such as manumission liberalized in the North and upper South. Just after the turn of the century free blacks represented 10.4 percent of the population in the upper South and 3.9 percent in the deep South, increases due to such liberalization. This increase in the free black population, however, prompted anxiety since slavery was a method of complete control which held sway over a decreased percentage of the black population (though it still governed the vast majority of it). With blacks denied citizenship by the federal government, there was little in the way of protection when racial anxiety resulted in a new set of social measures at the local level. For instance, by 1820 blacks were assumed to be slaves unless they could provide documentation proving otherwise, they were widely disenfranchised (and enfranchised in highly qualified ways in some Northern states such as New York), they were barred from many occupations, received harsher criminal punishment and paid

³⁶ Winthrop Jordan, *White Over Black*, 108.

special taxes, among other burdens.³⁷ As an example of the degree to which formal procedures colluded with racial animosity to result in outright racial subordination, Levine notes “most Upper South states permitted judges to place free black children of supposedly unfit parents with white families as apprentices,” which amounted to an updated form of racial servitude.³⁸

Local authorities had nothing to fear in the form of federal retribution for such treatment. By 1835, the Postal Service permitted the confiscation of materials sent by abolitionists via the postal system.³⁹ In the same year, the House implemented a ‘gag rule’ in order to prevent abolitionists from making their case before the national legislature. The newly formed state and society of America became increasingly committed to the ideal of racial subordination in consistently wedding prevailing racial norms with the administration of an orderly democracy. However, we should note that as time passed with the revolution and beyond it, the increase in free blacks and abolitionist rhetoric, while resulting in some liberalization early on, only resulted in a hardening toward blacks at the turn of the 19th century. Social control evolved beyond simple absolute labor control and insinuated itself into the lives of blacks by way of black codes, as well as whites by way of laying down the principles by which blacks would be granted minimal toleration. By the time Chief Justice Taney reaffirms the denial of black citizenship in *Dred Scot* in 1857 by arguing that blacks had not been considered a part of the political community at the founding, it is clear that racial subordination would not only have a place in American society but would be sanctioned by institutional policy and development, only by this time,

³⁷ Michael L. Levine, *African-Americans and Civil Rights*, 74.

³⁸ *Ibid.*, 75.

³⁹ Philip Klinkner, *The Unsteady March*, 40.

in ways more conducive to navigating the newly vocalized arguments over the moral issue of black subordination.

Image #3

In the opening months of 1861, both the House and Senate passed a 13th Amendment very different from the one which eventually abolished slavery. Offered by Representative Thomas Corwin, a member of the party of Lincoln, its provisions mandated *against* any interference by the federal government on the issue of slavery at the local level. By the time the proposal passed in the Senate, seven slave states had seceded from the Union so ratification was impossible. The Civil War began months later, which resulted in a historical moment that by all means should have represented a watershed for black equality and rights. It was not to be. As in earlier periods of American history popular racial sentiment, its institutional support, and development of laws and processes set the stage for nearly another hundred years of racial subordination and degradation.

The Civil War had evidenced such a sectional rift that it was necessary to reconstitute the political fabric of the nation. Of course, a major issue was the status of emancipated blacks. The future for this group seemed promising, however the defining characteristic of the Reconstruction period and the years immediately following was not the potential paths open for racial progress but the numerous retroactive avenues available to the legacy of racial subordination and the norms which fueled them; all roads from the past, on the levels of both individual agents and structural factors, led straightaway to conservative rather than racially progressive institutional design.

History offers us the benefit of realizing that Reconstruction and black emancipation never got off to a proper start. The conclusion of the Civil War witnessed a newly freed and homeless black population. To deal with this population the military was directed to draw up one year labor contracts that would obligate freed blacks to be employed by members of the planter class. However, it was in practice difficult to differentiate the new arrangement from slavery: wages were meager, workers labored under an overseer and needed permission to leave the property they were contracted to work, resulting in a set of circumstances startlingly familiar to any former slave.⁴⁰ Moreover, among the parameters Lincoln set out for the formation of new state constitutions was the ability to put in place measures dealing with blacks “consistent...with their present condition as laboring, landless, and homeless.”⁴¹

The form military involvement took was indicative of a pattern of measures that would be undertaken during Reconstruction but which would ultimately undermine any chance of true emancipation and equality for blacks. Klinkner identifies four stages of Reconstruction: preliminary, obstructed, congressional, and remnant. The preliminary phase is specified as that time period directly following on the end of the Civil War. In this phase, Lincoln makes a number of preliminary moves as he tries to find the Archimedean point from which to reconstitute a broken union. The last phase, remnant, consists of Reconstruction’s end with the compromise placing Hayes in the White House on the condition that he would end Reconstruction. Though a Republican president (and by this time, Radicalism was nearly defunct in any case) he faced a Democratic congress and

⁴⁰ Michael L. Levine, *African-Americans and Civil Rights*, 91.

⁴¹ Quoted in Eric Foner, *Reconstruction: America’s Unfinished Revolution* (New York: Harper & Row, 1988), 35-36 [emphasis mine]

promptly withdrew troops from the Southern territories, completing the process of Southern redemption. The two middle phases will be our focus, for the series of events therein laid the groundwork for the next several decades of the U.S. government's disposition to race, which shared a complex relationship with the broader social dynamic – that is to say, a troubling and enduring synergy would develop between American political development and white supremacy.

The obstructed phase of Reconstruction revolves almost entirely around the active, overt, and explicit hostility of Johnson to the aims set by Reconstruction. Once in office, Johnson moved to turn back racial progress whenever the opportunity presented itself. Lincoln's 10 Percent Plan was a measure meant to slow the return of rebellious elements to positions of political power in the South. It stipulated that a state would be able to form its own government on the condition that 10 percent of those eligible to vote prior to the start of hostilities take an oath of allegiance to the Union. Shortly after taking office Johnson endeavored to first pause, then reverse the possibility of racial progressivism. There were four key ways he sought to accomplish this goal. First, he provided amnesty to former Confederates and restored their property rights so long as an oath of loyalty was taken.⁴² Additionally, he recognized a reconstructed Virginia that offered almost no guarantees of rights to blacks. Further, Johnson rescinded the Sherman Act intended to provide blacks with free land, which would in effect "allow them to escape from white domination and achieve economic independency."⁴³ Last, the Freedmen's Bureau had been created as a temporary measure from the start, but it became apparent to many that the work to be done required more time. Senate Bill 60, proposed by Lyman Trumbull in 1866, was

⁴² Eric Foner, *Reconstruction*, 183; Philip Klinkner, *The Unsteady March*, 77.

⁴³ Richard Wormser, *The Rise and Fall of Jim Crow* (New York: St. Martin's Press, 2003), 13

designed to make the Bureau permanent. Johnson vetoed it on the grounds that whites had never received such assistance, the matter should be left to the states, and that such assistance would only encourage irresponsibility on the part of blacks.

These arguments were troubling precursors to the conservative rhetoric of the 1960's. As Foner remarks: "In appealing to fiscal conservatism, raising the specter of an immense federal bureaucracy trampling upon citizen's rights, and insisting self-help, not dependence upon outside assistance, offered the surest road to economic advancement, Johnson voiced themes that to this day have sustained opposition to federal intervention on behalf of blacks."⁴⁴ Of particular concern are the effects Johnson's activities had on the shape and dynamic of racial progress during this time. The above actions were a clear signal that any efforts Lincoln was prepared to commit the nation on behalf of racial equality were no longer the priority of the White House. The most indicting historical analysis on this matter comes from Wormser: "The clan systematically murdered black politicians and political leaders throughout the South. Since Johnson had appointed federal officers hostile to Reconstruction, they did nothing to prevent the killings or to arrest the killers."⁴⁵ In effect, as Klinkner observes, "Not only did Johnson's actions hamper these key measures significantly, they also breathed a new spirit of resistance into many of the white Southerners who felt thoroughly defeated and demoralized when Richmond fell."⁴⁶

The point being made by Klinkner cannot be stressed enough. Though Johnson's action as leader of the reconstituted Union were definitely a signal that racial progress would not move forward on his watch, it can hardly be said that his view was leading

⁴⁴ Eric Foner, *Reconstruction*, 248.

⁴⁵ Richard Wormser, *The Rise and Fall of Jim Crow*, 22.

⁴⁶ Philip Klinkner, *The Unsteady March*, 77.

sentiment. The end of the Civil War was attended by the growing prominence and strength of Northern industrialists whose sense of justice on the race issue was replaced with a greater desire for stability so that economic development in a new age of production could move forward. But as noted above, blacks were already at a severe power disadvantage in re-entering the work force since the denial of land meant submitting to planters' terms, at the behest of the federal government no less. It had become clear that planters were more interested in racial supremacy than the academic principles of free markets. Moreover, such views were not the sole domain of the Deep South: a referendum held in Washington, D.C. on granting blacks suffrage was defeated 6,691 to 35.⁴⁷ In light of such evidence, while surely people look to the institution of the presidency for guidance on American values, Johnson seemed to be institutionalizing racial norms by giving them a prominent voice. In all, Johnson gave sanction to a prevalent mood in the country which was at odds with the improvement of the lives of blacks at a crucial historical juncture.

The congressional phase of Reconstruction is as important for what it attempted to accomplish as for what it failed to accomplish. Realizing that Johnson was an enemy of racial equality, the contingent of radical Republicans that remained in Congress sought to push back. Johnson vetoed Trumbull's follow-on attempt at giving Reconstruction substantive content – the Civil Rights Bill. The bill defined all U.S. born persons as citizens thus extended them full legal rights such as right of contract. Though Congress overrode the veto and enacted other measures such as the First Reconstruction Act of 1867, which divided the South into five military districts, it failed to provide funding to support the enforcement of the 15th amendment. Providing only \$2 million a year Congress off-loaded

⁴⁷ Richard Wormser, *The Rise and Fall of Jim Crow*, 16.

the burden of enforcement on federal courts.⁴⁸ As was seen above, circumstances on the ground locally were known to be less than ideal for moving the aims of Reconstruction forward, yet Congress deferred to precisely those forces whose singular aim was to establish white supremacy. Additionally, the 15th amendment itself was tepid in its ability to guarantee black voting rights since it did not mandate universal voting requirements, failed to protect the rights of blacks to run for office or sit on juries, and did not explicitly prohibit the tools of white supremacy such as the poll tax, grandfather clauses, and literacy tests.⁴⁹ A last point to mention is that while the 14th amendment prevented former Confederates from taking office, Congress pardoned all Confederate supporters in 1872. This is of some importance given that Johnson, Congress' main nemesis in moving Reconstruction forward, had been out of office for four years by this time.

With Johnson's overtly hostile actions and the seemingly half-hearted nature of Congress' efforts at seeing Reconstruction through, the damage had been done; moreover, popular will to move America towards racial egalitarianism continued to diminish. In 1874, the Democratic Party not only erased the one hundred person majority held by the Republicans but won an additional sixty seats.⁵⁰ Outside of electoral politics, local elements took action into their own hands. In 1875, a strategy termed the Mississippi Plan endeavored to terrorize black leaders by way of murder to prevent black voter turnout. Ulysses Grant's response as president was a refusal to send troops on the grounds that the public had become weary of Southern outbreaks of violence and federal intervention.⁵¹ It is little surprise then that by 1876 Democrats regained control of every state except Georgia

⁴⁸ Philip Klinkner, *The Unsteady March*, 81.

⁴⁹ Richard Wormser, *The Rise and Fall of Jim Crow*, 23.

⁵⁰ *Ibid.* 29.

⁵¹ *Ibid.*, 30.

and Louisiana, and that they were able to prompt the end of Reconstruction by allowing Hayes to ascend to the presidency in a compromise ending an electoral crisis. It was a gesture which he immediately repaid by removing the last of federal troops from New Orleans on April 24, 1877.

Before concluding, it is worth mentioning the Supreme Court's role during this time period. At issue in the *Slaughter House Cases*, decided in 1873, was whether the federal government could intervene on behalf of butchers in New Orleans seeking to restrict that state from creating a corporation that, among other things, would fix prices. Though the complaint was argued on the grounds of equal protection and due process granted by the 14th amendment, the crucial decision offered by the court was that police powers were relegated strictly to the states, making the issue a local one. This would impact the lives of blacks the most as it left enforcement of their rights up to constituencies hostile to that ideal. More explicitly the the decision handed down in *Civil Rights Cases* of 1883 denied the application of the 14th amendment to actions of private entities, thus the complainants' claim that the government was committed to acting against unequal treatment in hotels, theaters and similar accommodations was rejected. These decisions helped set the stage for decades of Jim Crow and provided grounds for claims to "states' rights" during the Civil Rights Era. Thus, the court completed the tripartite institutional dynamic which did little but ensure that blacks would have to wait some time for their share of equality and fair treatment. Further, it affirmed that the institutions of government were in no way committed to challenging either the principles or results of white supremacy. In fact, the Supreme Court provided ample opportunity for white supremacy to take the course it would into the 20th century.

In all: the development of a set of American racial norms in our early history, the way those norms came to be institutionalized in law, that trend finding continuity in our founding by sanctioning the idea of blacks as property while denying them political membership, the failure of the one moment that might have altered contemporary race relations but instead set enduring and dangerous precedents compel us to consider current racial inequality as a continuation of the above narrative rather than as a discrete set of circumstances. But the more than one hundred years between Reconstruction and today is a substantial portion of time. In that span institutions did reform and civil rights were formally realized. Yet, systemic racial inequality is a fact of contemporary American life. We now move to two case studies illustrating ways in which the forces that initially supported and shaped overt racial subordination can be understood as becoming a normal part of how institutions currently operate in the absence of overt, explicit racial agendas. Nevertheless, such adaptation does give tacit support to enduring racial norms, which, as we saw, have a significant and troubling history in our society.

Historically Evolved Power in Two Case Studies

Historically evolved power is posited just in case institutional practices result in differential outcomes that express continuity with historically significant prior patterns of social asymmetries. I have chosen racial inequality given its diffuse, pervasive nature. We began by accepting the fact of systemic racial inequality – the fact that my being of color alone is sufficient to statistically reduce my chances of realizing the good of my life. We

observed that the fact of systemic inequality seems to be at odds with a society committed to fairness, inclusion, and equality; that although inequality is a condition of liberal capitalist society (given differential endowments, and so on), the fact that merely being of color reduces my chances in life alerts us to mechanisms other than free markets or minimal social governance. We then observed that the group suffering systemic inequality has a long history of suffering under oppression, dominance, exclusion, and disrespect. After considering that the provision of formal equality had not achieved its aims, hence systemic racial inequality, we were led to consider the degree to which that extended disadvantageous history continued to play a role in the lives of persons of color today. This led to historically evolved socially embedded power as an explanatory model.

The three images above offered some insight into a very particular aspect of American racial history – the way race, norms, and institutional sanction have interacted over time to produce a continuity of disadvantageous outcomes for persons of color. At this point, we should like to know the relationship of that history to contemporary circumstances and outcomes. Below I offer two case studies to lend analytic traction in developing an understanding of historical continuity along the dimension of racial inequality.

Theorizing domains of policy as a subset of a larger historically extended phenomenon rather than as discrete contemporary phenomena in their own right is fraught with particular difficulties. First is lack of precedent. For instance, while literature in American political development does take a historical and theoretical view of certain phenomena, it tends to take a broad view of a particular issue and may or may not be concerned with theorizing the even larger context surrounding that issue. Second is the

highly fragmented nature of policy literature in terms of both method and concern, i.e. behavioralists may or may not look at anything more than the actual behavior of individuals, ignoring how institutions affect the views of individuals, while institutionalists may or may not be concerned with historically contextualizing their subject of study.

In what follows below I mobilize the issue areas of criminal justice and welfare policy to capture the dynamic relationship between historical normative precedent and contemporary conditions. Each of these issue areas can and have filled multiple volumes in their own right. I propose the modest goal of establishing the plausibility of the model by way of tracing out compelling evidence supporting the argument that disproportionate mass incarceration and the development of welfare policy have deep roots in America's racial history. For the issue area of criminal justice I rely primarily on the work of Jim Sidanius and Felicia Pratto, and Vesla Weaver to offer a coherent theoretical and historical picture of the development the institution of criminal justice. For welfare policy I turn to Robert Lieberman and Jill Quadagno.⁵² It ought to be admitted that these issue areas do have factors that contributed to their independent development over time, and, moreover, that these factors had little to do with race. However, both cases undeniably have significant racial components – it is these racial components, sharing both temporal and cross-

⁵² It is worth pointing out what is sure be perceived as an imbalance between the presentation of the two cases, namely that the study of crime policy is accompanied by a rather robust explanatory framework while the investigation into welfare seems mostly descriptive. A main reason for this has to do with the nature of the two issue areas. Criminal justice is fundamentally a coercive institution, thus most scholars seeking to explain it, whether intentionally or not, have a theory of power. Welfare, on the other hand, is of a very different nature. Though, as will be seen, it has often been wielded as a tool of coercion, few scholars have theorized it in terms of power. My mobilization of Lieberman's framework of institutional levels in welfare policy is meant to alleviate this to the extent that he lays down a schematic of how welfare came to differ from other New Deal policies. The task of theorizing a deeper explanatory framework for welfare, while worthwhile, is too complex to include in this space. I rely instead on the reader's acceptance that an analytic description has embedded within it an explanation of the development of welfare policy though I will not always be able to stop and make an explicit point of this.

sectional attributes, that facilitate gathering them under the model of historically evolved power.⁵³

Case Study #1 – The Political Development of Racial Criminal Justice

As a theorist who acknowledged the added value of historical investigation, Michel Foucault was an early mover in investigating modern society's disciplinary practices. In brief, Foucault exposed a pretense of our time – punishment is an objective and humane practice the sole object of which is to maintain an orderly society. The general historical move Foucault argues for can, I think, be characterized as the *liberalization-disciplinary paradox*. As societies have increasingly embraced the idea of individual rights, social progress, and free markets, they have also primed themselves for ever more vigilant, robust, yet nuanced forms of discipline and constraint which do more than simply respond to deviance. In fact, on Foucault's view, contemporary discipline and punishment produces political subjects – its machinery is mobilized to categorize, stigmatize, and rehabilitate. However, one critical question consistently leveled at Foucault has been: to what end? To serve who's, or at least what interests? Is there a way to move the general Foucauldian thesis forward and employ it to understand the relationship between race, history, and the development of criminal justice? I believe so, though we must mobilize other resources for such an investigation.

⁵³ As an example of how we may extend the reach of historically evolved power, if space provided, the issue of housing segregation could be similarly mobilized and explored.

Jim Sidanius and Felicia Pratto argue that if outside observers “wanted some quick and easy way to determine which...social groups were dominant and subordinate, they would merely need to determine which groups were over- and underrepresented in societies’ jails [and] prison cells.”⁵⁴ The importance of this observation for the authors is that criminal justice is a fundamentally coercive institution. Further, one scholar expresses concern that “Institutional arrangements for dealing with criminal offenders in the United States have evolved to serve expressive as well as instrumental ends....In the process [they] have created facts.”⁵⁵ Thus, if it is the case that criminal justice goes beyond its mandate of controlling crime and functions to exert control over as well as define a subordinate population under the rubric of controlling crime then a significant injustice obtains. Sidanius and Pratto posit this phenomenon within the frame of social dominance theory.

The backbone of social dominance theory is a fundamental anthropological/sociological axiom: “all human societies tend to be structured as systems of *group-based social hierarchies*.”⁵⁶ Hierarchy need not entail dominance; however, the reproduction of social hierarchy is an indicator of dominance. Sidanius and Pratto intend social dominance theory to “address[] how individual and group differences along psychological dimensions are influenced by and, in turn, influence structural differences between groups, resulting in the maintenance of group based social hierarchy.”⁵⁷ Race as a social construct is a powerful psychological dimension for individuals and groups – it is

⁵⁴ Jim Sidanius and Felicia Pratto. *Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression*. (New York: Cambridge University Press, 1999), 202

⁵⁵ Glenn Loury, “Ghettos, Prisons and Racial Stigma” *The Tanner Lectures on Human Values* delivered April 4, 2007, 2.

⁵⁶ *Ibid.*, 31

⁵⁷ Jim Sidanius, Shana Levin, and Felicia Pratto. “Hierarchical Groups Relations, Institutional Terror, and the Dynamics of the Criminal Justice System,” in *Confronting Racism: The Problem and the Response*. Eds. Jennifer L. Eberhard and Susan T. Fiske (Thousand Oaks: Sage Publication, 1998): 138

both cognitively salient and normatively loaded, thus it is of particular concern when it serves as an independent organizing principle. Moreover, we're especially concerned with race as an organizing principle should it turn out to motivate the administration of disproportionate measures of control. Sidanius and Pratto locate the critical juncture of race and social dominance in the use of official terror: "the public and legally sanctioned violence and threat of violence perpetrated by organs of the state and disproportionately directed towards members of subordinate groups."⁵⁸ Let us take a brief look at the dimensions of this disproportion with regard to criminal justice as an organ of the state.

As a general matter, Marie Gottschalk observes that the U.S. is the most punitive nation in the world. She states that with an incarceration rate at roughly 714 per 100,00, the U.S., with only "five percent of the world's population, has nearly a quarter of its prisoners."⁵⁹ While this is indicative of a generally overreaching approach to crime control, the issue of social control arises when we observe that while blacks constitute only thirteen percent of the population, they make up half of America's prison population. And this development represents the most recent phase in a trend that saw black representation at a quarter in the 1930's and at a third in the 1980's.⁶⁰ Providing contemporary examples of this imbalance, Sidanius, et al inform us that in the early 1990's, while whites represented roughly 50 percent of crack-cocaine users, they represented only ten percent of the convictions. Meanwhile, blacks were only forty percent of the users and represented over eighty percent of the convictions.⁶¹ As a crucial parallel, Andrew Hacker is perplexed by the

⁵⁸ Jim Sidanius and Felicia Pratto, *Social Dominance*, 41.

⁵⁹ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America*. (New York: Cambridge University Press, 2006), 1.

⁶⁰ *Ibid.*, 2

⁶¹ Sidanius et al, "Hierarchical Group Relations," 143

fact that white collar crimes rarely result in significant hard time, though these criminals commit crimes that may affect hundreds if not thousands of people, which “is a far cry from the demand for ‘three strikes and you’re out’ for crimes for which most of those will be black.”⁶² While it is statistically the case that persons of color commit more crime, Hacker, Sidanius and Pratto, and Gottschalk all agree that there are two factors that contribute significantly to the equation resulting in racially disproportionate incarceration. One factor, conforming behavior will be dealt with, as a general phenomenon, in the next chapter. The other factor, institutional injustice, is our focus here. If we acknowledge racially disproportionate incarceration as a contemporary social and political problematic, is there a way to 1) specify the liberalization-disciplinary paradox alongside social dominance theory while 2) understanding the continuity of temporally extended racial disadvantage to the present day fact of racially disproportionate incarceration?

One way to approach this is by noting a general fact: at two important junctures representing the possibility or actuality of improved conditions for blacks, significant developments and innovations occurred within the institution of criminal justice. The first juncture occurs shortly after Reconstruction, which we earlier identified as the last major opportunity for blacks until Civil Rights. Whites looked for a way to regain complete control over the black population. During slavery, the idea of repression through the use of the penal codes was more or less unnecessary. Slavery was a complete and total form of domination in itself. Further, as Gottschalk notes: “the institution of slavery made it ideologically difficult to acknowledge the difference of a white criminal class and to legislate for its control. The association in the South of crime with race made it impossible to

⁶² Andrew Hacker, *Two Nation: Black and White, Separate, Hostile, Unequal*. (New York: Ballantine Books, 1995), 186.

embrace rehabilitation, the purported *raison d'être* for the penitentiary.”⁶³ However, the freedom obtained by slaves after the Civil War posed a challenge to threatened whites. Rather than seek the aim of rehabilitation, blacks were dealt with through a partnership formed with the private sector resulting in the convict lease system.

Christopher Adamson posits the convict lease system as contiguous with slavery. He argues, “convict leasing appealed to governments not simply because of its fiscal utility....In a real sense [it] was a functional replacement for slavery; it provided an economic source of cheap labor and a political means to re-establish white supremacy in the South.”⁶⁴ On the one hand, the convict leasing system expressed economic functional continuity with slavery in that free or extremely cheap labor was provided to producers of goods. The synergy between this functionality and criminal justice is illustrated when one scholar observes that it was not uncommon for blacks to be arrested without cause or on false accusations, for blacks in some instances to receive sentences almost ten times as long as those for whites for the same crime.⁶⁵ Indeed, “To supply the demand for convict labor, sheriffs arrested blacks for misdemeanors and vagrancy.”⁶⁶

However, Adamson also notes that convict leasing supplied resources for another productive system: white supremacy. We will recall that the *liberalization-disciplinary paradox* holds that as societies liberalize, the measures used for discipline over it become more deeply embedded and multiply. Additionally, social domination theory explains its

⁶³ Marie Gottschalk, *The Prison and the Gallows*, 48.

⁶⁴ Christopher Adamson, “Punishment After Slavery: Southern State Penal Systems, 1865-1890,” *Social Problems* 30, no 5 (1983): 556. See also, J. Thorstein Sellin, *Slavery and the Penal System* (New York: Elsevier, 1976); Milfred C. Fierce, *Slavery Revisited: Blacks and the Southern Convict Lease System, 1865-1933* (New York: African Studies Research Center, 1994). For a comparative view of the development of criminal justice in the north and south, see Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill: The University of North Carolina Press, 1980).

⁶⁵ *Ibid.*, 54

⁶⁶ Richard Wormser, *The Rise and Fall of Jim Crow*, 57.

intended phenomenon whenever group hierarchies are reproduced, and is especially concerning when states mobilize the use of official terror. Democrats' "coded attack on crime, corruption, high taxes, and big government were subtle methods of promising whites that something like the status quo ante could be restored."⁶⁷ Moving beyond coded attacks Mississippi passed in 1876 the Pig Law which extended the number of crimes that could be classified as grand larceny, thus ensuring excessively harsh penalties for crimes that were likely to be committed by blacks. At the same time, spending programs that would have helped now vagrant or destitute blacks were eliminated, which would only increase the chances that they would be the ones running foul of laws, thus falling into a system intended to maintain control over them.

We should take note that convict leasing was not an immediate short-lived reaction to emancipation. Douglas Blackmon tells the story of a young man – Green Cottenham – arrested in 1908 on the charge of vagrancy. An initial sentence of thirty days of hard labor was extended to six months when Cottenham proved unable to pay the fees all prisoners were expected to pay. Cottenham was subsequently sold. U.S. Steel Corp paid Shelby County (in Alabama) \$12 a month to cover Cottenham's fees. In turn, Cottenham was sent to a mine which saw the deaths of six prisoners within Cottenham's first four weeks due to wretched working conditions, and sixty before the year was out.⁶⁸ Not only were state governments literally in the trade of selling blacks, nearly forty years after emancipation, but had mobilized the institution of criminal justice to its cause. Moreover, state officials neglected

⁶⁷ Philip Klinkner, *The Unsteady March*, 91.

⁶⁸ Douglas A. Blackmon, *Slavery By Another Name: The Re-enslavement of Black People in America From The Civil War to World War II* (New York: Doubleday, 2008), 1-2.

to enact any oversight – the lives of the prisoners were worth only as much as their monthly fees.

The second significant historical juncture that presented improved prospects for blacks is the advent of Civil Rights for blacks. This period, and the decades leading to today, earn our concern for one reason in particular. While convict leasing was certainly abhorrent, it was, in retrospect, an entirely plausible development. While emancipation had obtained freedom for blacks, we observed earlier that the Constitutional amendments which followed on were not sufficiently substantive. Moreover, those who had been defeated – Southern Democrats – had regained nearly complete political control, and would naturally turn a blind eye to the injustice being perpetrated against blacks. However, while racism was alive and well in the 1960's its explicit institutional support had eroded significantly. Additionally, as we move forward in time to the late 20th century we admit that the observable racial climate is a vast improvement from Selma, Alabama and Chicago in the 1950's and 1960's. Yet, as noted above, incarceration is racially disproportionate, exhibiting signs of official terror parallel to the period following Reconstruction.

Vesla Weaver opens her investigation into the racial roots of the modern carceral state with a tension internal to the Second Reconstruction. While wide-ranging legislation was established to provide blacks what they had been promised during the first Reconstruction, the U.S. began its ascent toward its punitive disposition. As she observes, "The death penalty was reinstated, felon disenfranchisement statutes from the First Reconstruction were revived, and the chain gang returned."⁶⁹ And, while we observed above that the developments following Reconstruction were not entirely surprising or

⁶⁹ Vesla M. Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development*, no 21 (2007): 230.

unexpected, this new development marked a significant turning point, for justice in the South (and the North) was exactly that – a local issue.

Were we to take Lyndon Johnson’s engagement with crime during his first two years as a barometer, it seemed the federal government was uninterested in the crime problem.⁷⁰ Measured by legislative activity, or even public rhetoric, this observation is right. Prior to the 1960’s, though crime had risen sixty-six percent in the prior decade, the federal government had remained uninvolved in the issue.⁷¹ However, though few official steps were taken, recent scholarship shows a disposition during the 1950’s to associate race with crime and lawlessness. Naomi Murakawa provides extensive evidence from the Congressional Record illustrating the explicit discussions over the extent to which movement on the Civil Rights Issue might seem a reward for blacks’ open indication to willingly disrupt the political status quo.⁷² At the dawn of significant social and political justice for blacks, there loomed the specter of official terror.

Weaver’s theory of *frontlash* formalizes the development of this trend into the 1960’s, and importantly, what implications that development holds for contemporary crime policy trends and incarceration rates. *Frontlash* is undergirded by the premise that politics can be more than reactionary – it can be creative, and institutional design may be the canvas upon which pivotal political actors can simultaneously express their adaptation to a changed political and normative landscape while mobilizing that landscape’s constituent parts to their own interests and preferences.⁷³ The theory has three main components

⁷⁰ *Ibid.*, 240.

⁷¹ *Ibid.*, 239.

⁷² Naomi Murakawa, “The Origins of the Carceral Crisis: Racial Order as ‘Law and Order’ in Postwar American Politics,” in *Race and American Political Development*. eds Joseph Lowndes, Julie Novkov, and Dorian T. Warren (New York: Routledge, 2008), 234-255.

⁷³ Vesla Weaver, “Frontlash,” 238.

explicating its mechanics.⁷⁴ First, though politics is often seen as a negotiated dynamic, there can certainly be clear losers and winners. The victory of the Civil Rights movement meant a clear defeat for conservatives. Second, the presence of what Weaver terms a focusing event can provide a point of entry for losers looking to put their politically creative abilities to reestablish their preferences and agenda. She identifies an objective rise in crime (due to factors such as a growing youth population and better means of measurement). Crucially, another focusing event was the nearly regular occurrence in race riots. Third, there is issue capture – the losing contingent develops a monopoly on an issue which can be mobilized using the newly developed normative language and expectations in order to swing the political process back in its favor. In this instance, conservatives mobilized fear around riots and used the language of equality and citizen’s rights, the same language mobilized by the Civil Rights Movement, to argue that riots were not only disruptive, but a crime. This leads to an aspect of Weaver’s account that helps shed light on the conceptual continuity from the *liberalization-disciplinary paradox* to social dominance theory to *frontlash* as a plausible theory of punitive reform, as well as shedding light on the historical continuity of the racial mobilization of the institution of criminal justice from Reconstruction to the Civil Rights movement to today.

While riots are materially destructive and socially disruptive, they are also usually indicative of deep-seated outrages against a system seen as responsible for a seriously disadvantageous state of affairs. Rather than seeing riots as a discrete phenomenon of expression, it is better understood at the extreme of a continuum of political and social protest. It is here that maybe one of the most important aspects of Weaver’s account plays a

⁷⁴ *Ibid.*, 236.

significant role – the depoliticization of political grievances by way of seeking to criminalize riots. Southern Democrats sought to, and succeeded at, collapsing the distinction between peaceful protests and riots, thus making all forms of resistance a crime against society. Senator Russell Long, for instance, offered that Martin Luther King’s letter from the Birmingham jail encouraging civil disobedience was the manifesto which led to race riots.⁷⁵ It is worth pausing here for a moment.

What ought to concern us is not whether riots were just or unjust, moral or immoral. Certainly, to the extent that in specific circumstances the lives and property of innocents were damaged or taken, riots were a bad thing. We should take note, though, of the move illustrated by Weaver where the institution of law and criminal justice is mobilized to maintain a status quo, the same structural status quo that was being challenged for it was also the means by which persons of color had been oppressed for over a century. The ability to frame the norms of legality in synergy with the newly heralded norms of rights resulted in the initiation of a process that would only go on to disproportionately affect a recently emancipated population – just as after the first Reconstruction.

To elaborate, prior to the prevalence of riots, Southern conservatives in Congress had been looking to link crime to race.⁷⁶ Peaceful forms of protests such as the Freedom Rides of the 1950’s were portrayed as criminal. One argument that linked crime to racial equality was that integration would lure crime prone blacks to white neighborhoods, thus undermining their rights. By the time the Harlem riot broke out in 1964, a common rationale for adopting a punitive stance had become that granting Civil Rights would only reward lawlessness.

⁷⁵ *Ibid.*, 248.

⁷⁶ *Ibid.*, 240-41.

However, Civil Rights succeeded, and, subsequently, political losers became creative. The Civil Rights Movement had been too strong, momentous, and overdue to be rolled back. The issue of crime was a way to link race to a social malady which would result in a stigma. The federal government was mobilized to create the infrastructure, processes, and conduits for the U.S.'s punitive turn. Weaver identifies the 1960's as this turning point not only for the openly displayed racial rhetoric coupled with ideology. This time period resulted in concrete developments that have played a significant role in sustaining the carceral state to today.

Though Johnson had been initially uninterested in the crime issue, factors such as Goldwater's mobilization of the issue prompted him to pay crime political homage. Moreover, riots were a real and frightening phenomenon, with many looking for a strong stance on it. Meanwhile, conservatives, as noted above, had been working hard to substantively link race to the crime issue. In March of 1965, Johnson sent to Congress the most expansive federal crime bill in U.S. history. Within this proposal were provisions for the Law Enforcement Assistance Administration (LEAA). As we saw above during the first Reconstruction, laws had been passed that went some ways in ensuring that the least advantaged, a group most likely to commit crimes, would remain that way. The LEAA developed into an administration that distributed funds to local agencies and states, so long as certain benchmarks were achieved,⁷⁷ in an effort to get crime under control. Weaver tellingly observes that the agency would ultimately deny funds to agencies tied to anti-

⁷⁷ The importance of this qualifier cannot be over-estimated: the structure of LEAA funding provided tangible incentives for state law enforcement apparatus to mobilize. Of the many results, local agencies sought to capture and prosecute criminals as proof that the funds were being used properly, and, importantly, as reasons why more funds would be needed. It is easy to see how this suggests a virtuous cycle of rising crime rates and greater government involvement and expansion in this area.

poverty, remove provisions for drug rehabilitation programs, while at the same time, mandatory minimums were introduced.⁷⁸ The LEAA would ultimately and rapidly evolve into a powerful agency, propelling the growth of the carceral state forward at a breakneck pace: in the years 1969, 1970, 1973, under Richard Nixon's watch, funding for the LEAA was \$59 million, \$268 million, and \$850 million respectively.⁷⁹ The LEAA provided block grants to states contingent upon fighting crime, with showing increases in policing, arrest and prosecution rates as a sign that states were earning their funds. In effect, the LEAA funded and motivated every level of government to invest in the carceral state. Since 1973, imprisonment has increased by a factor of six.⁸⁰

But the racial subtext of these trends remains powerful today. Whether it be the differential application of the death sentence⁸¹ or the fact that while the likelihood of a black person to be arrested for a drug offense rose from being twice as likely as whites in 1975 to four times as likely in 1989,⁸² it is apparent that criminal justice plays a significant role in the lives of persons of color. Maybe the simplest statistical heuristic is that today, one in three black males between the ages of twenty and twenty-nine are under state supervision.⁸³

Crime policy and punishment, as the two arms of the institution of criminal justice, are fundamentally forms of social control. Crime policy fulfills this function by way of offering bureaucratically explicit guidelines for the administration of justice. However, as

⁷⁸ *Ibid.*, 254-56.

⁷⁹ *Ibid.*, 260.

⁸⁰ *Ibid.*, 230.

⁸¹ Benjamin Fleury-Steiner *Jurors' Studies of Death* (Ann Arbor: University of Michigan Press, 2004).

⁸² Glenn Loury, "Ghettos, Prisons, Racial Stigma," 21.

⁸³ Vesla Weaver, "Frontlash," 230. For a useful analysis on racial disparities in criminal justice effects, see Becky Pettit and Bruce Western "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration" *American Sociology Review* 69 (2004): 151-169.

society has liberalized, crime policy tends towards representing itself as a stabilizing factor paving the way for an orderly society that makes manifest individual liberties and takes seriously the idea of individual responsibility by way of rewards and depredation. It identifies what counts as deviant behavior and the right method of extracting society's due as a crucial component to liberal democracy. Punishment fulfills this function so far as it translates the abstract ideals and procedures of policy into corporeal reality by either removing deviants (imprisonment) or eliminating them (death penalty). Criminal justice is that institution by which Western societies seek to hold constant a status quo of order so as to facilitate democracy's proper functioning as well as guaranteeing the economic system's integrity. However, we have seen a status quo of group subordination is served almost equally well by this institution. We shall revisit the moral importance of this in chapter five.

Case Study #2: Welfare as We (Ought) To Know It

When Bill Clinton promised to “change welfare as we know it,” he was in conversation with history. Little less than twenty years earlier, Ronald Reagan tapped into and reinforced the public's racialized view of the undeserving by invoking the image of the black welfare queen. Though a Democrat, Clinton's promise resulted in the most restrictive and punitive welfare measures since Aid To Dependent Children was initiated. History shows us, however, that welfare reform under Clinton simply came full circle. Although Roosevelt initiated the transformation of the Democratic party into a liberal safe haven for the needy via the New Deal, thereby revolutionizing the American welfare state, the transformation came with historical racial baggage. Social conservatives resisted any possibility of giving blacks the means of

reshaping the prevailing social or economic regime. Over time, the processes set in motion by that resistance transformed into a self-sustaining trend of first, opportunity denial, and then, stigma. Below, I trace the arc of the racialized development of welfare in America with particular focus on the ways in which the mechanisms guaranteeing racial disadvantage and stigma have been embedded in the institution and have continually been in conversation with racial history and norms.

The Social Security Act of 1935 established or provided precursors for major social spending programs today. It was conceived out of recognition that free market industrialized societies are capable of producing periods of economic suffering and levels of inequality which threaten the well-being of their own members. These conditions could obtain to a degree that called into question the desirability of *laissez faire* economics and providing a clear mandate for government intervention. Though the Social Security Act was clearly needed, the shape it took wasn't the only option, nor an inevitable outcome. Indeed, its passage was the first sign that America had not quite turned the corner on race. Contemporaneous with the Social Security Act were the Lundeen Bill and the Townsend Bill. Each was informed by a slightly populist, egalitarian reaction to the social and economic vulnerability exposed by the Great Depression. The Lundeen Bill explicitly disallowed discrimination based on race while offering unemployment insurance, without restriction on any occupational group, to be funded by taxing the wealthy.⁸⁴ Its measures were so popular that thousands of union locals endorsed it while garnering one million signatures in a supporting petition. A New York Post reader survey at the time showed that 83% of the readership preferred it to the Social Security Act. The Townsend Bill had similar redistributive potential. The bill proposed a 2% tax on all financial transactions to be placed in a fund providing a \$200 monthly stipend to all persons over 65 years of age. The

⁸⁴ Poole p. 22

idea was two-fold. From a normative point of view, financial institutions had been complicit in the greed fueling the depression, and, pragmatically, the stipend would compel older workers to retire and make room in the work force.

The Townsend Bill would have resulted in a \$2,400 a year unconditional grant to recipients. As an example of the economic dependence of blacks at the time, women in the South earned between \$2 and \$4 a week for various kinds of menial labor – the only labor blacks were by and large hired for. Sharecropping, which not only provided blacks with no income but often saddled them with year-end debt, absorbed 44% of the black agricultural work force but only 16.4% of white agricultural workers.⁸⁵ In the North, which also sought to exclude blacks from obtaining skilled labor, women cooks earned an average of \$579 a year with men earning \$788 a year, while the minimum comfortable wage at the time was \$1,500 to \$3,000.⁸⁶ Given the deep structural disadvantage for blacks proposals such as the Lundeen and Townsend bills were not merely radically redistributive but held great emancipatory potential.

As one New Deal historian observes, “The Social Security Act was not born from a movement of average Americans.” Rather, “it was drafted by government experts in the fields of economics and social welfare....Of the three bills, the Social Security Act was the only one that discriminated against African American workers.”⁸⁷ The Social Security Act was divided into two categories of programs, one for the industrial labor force, Old-Age Insurance (OAI) and Unemployment Insurance (UI), and the other comprised of means-tested programs, Aid to Dependent Children (ADC) and Old-Age Assistance (OAA).

Focusing on the labor programs first, OAI was intended to provide retired workers with a means of subsistence after having contributed to a national fund during the course of their

⁸⁵ p. 18

⁸⁶ Poole, p. 15

⁸⁷ p. 25

employed lifetime. However, the mechanics of the system would prove particularly burdensome for blacks. In 1935, the year the act was passed, more than 75% of blacks in the U.S. lived in the South, with a significant portion of them sharecropping.⁸⁸ However, the Senate Finance Committee and House Ways and Means Committee were comprised of thirty-three Democrats, seventeen of whom were Southern.⁸⁹ Since the South had been a relatively uncontested one party region, Southern Democrats easily attained seniority on Congressional committees placing them in highly influential positions with regard to policy development. They were well aware of the potential these programs held for blacks and, thus, the possibility for upsetting the social dynamic supported by Jim Crow. For instance, OAI, paid directly to recipients from the federal government, offered \$15 per month which was more than a sharecropper might see in the course of a year.⁹⁰

So far as benefits go, a program intended to merely hold steady the average American poor held the potential to immediately provide blacks the means to significantly improve their quality of life. The programs offered bargaining power for demanding equitable compensation in agricultural work or opting out of the Southern Economic system altogether. But a great portion of blacks would not be given that opportunity. The legislation made sure to exclude benefit provisions for laborers in two occupations in which blacks were most overrepresented: farm work and domestic work. Nationally, 65% of blacks fell completely out of the program's guidelines.⁹¹ Even when blacks had managed to pay into the system through working in an accepted labor sector, their benefits were lower since they had historically been denied competitive wages.

⁸⁸ Quadagno p. 21

⁸⁹ Katznelson p. 43

⁹⁰ Quadagno p. 21

⁹¹ Katznelson p. 43

Given America's racial climate and the ability of influential Southern conservatives to shape policy, it is little surprise that the Lundeen and Townsend bills never had the opportunity to be brought to a vote. For example, Mary Poole tells us though "Supporters of the plan had secured enough votes to substitute the Townsend Bill for the Social Security Act on the House floor; they were only prevented from doing so by the passage of a gag rule that prohibited the addition of amendments to the Social Security Act."⁹² House Democrats had managed to pass a rule requiring the number of necessary votes for a measure to make it to the floor to be raised from 145 to 218. All other contingents, including seventy dissenting Democrats, opposed the measure. The gag rule, which was the fallback option for preventing the bills' consideration on the floor, was then implemented to protect the Social Security Act in its then current form. It was passed in June 1935, with racial disadvantage structurally institutionalized in its otherwise egalitarian structure.

The New Deal was a program of intervention and aid that extended the reach of government into many aspects of American life, with each reach similarly tainted by racial disadvantage. For example, though the Agricultural Adjustment Agency provided subsidies to promote crop yield reductions in order to stabilize and boost the price of cotton, which had declined dramatically, subsidies were provided directly to farmers with no oversight as to how the benefits were shared with sharecroppers. Needless to say, many farmers denied their sharecroppers any of the benefits. The National Recovery Administration, which allowed employers to pay employees differential wages for the same work, only provided employers with an avenue of wage discrimination (which would impact benefits received under other programs). Moreover, the NRA also excluded occupations such as agricultural and domestic labor from its

⁹² Mary Poole, *The Segregated Origins of Social Security: African Americans and the Welfare State* (Chapel Hill: University of North Carolina Press, 2006), 23.

program. However, what is most compelling about this series of events is that these programs, over time, as compared to welfare – defined as a means-tested program paying out cash or cash equivalent assistance to the working-age, able-bodied poor⁹³ – turned out to be relatively fair to blacks. Significantly, none of these programs became saddled with racialization or with the price of remaining at the front and center of public view of government spending.

What we know as welfare today began with normative racial imbalances, and that process only accelerated over time, culminating with ADC's (AFDC) transformation into TANF and GA under Clinton. Robert Lieberman's work on the racialization of welfare policy provides the clearest insight as to how welfare was different from other spending programs from its inception, and how its administrative structure would easily provide a policy space for its continual racialization. As he writes: "Attention to the role of institutions in the construction of racial inequality suggests that the status of racial groups in society results not necessarily from the mobilization of racist ideology but from the normal workings of social and political arrangements."⁹⁴ Should this turn out to be right, and evidence along with the general history of welfare and race strongly support this contention, its importance consists in the observation that "African-Americans...rarely have been widely included as honorable recipients of broad policies of social provision, and they are disproportionately segregated into the weakest, stingiest, and most politically vulnerable parts of the welfare system."⁹⁵

Lieberman's main analytic contribution to understanding the racial disadvantage historically built into welfare consists in his going beyond parsing out the Social Security Act into labor targeted and means-tested programs. He identifies how various levels of structure

⁹³ Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: University of Chicago Press), 12

⁹⁴ Robert C. Lieberman, *Shifting The Color Line: Race and the American Welfare State* (Cambridge, MA: Harvard University Press, 1998), 11.

⁹⁵ *Ibid.*, 3.

combine to provide a range of favorable or unfavorable outcome for blacks. On Lieberman's account, the policies comprising Social Security have three levels of structure. The benefit structure can range from egalitarian to discretionary. A policy's financing structure can range from contributory to non-contributory. Finally, there is its administrative structure which is comprised of many sub-structures: level of government (national or state); policy permeability (easy access for the purposes of change or closed); policy environment (administratively stable or unstable); and, last, client contact (are taxes withdrawn by the state and automatically distributed at some later time or must clients approach the institution first requesting help). It turns out that of the three institutions Lieberman studies (ADC, UI, and OAI), ADC has all the ingredients for comportment with a deep history of racial bias. ADC is noncontributory so it is the most redistributive of the three policies – it takes from the well-off and gives to the less advantaged; it is open so it is easily amended, which leads to it being the least stable of the three; clients must approach the state for assistance, so it is the most evaluative and punitive; last, and on many accounts, most importantly, it is parochial and entirely discretionary – as assured by Southern congressmen at its inception, it is managed at the most local level of all the other programs. How has this structuring of the most visible need-based program continuously interacted with America's racial dynamic over time? What have been the implications of this interaction?

As American society moved past the Great Depression, one trend continued while another began. First, blacks remained systematically disadvantaged with respect to welfare and this disadvantage had precedent. The Federal Emergency Relief Administration (FERA) could be considered an ADC forerunner (as well as earlier programs aimed directly mothers, as ADC was). It was responsible for coordinating other New Deal programs and providing aid to the

needy. Like ADC, it was parochial and discretionary. For instance, as a general matter, average monthly relief in New York was \$49.06 per month, compared to Virginia's \$17.65 per month which made it relatively generous by Southern standards.⁹⁶ In their study, Leslie Fishel and Benjamin Quarles observe that in "Jacksonville, Florida, Negro families on relief outnumbered white families three to one, but the money was divided according to proportions of the total city population. Thus 15,000 Negro families received 45 per cent of the funds and 5,000 white families got 55 per cent."⁹⁷ This trend was picked up almost immediately by ADC. Lieberman notes that by the late 1930's "seven Southern states that had an ADC program awarded benefits to black children at a lower rate than their proportion in the population."⁹⁸ There is evidence to support this statement: 37% of Louisiana's children were black but only represented 26% of its clients; for North Carolina, the proportion was 30% vs. 22%; in South Carolina 48% vs. 29%; in Alabama 39% vs. 24%.⁹⁹ In the 1940's the national average benefit was \$13.40 per child per month – in Arkansas, the grant averaged \$3.52 per black child, while Louisiana offered \$4 per black child.¹⁰⁰

The second trend was the growing association of blacks with welfare, which did little but make welfare the least favored aspect of the Social Security Act while at the same time, offer a means of portraying blacks as undeserving and lacking in the American ethos of self-responsibility and achievement. From a structural point of view there were aspects of the institution that contributed to its growing stigmatization. First, while the government picked up one half the states' cost for OAA, it only picked up one third of ADC. This evidenced a lesser

⁹⁶ Ira Katznelson, *When Affirmative Action Was White: The Untold Story of Racial Inequality in Twentieth-Century America* (New York: W. W. Norton, 2005), 38.

⁹⁷ Leslie H. Fishel, Jr. and Benjamin Quarles, "In The New Deal's Wake," in *The Segregation Era: A Modern Reader*, eds, Allen Weinstein and Frank Otto Gatell (New York: Oxford University Press, 1970), 221.

⁹⁸ Robert Lieberman, *Shifting the Color Line*, 127.

⁹⁹ Ira Katznelson, *When Affirmative Action Was White*, 46.

¹⁰⁰ Martin Gilens, *Why Americans Hate Welfare*, 105.

commitment to welfare on behalf of the federal government while simultaneously providing a cause for resentment among local constituents since their states were picking up a large part of the bill. At the same time, it was exactly because ADC was premised on giving to the needy in general, and that provisions, such as those in UI and OIA, had not been built in that immediately disqualified blacks, that they were equally if not more than likely to be ADC recipients.¹⁰¹ It was not until blacks began to depend on the government for their needs to be met, and that this became publicly visible, that welfare became the bane of the newly developed welfare state.

A significant reason for welfare's increased publicity was the rapid and substantial growth of ADC's rolls. By 1957 ADC had more claimants than any of the other Social Security programs.¹⁰² At the same time, blacks also became increasingly represented on the rolls. While blacks were only 2% of the northern population in 1920, that number swelled to 7% by 1960.¹⁰³ Specifically, in urban areas – areas associated with ghettos and destitution – blacks were 12% of the population. At the same time, and not without coincidence, blacks became more prominently represented on ADC rolls. While they made up 13.5% of the rolls in 1936, they comprised 45% by 1969.¹⁰⁴ In both instances black representation had ballooned by triple digit percentages. Increases in black ADC representation, however, were not only a function of black migration. For example, the 1939 Amendments to the Social Security Act added a survivor's benefit to OAI which relocated many white mothers from ADC to that program, hence black percentages rose since blacks were significantly underrepresented in OAI. As another example, ADC had been in part regulated by “man in the house” rules – mothers found living with a man could be removed

¹⁰¹ Robert Lieberman, *Shifting The Color Line*, 48.

¹⁰² *Ibid.*, 155.

¹⁰³ Martin Gilens, *Why Americans Hate Welfare*, 104-105.

¹⁰⁴ *Ibid.*, 105.

from ADC, but this rule was relaxed in 1961, as were others in 1966. In that year alone, ADC enrollment rose from 7.8 million to 8.4 million.¹⁰⁵

While we are limited in drawing substantive conclusions from the following statistic, it seems remarkably symbolic, given welfare's racially charged stigma, that in 1964 68% of Northern whites supported the government's role in pushing integration, but in 1966, the same year that saw ADC roles dramatically increased, 52% now felt the government was pushing integration too fast.¹⁰⁶ However, there is some evidence that can be brought to bear to indicate that, while there is no causal story *between* the two facts, they do indicate a general racial climate with which welfare became easily bound up. Gilens' research on the media's role in racializing welfare reveals disturbing trends. He points out that though blacks averaged 29.5% of those in poverty from 1950 to 1995, they comprised 53.4% of the images in media stories on poverty.¹⁰⁷ In parallel with the remarkable reversal of opinion on the role of government in pushing racial integration, Gilens finds that "The percentage of blacks among pictures of the poor jumped from 27 percent in 1964 to 49 percent in 1965."¹⁰⁸ In that same two-year time span, media coverage moved from covering Johnson's War on Poverty as a general policy concern to training a critical eye on anti-poverty efforts, quick to focus on mismanagement in the Office of Economic Opportunity and issues in related offices such as the Job Corps program.

From a historical point of view, the years immediately following this time period in the process of racializing welfare represented seemingly conflicting initiatives, with the conflict indicating a juncture at which welfare seemed caught between getting fully behind the program

¹⁰⁵ Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (New York: Oxford University Press, 1994), 120.

¹⁰⁶ *Ibid.*, 30.

¹⁰⁷ Martin Gilens, *Why Americans Hate Welfare*, 113.

¹⁰⁸ *Ibid.*, 117.

of aiding the poor or remaining non-committal at best, detrimental at worst for those who needed the government's help. Two initiatives capture this moment well.

The Work Incentive Program (WIN) was established to promote the idea of responsibility among the needy. In recent years, this idea has been rightly associated with conservative rhetoric masking a deeper desire to see persons of color off of government assistance and to deconstruct any social contract the government has entered into with regard to poor aid. However, we should not casually dismiss efforts to encourage ADC recipients to take ownership of their well-being. For instance, WIN instituted the thirty-and-a-third scheme, under which recipients would still claim aid while keeping the first thirty dollars and one-third of earnings. Additionally, it was designed to provide job training and daycare for mothers with children.¹⁰⁹ However, and these are reasons why a possibly honest invocation of self-reliance transformed into empty rhetoric, job training never fully took off, and daycare was underfunded. At the same time, caseworkers had discretion to drop recipients who refused to participate in training without good cause or if they determined that there was parental absence from the home.¹¹⁰ As Lieberman notes, guidelines were so loose case workers could easily come to and justify two opposite decisions about a recipient's eligibility. The welfare system was increasingly becoming the site of a battle over the right response to poverty as well as an ideological battle over who constituted the deserving.

The second initiative, the Family Assistance Plan (FAP), intended for the working poor, was formulated by Nixon early in his term. This plan, too, seemed to hold great promise for welfare recipients. It provided \$500 for each of the first two members of a family and \$300 for each additional member. It was meant to encourage work since full benefits could be claimed up

¹⁰⁹ Jill Quadagno, *The Color of Welfare*, 120.

¹¹⁰ Robert Lieberman, *Shifting The Color Line*, 169.

to an annual salary of \$720 and for each dollar past the limit, benefits were reduced by fifty cents until they reached zero.¹¹¹ Tellingly, though, Nixon's plan was devised in response to the race riots that had shook America the past few summers. Quadagno points out an inconsistency when she asks: if FAP was only meant for families and the majority of persons participating in riots were young, black, single males, in what ways did this constitute a response to the riots? Motivated by the Moynihan report which located black instability in the single-parent home, the FAP was in fact an attempt to engineer the black family structure by inducing black males to marry.¹¹² Moreover, it was meant to provide enough support to allow women to stay home with their children, thereby institutionalizing black patriarchy. The point became moot – Southern conservatives would not allow the FAP to pass, for their constituents had been wielding welfare as a tool of coercion by removing blacks participating in voting drives or who registered to vote. In ironic fashion, liberals had been completely sidelined and FAP was a competition between racially biased conservative policy agendas.

The mid-term upshot was that by the time Reagan was elected president, it somehow became acceptable to represent a body of egalitarian policy by way of irresponsible, money grubbing, black mothers. However, it turns out that it wasn't the idea of helping the poor that upset people, for when the Reagan recession hit, Gilens' media research finds that the pendulum swung the other way: the early 1980's "saw the lowest percentage of blacks in magazine portrayals of the poor of any time since the 1960's."¹¹³ Moreover, in 1982 and 1983 the percentage of blacks in pictures of the poor dropped to 33%, nearly twenty percentage points below their forty-five year average. Coincidental with the change in visual representation, was a change in the content of the stories: rather than expressing doubt and popular rage with welfare,

¹¹¹ Jill Quadagno, *The Color of Welfare*, 118.

¹¹² *Ibid.*, 124.

¹¹³ Martin Gilens, *Why Americans Hate Welfare*, 125.

when poverty became white the news became concerned with how national economic conditions were contributing to their plight.¹¹⁴ Somewhere along the way, responsibility was forgiven and excused.

In 1994, Republicans took control of both the House and Senate for the first time in forty years, just as Clinton made his promise to “change welfare as we know it.” However, while welfare did change, the most familiar aspect of those changes¹¹⁵ – the aspects embedded in social normative knowledge – were those which would once again call into question the principled integrity of the idea of welfare. Welfare changed from Aid to Dependent Children to Temporary Assisntance to Needy Families (TANF) in conjunction with General Assistance (GA) for the needy poor. As indicated by the term ‘temporary,’ among the changes wrought upon welfare was the first ever implementation of hard time limits. The idea of training was revived, but recipients were mandated to take a job after one year. The changes also embodied social conservative clauses and causes: teen parents were required to live with a parent or guardian, and states could compete for a \$20 million bonus if they could eliminate ‘illegitimacy.’ Entitlement to childcare was eliminated, and states could choose to institute mandatory drug testing. Maybe the most detrimental of changes was the shift from open funding as needs arose to block grants – fixed sums of money the states were to appropriate as they saw fit. While the parochial nature of welfare had always been problematic, the above changes in conjunction with the shift to block grants gave states even more incentive to exercise the discretion allowed by welfare’s parochial nature, including shortening the hard time limits on welfare receipt as well as exercising subjective judgment as to whether a recipient had made good faith efforts to make good on his or her ‘individual responsibility plans.’

¹¹⁴ *Ibid.*, 126.

¹¹⁵ Linda Williams, *The Constraint of Race: The Legacy of White Skin Privilege in America* (University Park: Pennsylvania State University Press, 2003), 258-260.

It is too soon to fairly assess what impact Clinton's reforms have had, but even if we could, that might not be our focus in any case. The aim of the account of welfare development to this point has been to establish not merely that welfare has been racialized – that is a more or less accepted fact – but the shape of the continuity and to argue that regardless of what language is used – the language of responsibility or the language of race neutrality – institutions continue to support older patterns of disadvantage.

While very recent empirical evidence is not yet widely available, some recent studies go some ways to establishing the this pattern of disadvantage. Engaging in state level analyses of the relationship between welfare policy levels and race, these studies provide strong evidence that even until today, skin color is a strong predictor of disadvantage. Christopher Howard analyzes this relationship by holding income, education, percentage urban, the poverty rate, and party control (which party runs the state) constant. In five separate models he introduces racial independent variables: percentage of black population, percentage of black and Hispanic population, racial attitudes, and the number of black elected officials, and shows that each significantly correlates with reduced benefits.¹¹⁶

In another telling analysis, Richard Fording correlates percentage of black AFDC caseloads with the likelihood of adopting (what might be considered punitive) restrictive work requirement, time limit, and responsibility waivers.¹¹⁷ As the percentage of black AFDC caseloads rises, so does the likelihood of adopting a waiver. Fording's analysis shows that "in states where the relative number of black AFDC families was largest (70-90 percent), the probability of adopting a waiver was five to six times greater than that of states where the AFDC

¹¹⁶ Christopher Howard, *The Welfare State Nobody Knows: Debunking Myths About U. S. Social Policy* (Princeton: Princeton University Press, 2007), 187, Table 9.1.

¹¹⁷ Waivers allow states to adopt their own policies for which the waiver is applicable.

population was predominantly white.”¹¹⁸ It bears mentioning that the Clinton administration, in a sign that his welfare reforms were not merely the result of Republican pressure, allowed fast-track processing of waiver requests, which encouraged more applications for waivers.

A very unfortunate outcome of this is the collateral damage: not only are persons of color carrying the historical baggage and stigma of race but, since even in those states where they are only 50% of the AFDC cases display a tendency to request these waivers, other groups, including whites themselves, are pulled into the racial framework. At this point, racial disadvantage illustrates how it can transcend its own bounds.

Conclusion

When Thurgood Marshall lamented the bicentennial celebration of the Constitution, he was expressing deeply felt dismay with how racial disadvantage could remain with us for centuries after the founding and how its most troubling, pervasive aspects could seem almost invisible to most. And rightly so. The Civil Rights Act was a landmark achievement during a time when racial unrest was prevalent. Nonetheless, the Civil Rights Era offered the promise of righting America’s moral compass with respect to how it treated its historical underclass. The above images have been intended to illustrate not so much how difficult achieving justice can be. Rather I have aimed to illustrate the many avenues open and taken for racial disadvantage to not only operate in our most important institutions but to actually produce results and trends that express continuity with our racial past. Historically evolved power is posited just in case current

¹¹⁸ Richard C. Fording, “ ‘Laboratories of Democracy?’ of Symbolic Politics?” in *Race and the Politics of Welfare Reform* (Ann Arbor: University of Michigan Press, 2003), 88, 89 figure 3.1. In same volume see also Joe Soss *et al* “The Hard Line and the Color Line: Race, Welfare, and the Roots of Get-Tough Welfare Reform,” 225-253. For a historical account of the impact of fiscal federalism on this policy trend, see in the same volume Michael K. Brown’s “Ghettos, Fiscal Federalism, and Welfare Reform,” 47-71.

racial disadvantage expresses continuity with historical patterns of racial disadvantage stemming from social asymmetries. While the images illustrate the contours of that continuity, the above case studies are meant to articulate their continuing impact and adaptation to widely accepted norms. But this only addresses the first part of Marshall's concerns. To address the invisibility of these contours I now turn to power's social embeddedness – its relationship with our internal lives.