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*"Human nature being what we know it to be, there were, inevitably,
examples of selfish fancies, feigned distractions, treacherous appeals to an
all-too-easy sentimentality, deceptively seductive maneuverings, but there
were also cases of admirable selflessness, of the kind that still allow
us to believe that if we persevere in these and other such gestures worthy of abnegation
we will, in the end, more than fulfil our small part in the monumental project of creation."*
- *Jose Saramago,* Seeing

*"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

Chapter 3 – The Story of Racial Subordination: Three Images and Two Case Studies[1]

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.[2]

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

distinct ways.

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[1] This paper represents one chapter in a larger body of work which seeks to account for the contemporary fact of systemic racial inequality in the face of formal equality. To this point, I have argued that the reason for persistent racial inequality is not coincidentally related to America's racial history, but is rather an extension of it. I previously argued that the point of concern for us is not that America represents an overtly racist regime, as it once did, but that processes and patterns of valuation and distribution persist due to historical precedent. I offered a model of power, stated on p. 3 here, that frames our understanding of this phenomenon. This paper presents a narrative to complement the model in order to lay the groundwork, and justify, normative prescription which is to follow later in the project.

[2] Thurgood Marshall, "Reflections On The Bicentennial of the United States Constitution" *Harvard Law Review* 1 (1987): 1-5, 5.

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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."[3] Thus, "When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago."[4]

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."[5] 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."[6] Marshall's speech is remarkable for the ground it covers in such a short space, but it is clear that one

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[3] *Ibid.*, 2
[4] *Ibid.*
[5] *Ibid.*, 4
[6] *Ibid.*

question haunts his 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 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 aim to provide a narrative that will ground both our theoretical understanding of current racial inequality and the normative claims we will want to make in response to that understanding. 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 political dominance 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.

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. Chapter two offered historically evolved socially embedded power as a model of power which seeks to account for both the persistence of racial injustice as well as our deficiency in dealing with this injustice by virtue of its impact on the internal lives of persons. We will recall that the first aspect of the model offers power as historically evolved just in case society witnesses systemic inequalities that express continuity with prior patterns of unjust distribution and social asymmetries. A model alone, however, provides weak grounds and justification for normative prescription. The account

provided below seeks to give content to the first aspect of the model 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. The chapter presents 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, all with particular attention to the impact of these developments 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. What is laid out below is fashioned to highlight how we understand current systemic racial injustice, and, importantly, why and in what ways it deserves the commitment of our moral energies.

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 beginning 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.

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More than a 'peculiar institution,' slavery was unambiguously derogatory in its estimation of blacks. In the extensive literature on slavery, many common factors are cited explaining why slavery became a prominent institution in America. Among these is the need for a sizeable workforce, easily replenished. Derivative of such points are factors such as: the system of indentured servitude provided workers for limited, well-defined times, and the flow of white indentured servants began to slow toward the end of the 17th century. Underlying these explanations is a variable that cannot be written off to pragmatic functionality: slaves quickly and ultimately came to be dominantly comprised of blacks, and, blacks 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."[7] With Puritans settling the northern colonies in New England there came 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.[8] With Africans qualifying as such, 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

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[7] Winthrop Jordan. *White Over Black: American Attitutudes Towards the Negro, 1550-1812* (Baltimre: Penguin Books), p. 66
[8] *Ibid.*, 67-8

they identified with the biblical term 'strangers.'"[9] As a result of such prevailing norms, it was probably slight coincidence that New York's slave population grew quickly when the English took it from the Dutch in 1664, or that Massachusetts' first law recognizing slavery was passed in 1641, with it becoming an inheritable condition by law in 1670.[10]

Considering the South, we see a different set of circumstances. While the Puritan embrace of slavery seemed to have turned on a set of religiously grounded beliefs that accorded value to persons in light of their spiritual commitments, the South seemed 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 use for 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, of which was the fact that indentured servants (a class of laborer that had over time become associated with white Europeans as slavery became the domain of blacks) were able to leave the workforce and acquire their own land in addition to a decline of white workers beginning around 1660.[11]

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 many whites and their legislatures. While we cannot answer these questions with any more precision than historians in this space, we ought to take note of three precedents which seemed to at least have played a role in informing early American race relations.

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[9] *Ibid*.

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

[11] *Ibid*., 17

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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 stocked with the images of unmistakable black Africans as torturers, tempters, and executioners, often in scenes of the Passion of Christ."[12] Davis concludes that it is "probable that most Europeans received their first subliminal impressions of so-called Negroes in a local church or cathedral."[13] From this we are meant to surmise that a negative view of blacks was present in English culture, which might be imagined as providing cultural justification for racial subordination.

Second there was religious precedent. In the Genesis "Curse of Ham" narrative, Noah curses Canaan's son, Ham to slavery (in comparison to servitude) for looking upon him while naked.[14] 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. First, the writings of St. Jerome and St. Augustine suggest that Africans are descendants of Ham, hence persons of dark skin were ancestrally linked to the stigma of servitude.[15] 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.'"[16] 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 religious judgment of strangers, and that blacks were considered as such, it does not seem a stretch to offer that religious preconditions for racial subordination were likely operative in the background.

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[12] David Brion Davis. *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006), p. 59
[13] *Ibid*.
[14] Davis 2006; Jordan 1969
[15] Jordan 1969, 18
[16] *Ibid*.

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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 both conferred upon and 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 which 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.[17] 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 worldview to a concentric worldview, of which they populated the center with those considered more alien in the surrounding rings of valuation.[18] 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.[19] The necessary complement was that non-whites were outside the value space of whites. At the time, 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 racial distinctions would play a role in relegating blacks to the outermost ring, if not to another sphere of valuation altogether.

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[17] See Audrey Smedley. *Race in North America: Origin and Evolution of a Worldview*. 3rd Edition (Boulder: Westview Press, 2007)
[18] *Ibid.*, 86.
[19] *Ibid.*, 95

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For our purposes, it is crucial to place the above normative ideas and developments alongside the early development of laws. As a general matter, it is to be noted that the emergence of an explicitly racialized worldview is roughly contemporaneous with institutional developments. Virginia, by way of a 1661 bill, becomes the first colony to recognize and institutionalize slavery as lifetime service, inheritable, and based on race.[20] Thirty years later, Virginia abolishes Indian slavery, thus "Only for blacks, then, was slavery considered the normal condition."[21] 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.[22] 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."[23]

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."[24] 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 them in with numerous restrictions."[25] For instance, though agriculture remained a primary way for one to earn a living, blacks could not own property. 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

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[20] Levine 1996, 17
[21] *Ibid.*,18
[22] *Ibid.*, 20
[23] Jordan 1969, 85
[24] *Ibid.*, 26
[25] *Ibid.*, 29

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 as well.

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 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."[26] 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."[27]

In all, while surely colonists felt their rights were infringed upon by British government, this

either was inspired and/or further motivated by the Lockean concern of the degree to which one

was at liberty to pursue and dispose of one's property. Though elements 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

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[26] Donald Robinson. *Slavery In The Structure of American Politics, 1765-1820*. (New York: Harcourt Brace
Jovanovich,1971), p. 25
[27] Philip A.Klinkner with Rogers Smith. *The Unsteady March: The Rise and Decline of Racial Inequality in America*
(Chicago: University of Chicagor Pres, 1999), p. 24

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interpersonal power relations.[28] 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.[29] 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 it as deemed fit.

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 there 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,

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[28] Orlando Patterson. *Slaver and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), p. 1
[29] *Ibid.*, 27-28

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almost casually, in the founding document that confirmed American independence, Negro slaves

were recognized as property by the United States government."[30]

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. For the purposes of both representation and taxation, planters were to count each slave as

3/5th's a free person. The sectional difference resulting in the compromise represented what

seemed to be 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 an egalitarian concern with the status of

blacks. With Southerners were concerned about losing power as a function of smaller free

populations as 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 but a proposal to on the one hand acquiesce to the South by

offering the 3/5th's solution and gaining the concession that if their property could be

acknowledged for purposes of representation it could also be acknowledged for purposes of

taxation.

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

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

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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, such as in the law, on Jefferson's view reflected the reality of black

inferiority. [31]

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 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."[32] 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 of 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

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[31] Klinkner 1999, 24
[32] *Ibid.,* 295

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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 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.[33]

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.

The denial of political inclusion, 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.[34] 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

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[33] Klinkner 1999, 26
[34] Jordan 1969, 108

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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. This increase in the free black population, however, prompted anxiety since slavery was a method of complete control 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. 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 special taxes, among other burdens.[35] 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.[36]

Local authorities had nothing to fear in the form of federal retribution for such treatment for by 1835, the Postal Service permitted the confiscation of materials sent by abolitionists via the postal system.[37] 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

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[35] Levine 1996, 74.
[36] *Ibid*., 75
[37] Klinkner 1999, 40.

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, 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 by the states 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 sentiment, its institutional support, and development

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of laws and processes which resulted in the continued disadvantage of blacks 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, thus to all-too-familiar racial outcomes.

History offers us the benefit of realizing that Reconstruction and black emancipation never really 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.[38] 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." [39]

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[38] Levine 1996, 91.

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

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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 which placed 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 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

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accomplish this goal. First, he provided amnesty to former Confederates which included the

restoration of property rights so long as an oath of loyalty was completed.[40] Additionally, he

recognized a reconstructed Virginia which 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."[41] 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 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."[42] 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

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[40] Foner 1988, 183; Klinkner 1999, 77
[41] Richard Wormser. *The Rise and Fall of Jim Crow* (New York: St. Martin's Press, 2003), p. 13
[42] *Ibid*., 248

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killings or to arrest the killers."[43] 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."[44]

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 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. Moreover, historian Eric Foner

provides ample evidence that there seemed to have been a somewhat genuine belief that free

markets mandated rational economic agents, and that these agents would be far more interested in

the mutual benefit of free labor rather than holding onto a legacy of outmoded labor relations and

racial animosity [**cite**]. But as Wormser 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.[45] In light of such evidence, while surely

people look to the institution of the presidency for guidance on American's values, Johnson

seemed to be institutionalizing racial norms by giving them a prominent voice. In all, Johnson

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[43] *Ibid.*, 22
[44] *Ibid.*, 77
[45] *Ibid.*, 16

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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 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. Johnson's veto was proof positive that his conservatism was not born out of a concern for big government but rather a direct outgrowth of a well-known racism. 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 the burden of enforcement on federal courts.[46] 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.[47] 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.

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[46] Klinkner 1999, 81
[47] Wormser 2003, 23

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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.[48] 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.[49] It is little surprise then that by 1876 Democrats regained

control of every state except Georgia 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 in the *Civil Rights Cases*

the decision handed down in 1883 denied the application of the 14th amendment to actions of

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[48] *Ibid*. 29
[49] *Ibid*., 30

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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, 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 holds that we may posit the unjust outcomes and substantive inequality of some groups just in case society witnesses systemic inequalities that express continuity with prior patterns of unjust distribution and social asymmetries. I have chosen racial inequality since it offers a clear opportunity to investigate the nature of a particular kind and pattern of injustice. 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. We ended with Reconstruction as the last significant chance for our society to put itself on the right track, but we

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saw that the turn of events would only support almost another century of outright racial

oppression. 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 look at anything more than the

actual behavior of individuals, leading to lack of attention to 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 focus on resources that help us capture the dynamic relationship

between historical normative precedent and contemporary conditions in their respective issue

areas. I mobilize the issue areas of criminal justice and welfare policy in order to suggest the

general mechanics of historically evolved power and how we may understand its robustness over

time. 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 Foucault, Sidanius and Pratto, and Weaver to offer a

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coherent theoretical and historical picture of the development of crime policy. For welfare policy

I turn to Katznelson, Lieberman, and Quadagno. 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, which share both temporal and cross-sectional

attributes, that facilitate gathering them under the model of historically evolved power.[50]

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

The program of Foucault's *Discipline and Punish*,[51] is to give voice, shape, and

plausibility to a paradox in Western, capitalist, democratic societies: as they have moved farther

from 'barbaric' forms of punishment and overt displays of physical power, such as the public

spectacle of drawing-and-quartering, toward punishment as rehabilitative or civilly retributive,

these societies have refined the technologies of discipline in nearly every quarter over all

subjects. We will come to understand this as the *liberalization-disciplinary paradox*.

Discipline famously opens with a spectacle of torture, in which the 'body of the

condemned' is ravaged in order to extract the justice due the sovereign for the crime of parricide.

In this scene, the offender, Damiens, is subjected to the most brutal mutilations. In a detailed

retelling we are informed that the knife supposedly used for the crime was burned to the flesh of

his hand with sulfur; pincers one and a half feet long were used to tear flesh from the body of the

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[50] 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.

[51] Michel Foucault. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. 2nd Edition (New York: Vintage Books, 1995)

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accused, into the wounds of which boiling sulfur was poured; multiple attempts at drawing and

quartering were made; since Damien's legs had refused to depart his body, the torturer set to

hacking at then in order to make the drawing successful. The trunk of the body along with its

severed limbs were then burned.

In stark contrast, Foucault closes *Discipline* with the account of Bentham's unique

penitentiary design, the panopticon, a marvel of surveillance technology. The structure only

required two attributes for its success. First, it was circular so that the eyes of prisoners were

always upon each other; in this way, the simple act of being seen by others was presumed to have

an effect on one's sense of freedom of action. Second, and most importantly, at the center of this

circular structure there was a tower, an ideal of efficient and maximized disciplinary power since

there need be only one authority figure within it, having full ability to observe each prisoner from

this structural locus, to exercise this power over prisoners. Or, more tellingly, since prisoners

could not see into the tower (thus, had no surveilling power of their own) the tower could stand

empty and perform its disciplinary function just as well. We are ostensibly meant to take great

comfort in the fact that such gruesome practices as first outlined were now replaced by humane

forms of imprisonment and surveillance.

The paradox I alluded to above is constituted by two tracks of development of Western

society. The first track is that societies have increasingly embraced 'civilized' forms of

retribution and rehabilitation. However, this development, on Foucault's view, resulted in

technologies that could be conceived in such a way that persons could be controlled without the

need to invade their corporeal integrity – as long as the center tower stood in the panopticon,

there was little use in manhandling prisoners. Specifically, Foucault offers the following

significant thesis: "the punishment-body relation is not the same as it was in the torture during

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public executions. The body now serves as an instrument or intermediary: if one intervenes upon

it to imprison it, or to make it work, it is in order to deprive the individual of a liberty that is

regarded both as a right and as property."[52] This is meant to stand in contrast to the fact that it

took two men and six horses to gain retribution from Damiens; however, in our disciplinary age,

it only takes a proper set of circumstances to leverage minimal effort in exercising power over a

given population.

This leads directly to the second track of the paradox. The crucial parallel to the

development of disciplinary techniques are developments in three aspects of larger society.[53]

First, as the political structures of society moved from absolutism to democracy, penal reformers

moved to correct the irregularities of prosecution in the penal system, which reflected a larger

concern with the proper methods of gathering and categorizing data across all aspects of

society.[54] Second, as industrial capitalism became the dominant form of production and

exchange, there also arose the need for persons to move from unique craftsmanship to uniform

labor employed for impersonal production which promoted the development of skills

indistinguishable from any other person. Last, as society moves to internalize the norms that

sustain the ideal of democracy, the ethos of industrial capitalism is reflected in the developing

science of punishment since "the prison, and no doubt punishment in general, is not intended to

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[52] *Ibid., 10-11*

[53] I want to stress, I am not claiming that we take these three developments as taking place in locks step fashion in American society (as compared to Foucault's focus on France). Moreover, I don't claim that these three specific factors beared directly on the issue of the racial development of mass incarceration. Rather, I take these three developments as a way of indicating a trend that can be expressed in the following way: as society has moved away from procedurally arbitrary political organization, it has sought to normalize its constituent elements and institutions. This normalization can be traced to influences from spheres such as economic organization and scientific inquiry. The result has been the instantiation of techniques of power (discipline/domination) in various aspects of governance and social existence. With specific regard to criminal justice, the result has been a topical shift in its practice such that we believe we have appropriately settled on procedures which reflect our accepted political norms but which, in effect, have been mobilized to continuously exert social control differentially, while justifying and normalizing this difference by way of political language and norms to which all agree and consent to.

[54] *Ibid*. 77

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eliminate offences, but rather to distinguish them, to distribute them, to use them….the differential administration of illegalities through the mediation of penality forms part of those mechanisms of domination."[55] As we shall see, this idea of differential administration holds special import for us since, as Foucault concludes, the law is "made by the few and brought to bear on others."[56]

We ought to resist the temptation to take Foucault as saying something empirically definitive about the prevalence of panoptic power. Rather, Foucault's study of the development of the prison is a larger statement on how society believes itself to have advanced its civil principles when what it has actually done is enable itself to be increasingly under the power of its own advancements in ways it can barely recognize, thus the potency of modern power. Let us call this the *liberalization-disciplinary paradox*. As societies have increasingly embraced the idea of individual rights, social and economic progress, they have also primed themselves for evermore vigilant, robust, yet nuanced forms of discipline and constraint. Now the question is, is there a way to move the general Foucualdian thesis forward – that greater liberalization over time masks the ways social control and discipline have actually been both amplified and diffused throughout the normal workings of society – and employ it to understand the relationship between race, history, and the development of criminal justice? If so, it seems the idea of differential administration of punishment will hold even more significance than Foucault himself might have imagined.

Sidanius and 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

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[55] *Ibid, 272*
[56] *Ibid*. 276

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determine which groups were over- and underrepresented in societies' jails [and] prison cells."[57]

The importance of this observation for the authors is that criminal justice is a fundamentally coercive institution. Thus, if it is the case that it goes beyond its mandate of controlling crime and functions to exert control over 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*."[58] 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."[59] Race as a social construct is a powerful psychological dimension for individuals and groups – it is both cognitively salient and normatively loaded, thus it is of particular concern when it serves as an independent organizing principle. Moreover, we're particularly 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

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

[58] *Ibid.*, 31

[59] Jim Sidanius, Shana Levin, and Felicia Pratto. "Hierarchical Groups Relations, Institutional Terror, and the Dyanamics of the Criminal Justice System," *Confronting Racism: The Problem and the Response*. Eds. Jennifer L. Eberhard and Susan T. Fiske (Thousand Oaks: Sage Publication, 1998), 136-165; p. 138

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disproportionately directed towards members of subordinate groups."[60] 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."[61] 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 which saw black representation at a quarter in the 1930's and at a third in the 1980's.[62]

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.[63] As a

crucial parallel, Andrew Hacker is perplexed by the 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 (i.e. Enron executives), 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."[64] 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

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[60] 1999, p. 41

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

[62] *Ibid*., 2

[63] 1998., p. 143

[64] Andrew Hacker. *Two Nation: Black and White, Separate, Hostile, Unequal*. (New York: Ballantine Books, 1995); p. 186

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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 embrace rehabilitation, the purported *raison d'etre* for the penitentiary."[65] 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

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[65] *Ibid.*, 48

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labor and a political means to re-establish white supremacy in the South."[66] 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 can be seen when Wormser 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.[67] Indeed, "To supply the demand for convict labor, sheriffs arrested blacks for misdemeanors and vagrancy."[68]

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 intended phenomenon whenever group hierarchies are reproduced, and is especially concerning when states mobilize the use of official terror. As Klinkner argues, 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."[69] 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

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[66] Christopher Adamson. "Punishment After Slavery: Southern State Penal Systems, 1865-1890," *Social Problems* 5 (1983), 555-569; p. 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)
[67] *Ibid*., 54
[68] *Ibid*., 57
[69] *Ibid*., 91

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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 Cotttenham 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.[70] 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 to enact any oversight – the lives of the prisoners were

worth only as much as their monthly fees.

The second significant juncture 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

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[70] 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); p. 1-2

racial climate is a vast improvement from Selma, Alabama and Chicago in the 1960's. Yet, as we noted above, incarceration is racially disproportionate, exhibiting signs of official terror parallel to the period following Reconstruction.

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."[71] And, while we observed above that the developments following Reconstruction were not entirely surprising or unexpected, this new development marked a significant turning point, for justice in the South (and the North) was exactly that – a local issue. 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.[72] Moreover, were we to take Lyndon Johnson's engagement with crime during his first two years as a barometer, it also remained uninterested.[73] Yet, at the dawn of significant social and political justice for blacks, there loomed the specter of official terror.

Weaver's theory of *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

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[71] Vesla M. Weaver. "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21 (2007), 230-265; p. 230
[72] *Ibid.*, 239
[73] *Ibid.*, 240

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preferences.[74] The theory has three main components explicating its mechanics.[75] 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 use in order 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, the other 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 their 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 significant role – the

[74] *Ibid*., 238
[75] *Ibid*., 236

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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.[76] It is worth pausing here for a moment.

What ought to concern 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.[77] Peaceful forms of protests such as the Freedom Rides of the

1950's were portrayed as criminal. Another 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, the rationale had become that granting Civil

Rights would only reward lawlessness.

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

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[76] *Ibid.*, 248
[77] *Ibid.*, 240-241

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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 which 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 it prompted him to pay crime political homage. Moreover, riots were a real and frightening phenomenon, with many actors 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. Within this proposal were provisions for the Law Enforcement Administration Agency (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 in an effort to get crime under control. Weaver tellingly observes that the agency would ultimately deny funds to agencies tied to anti-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] Since

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[78] *Ibid.*, 254-256
[79] *Ibid.*, 260

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1973, imprisonment has increased by a factor of six.[80] One in three black males are under state supervision.[81]

Though, as seen above, crime policy and punishment have moved from corporeally cruel and unusual to 'enlightened' and 'humane,' and that this development has tracked evolving juridical philosophies of procedure and the proper purpose of punishment, one thing has remained true: 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. As societies have become procedurally democratic, 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.

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[80] *Ibid.*, 230
[81] *Ibid.*