



The Past & Future of American Civil Rights

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The history of civil rights in the United States has always been one of two steps forward and one step back. Significant progress toward racial equality has been made and then partially reversed, only to be advanced again at a later date. Race is too deeply embedded in the cognitive and institutional structure of American society to disappear entirely. (In speaking of race, I refer to attributes and meanings that are socially attached to inherited characteristics such as skin color.) Race has been a principal organizing frame in American society since its inception during the colonial era. Although race as a social category in the United States is unlikely to vanish anytime soon, its meaning will change. Indeed, the meaning of race has changed dramatically since the 1960s. In this essay, I review the history of racial formation in the United States to place the current moment in historical perspective. I then outline a new agenda for civil rights in the age of Obama.

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When the first “20 and odd Negroes” disembarked in Jamestown in August 1619, race did not yet exist as a coherent social category. The informal practices, formal rules, and substantive meanings accruing to persons of European and African origin had not yet been invented. The earliest evidence of racial formation in the United States is from a series of court decisions handed down in colonial Virginia’s legal system. These rulings established the basic tenets of U.S. race relations

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that would prevail for centuries: that blacks were inherently inferior to whites; that blacks were less than fully human and could be treated as property; and that black inferiority was divinely sanctioned and to be publicly enforced.¹

These precepts were well established in colonial jurisprudence by the 1660s, but the growing number of slaves, the expanding mixed-race population, and the rise of a small community of free blacks created complexities in race relations that could no longer be handled through piecemeal court decisions. As a result, state assemblies stepped forward to legislate race. Leading the way in 1662, the Virginia House of Burgesses enacted a measure that required the children of a white father and black mother to be defined according to the status of the mother, thus making racial bondage hereditary as a matter of public law. In 1667, the Virginia House declared that baptism did not alter a slave's condition of servitude, and in 1669, it held that the killing of a black slave by a white owner did not constitute murder but a lawful disposition of property.

Over time, as racial laws proliferated, legislators felt a need to systematize them. In 1705, the Virginia House of Burgesses consolidated race-related legislation into a coherent body of law known as the Slave Codes. In addition to reaffirming the basic precepts of black inferiority that were already well established in colonial law, the codes explicitly banned interracial marriage, prohibited African Americans from holding public office, and legally defined as black anyone with a black grandparent. These laws served as legislative models and were widely copied in other states.

Upon American independence, race became a preoccupying issue for the founding fathers. The U.S. Constitution was carefully crafted to permit the existence

of slavery in a nation otherwise dedicated to the proposition that "all men are created equal." Following what the late Federal Appeals Court Judge A. Leon Higginbotham, Jr., called "the principle of non-disclosure," Southern delegates voted repeatedly to strike words such as *Negro*, *African*, *slave*, and *slavery* from the text, preferring cryptic references to "other persons" and "persons bound to service" when constraining the rights of African Americans. The framers sought to make it virtually impossible to eliminate slavery constitutionally; they did so by granting disproportionate power to a minority of states through innovations such as an appointed Senate, the Electoral College, the three-fifths apportionment clause, and the requirement of supermajorities within Congress and the states to amend the Constitution.

Despite these constitutional protections, the legitimacy of the South's "peculiar institution" was never fully accepted. Over time, an abolitionist movement gained strength and sought ways to undermine the slave system. In defiance of the Fugitive Slave Act of 1793, for example, Northern legislatures passed a series of "personal liberty acts" that offered freedom to escaped slaves who reached Northern soil. Abolitionists then mobilized to prevent the spread of slavery to other states and achieved partial success with the Missouri Compromise of 1820, which admitted Missouri as a slave state but prohibited slavery in future states located above Missouri's southern border. This compromise led to an uneasy peace between North and South until new territorial acquisitions upset the delicate balance in the late 1840s.

In 1846, a treaty with England settled the location of the U.S.-Canada border and officially relinquished the territories of Washington, Oregon, Idaho, Wyoming, Montana, and the Dakotas to the United



States. The Mexican-American War ended in 1848 with a treaty that ceded to the United States the present states of Texas, Arizona, New Mexico, and California along with parts of Colorado, Utah, and Nevada. Southerners quickly realized that if all these territories were admitted as states under the terms of the Missouri Compromise, free states would eventually outnumber slave states and come dangerously close to the supermajorities needed to amend the Constitution and end slavery. In response, Southerners sought ways to consolidate the legal foundations of slavery within the nation.

The South struck back in 1850, when it forced through Congress a new Fugitive Slave Act that challenged the liberty of free blacks in the North. Congress acted again in 1854, passing (despite strenuous Northern objections) the Kansas-Nebraska Act, which rescinded the Missouri Compromise and allowed settlers in territories applying for statehood to vote on whether they would be admitted as slave or free states. Any remaining doubt about the legality of slavery under the Constitution was ended by the Supreme Court's *Dred Scott* decision of 1857, which not only affirmed slavery but articulated an explicit doctrine of black inferiority. Specifically, Chief Justice Roger B. Taney wrote that African Americans were not citizens under the Constitution but "a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."²

The *Dred Scott* case and the Kansas-Nebraska Act made it clear that slavery would not end in the United States unless free states could achieve the super-

majorities needed to amend the Constitution. Abolitionists thus focused political attention on preventing slavery's spread to states beyond those where it already existed, and this principle became a plank in the platform of the newly formed Republican Party in 1860. When Republican nominee Abraham Lincoln won the presidency in the same year, South Carolina led ten Southern states into secession to ignite civil war. In keeping with the founding fathers' designs, slavery was ended not through standard constitutional procedures, but through an armed, bloody struggle.

Although the war ostensibly erupted over the issue of "states rights," the true cause was made explicit by the Confederate Constitution, which rejected the principle of "non-disclosure" and made repeated, unambiguous references to slavery in the text. The very first article stated that the Confederate Congress would be apportioned "by adding to the whole number of free persons ... *three-fifths of all slaves*." It went on to state, "[N]o... law denying or impairing the right of property in *negro slaves* shall be passed." Likewise, Article IV held that "the institution of *negro slavery*, as it now exists in the Confederate States, shall be recognized and protected by Congress."³

Confederate Vice President Alexander Stephens affirmed the centrality of slavery to the Southern cause in a speech he delivered in Savannah, Georgia, on March 21, 1861. In his remarks, Stephens stated, "[T]he new constitution has put at rest, forever, all the agitating questions relating to our peculiar institution – African slavery as it exists amongst us – the proper status of the Negro in our form of civilization. This was the immediate cause of the late rupture and present revolution."⁴

Although Northerners may have entered the Civil War to preserve the

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Union and limit the spread of slavery, as the conflict and bloodshed wore on, the struggle took on a higher purpose: namely, freedom.⁵ On January 1, 1863, President Lincoln invoked his authority as Commander in Chief to emancipate slaves in the states under rebellion; two years later, with Union troops still dying in battle, Congress approved the Thirteenth Amendment to the U.S. Constitution, thereby abolishing slavery in all states. The amendment was quickly ratified in the North and, once the Southern states were defeated and occupied, in the former Confederacy as well. The lone exception was Mississippi, which refused to ratify the amendment until 1995.

Once it took effect on December 18, 1865, the Thirteenth Amendment ushered in a remarkable period of civil rights progress known as Reconstruction.⁶ Not only was slavery abolished, but with assistance from the federal government, African Americans advanced rapidly on multiple fronts: building schools, founding churches, creating self-help organizations, acquiring land, becoming literate, organizing politically, and achieving election to local, state, and federal offices. Forward movement on civil rights reached an apogee during the first Grant administration of 1869 to 1873. First, the ratification of the Fourteenth Amendment guaranteed equal protection under the law to all persons regardless of race. Next, the adoption of the Fifteenth Amendment confirmed the right of all adult males to vote regardless of race or former condition of servitude. To enforce the new constitutional provisions, Congress passed its first Civil Rights Acts, one in 1866 and a second in 1875. Finally, under the supervision of military governors and occupying Union troops, Southern states were compelled to rewrite their constitutions to end slavery and ensure black suffrage.

Progress on civil rights faltered in the second Grant administration, however, and came to a definitive halt in 1876, when Rutherford B. Hayes, the Republican presidential candidate, agreed to restore home rule to the South in return for its acquiescence to his assuming office in a disputed election. True to his word, President Hayes withdrew federal troops from the South in 1877, and in 1878, Congress prohibited the military from supervising Southern elections. With its “redemption” thus achieved, the South set about creating new institutions of racial hierarchy to replace those associated with chattel slavery.

Southern lawmakers organized a new system of peonage to replace the slave system in the economic sphere and instituted strict racial separation in the social sphere, thus yielding a new arrangement of racial subordination that came to be known as Jim Crow. In 1890, Mississippi became the first Southern state to replace its Reconstruction-era constitution with a new charter designed to limit black suffrage. Mississippi Governor James K. Vardaman put it bluntly: “[T]here is no use to equivocate or lie about the matter. Mississippi’s constitutional convention of 1890 was held for no other purpose but to eliminate the nigger from politics; not the ignorant – but the nigger. Let the world know it just as it is.”⁷

With white political control reestablished, Southerners in Congress quickly accumulated seniority and gained effective control of appointments to the federal judiciary, including the Supreme Court, which systematically began to undo Reconstruction-era reforms. In the *Civil Rights Cases of 1883*, the Court ruled that the Civil Rights Act of 1875 was unconstitutional and that the Fourteenth Amendment applied only to states, not to individuals or private



groups. In 1896, the Court's *Plessy v. Ferguson* decision explicitly endorsed the new system of racial separation by adopting the fiction that segregation rendered the races "separate but equal." Finally, in 1898, the Court ruled in *Williams v. Mississippi* that the latter's new state constitution did not violate the Fourteenth or Fifteenth Amendments, blithely ignoring Governor Vardaman's remarks to the contrary.

By 1900, Jim Crow was institutionalized throughout the South, creating a system of racial subordination that was "slavery by another name" and, in some ways, "worse than slavery," given the high levels of violence that accompanied it.⁸ Reconstruction was ultimately defeated not by political actions, but by a guerrilla war and terrorist campaign that drove federal officials from the South.⁹ African Americans bore the brunt of the violence before and after this "redemption" as lynching – the extrajudicial execution of African Americans by white vigilantes – became normalized in the South. Although the frequency with which lynchings occurred declined over time, the practice never disappeared; it remained a basic instrument of social control well into the twentieth century, rising during periods of economic and political uncertainty and falling during periods of calm and stability.¹⁰

Ironically, many of the discriminatory practices mandated under Jim Crow in the South originated in the North, where African Americans were neither perceived nor treated as equals despite Northerners' rejection of slavery as an institution.¹¹ Indeed, African Americans were routinely excluded from white society and relegated to the bottom of the Northern occupational hierarchy.¹² Moreover, as black populations increased during the Great Migration of the early twentieth

century, levels of discrimination and repression in Northern cities steadily grew. By 1920, institutionalized discrimination was endemic within Northern markets for housing, labor, services, products, and credit. Particularly in the residential sphere, a strict color line emerged, generating extremely high levels of school and neighborhood segregation.

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During the 1930s, the federal government began to intervene more forcefully in the U.S. political economy and increasingly invoked public policies to perpetuate black social and spatial isolation. Specifically, the social programs of Franklin Roosevelt's New Deal were deliberately racialized to accommodate de jure segregation in the South and de facto segregation in the North.¹³ The political reality was that no law could pass Congress without Southern support, and although Southerners favored the New Deal's populist economic programs, they did so only to the extent that the programs did not challenge the racial status quo. Therefore, at the insistence of Southern representatives in Congress, African Americans were systematically excluded from the various social protections and economic benefits of the New Deal. Traditionally black occupations were not covered by the Social Security Act; labor legislation was written to allow segregated unions; states were delegated authority to exclude African Americans from receiving veterans benefits; and bureaucratic rules were written to prohibit black families and black neighborhoods from receiving Federal Housing Association and Veterans Administration loans.

For most of the twentieth century, African Americans remained second-class citizens in both the North and South. In the wake of World War II, however,

America's self-proclaimed status as "leader of the free world" made the blatant oppression of African Americans difficult to sustain not only morally but also politically. In addition, black veterans, having served in the war to defend freedom against Fascism, returned home determined to exercise the civil rights they had long been denied. The civil rights era began in earnest in 1948, when President Harry Truman ordered the desegregation of the U.S. armed forces, and Democrats for the first time included a civil rights plank in their party platform, spurring a third-party revolt by Southern "Dixiecrats" led by Strom Thurmond of South Carolina.

In 1948, the Supreme Court also began a long retreat from legal segregation, declaring in *Shelley v. Kraemer* that racially restrictive covenants, routinely used throughout the real estate industry, were unenforceable and contrary to public law. In 1954, the Court finally dealt the constitutional foundations of Jim Crow a lethal blow when it overturned *Plessy*, declaring in its landmark *Brown* decision that separate was not and could never be equal, thus rendering the racial segregation of schools unconstitutional.

These court decisions, as bold as they were, nonetheless failed to bring about meaningful change in race relations in the face of implacable white opposition. Therefore, the main thrust of the civil rights movement shifted from the legal to the political arena. In 1957, Congress passed the first Civil Rights Act since Reconstruction. Ostensibly a voting rights bill to advance black suffrage in the South, its effect was largely symbolic in that it allowed Majority Leader Lyndon Johnson to demonstrate his mastery of the Senate by breaking a Southern filibuster led by Strom Thurmond.¹⁴ After Democrats captured the White House in 1960, President John F. Kennedy, facing a ris-

ing tide of civil rights agitation and Southern violence, decided to submit a comprehensive civil rights bill to Congress in June 1963.

Kennedy's assassination in November of that year opened the door for President Lyndon Johnson to use the young president's martyrdom and his own formidable legislative skills to push the civil rights bill through Congress, once again breaking a filibuster by Strom Thurmond. The 1964 Civil Rights Act turned the tide against Jim Crow by banning discrimination in public accommodations, services, and labor markets and putting new muscle behind school desegregation. The Voting Rights Act followed a year later, empowering the federal government to supervise elections in the South in areas where blacks were underrepresented. Although President Johnson also sought to ban discrimination in the real estate industry, this legislation stalled until the assassination of Martin Luther King, Jr., once again oiled the legislative machinery with a martyr's blood, leading to the passage of the Fair Housing Act in April 1968.

President Johnson was committed to more than ending legal segregation in the South, however. He also endeavored to break de facto segregation in the North and to move rapidly toward economic parity between the races. As he stated on June 4, 1965, in his widely quoted commencement address at Howard University:

Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly be-



lieve that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity.¹⁵

To further the goal of equal opportunity, President Johnson launched his signature War on Poverty.¹⁶ In 1964, he pushed through Congress the Economic Opportunity Act, which created a new Office of Economic Opportunity that made antipoverty grants to local organizations known as Community Action Agencies. In order to circumvent state and local authorities that had systematically excluded the poor and minority groups since the 1930s, the new agencies were obliged to move forward with the “maximum feasible participation” of these constituencies. In 1965, Johnson prevailed on Congress to create the Department of Housing and Urban Development (HUD), which channeled federal funds to distressed cities. In that same year, he succeeded in amending the Social Security Act to create two new health insurance programs: Medicare for the elderly and Medicaid for the poor. Additional money was made available for the War on Poverty through the Demonstration Cities and Metropolitan Development Act of 1966 and the Manpower Development and Training Act of 1967.

The remarkable string of congressional victories Johnson achieved between 1963 and 1969 represents the greatest period of civil rights legislation since Reconstruction and the most important period of social legislation since the New Deal. Together, they brought about a remarkable burst of progress for African Americans. In the decade from 1959 to 1969, the black poverty rate dropped from 55 percent to 32 percent; black incomes

rose 65 percent in real terms; the share of young African Americans completing high school rose from 39 percent to 56 percent; the ratio of white-to-black income dropped from 1.93 (where it had hovered for years) to 1.63 (still the lowest level ever reached); and the number of black elected officials jumped from under 300 to over 1,400.¹⁷

Unfortunately, however rapid this progress may have been in historical terms, it was not fast enough to keep up with the revolution of rising black expectations. Young African Americans, in particular, perceived good schools, decent jobs, union membership, college education, and professional occupations to be largely out of reach, and as the lag between expectations and opportunities gave rise to frustration, urban rioting swept over American cities during the late 1960s. Urban racial violence created a new political dynamic in which policymakers, business elites, educational administrators, and civic leaders sought some means – any means – to accelerate the economic progress and integration of African Americans.¹⁸

In public education, the means chosen to advance integration was busing. Given the realities of *de facto* segregation in housing, the only realistic way to desegregate schools quickly in the North was to bus children between catchment areas. In employment and education, the tool of choice became affirmative action. Up to that point, blue-collar jobs had been distributed to people largely through segregated neighborhood- and kin-based social networks, and the only practical way to promote greater black inclusion was to force employers to recruit more widely. Likewise, because selective colleges and professional schools recruited heavily through legacy admissions and well-established institutional pipelines, the only realistic way to desegregate

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The Past & Future of American Civil Rights higher education was to require admissions officials to expand their applicant pools.

Lyndon Johnson's dreams of a "Great Society" died in Vietnam, of course, but the momentum of the War on Poverty continued into the next administration. Despite Richard Nixon's stated goal of limiting civil rights enforcement and curtailing social spending, real efforts to turn back the Great Society were put off until his second administration. Indeed, shortly after his landslide victory in 1972, Nixon shut down the Office of Economic Opportunity, turned federal employment programs over to the states, introduced legislation to forbid busing students to other school districts, and deliberately slowed down civil rights enforcement.¹⁹ The backward movement would no doubt have continued had Richard Nixon not been forced from office by the Watergate scandal.

With the Republican Party temporarily derailed by Nixon's implosion, the civil rights movement got a second wind and rallied in 1974 to pass the Equal Credit Opportunity Act (to prohibit discrimination in mortgage lending), followed in 1975 by the Home Mortgage Disclosure Act (forcing banks to publish data on the race of mortgage applicants), and the Community Reinvestment Act of 1977 (outlawing the practice of neighborhood "redlining"). All told, in the two decades from 1957 to 1977, Congress passed seven major civil rights bills that eliminated the legal foundations for *de jure* segregation in the South and outlawed *de facto* discrimination and separation in the North. It was a remarkable period of civil rights progress that historian Manning Marable has called the "Second Reconstruction."²⁰

Given the history of America's first Reconstruction, it is hardly surprising

that its second incarnation sparked a similar counterreaction and backward movement with respect to civil rights. Resistance to the dismantling of *de jure* and *de facto* segregation is not only predicted historically, it is to be expected psychologically.²¹ Loss aversion is a well-established principle of human cognition. People find it painful to give up resources and benefits they already possess; indeed, they will fight much harder to avoid losses than to achieve gains. Unless public resources were somehow expanded after 1964 to accommodate black gains without white losses – a political gambit that Johnson's Great Society failed to realize because of the Vietnam War – white opposition to the second reconstruction was almost inevitable.

Loss aversion is only one of several psychological reasons to expect resistance to racial change, however. Human cognition is also characterized by considerable inertia, as established mental categories tend to resist modification. The mind works through pattern recognition and inductive generalization rather than deductive logic; it is wired to construct social categories that assign attributes and characteristics to people. Information that is inconsistent with existing categories of thought tends to be ignored or reshaped to fit preconceptions. Given that the social conceptualizations of race had evolved over hundreds of years and were deeply rooted in the American psyche, changes in racial thinking would come more slowly than changes in outward behavior.

Social categories are especially resistant to change because they are imbued with emotion. Labels such as "white" or "black" do not exist simply as neutral mental constructs; rather, they are associated with distinct emotional valences that contribute to prejudice – a predetermined orientation for or against certain



social groups. All people, whether they think of themselves as prejudiced or not, hold in their heads schemas that classify people according to age, gender, race, and ethnicity. These categories invariably include unconscious components whose expression is more or less automatic. Such “implicit prejudices” may be overcome rationally when their existence is made apparent and there is a will to change. But absent such deliberate cognitive work, prejudices tend to be expressed spontaneously and unconsciously, a phenomenon that psychologist John Bargh calls “automaticity.”

Together, the human traits of loss aversion, cognitive inertia, and automaticity offered fertile psychological grounds for a white political backlash, and in the late 1960s, Richard Nixon led the way with his “Southern strategy.” He began by cultivating Dixiecrat Strom Thurmond, who had switched parties in 1964 to become a Republican after his efforts to block the Civil Rights Act of 1957 failed. In secret negotiations, Nixon promised to retard civil rights enforcement as president if Thurmond would campaign on Nixon’s behalf.²² With Thurmond’s support, Nixon carried four former Confederate states – the first time a Republican had done so since Reconstruction. In subsequent years, most Southern Democrats would either be defeated or follow Strom Thurmond into the Republican Party. By the 1980s, the “solid South” had become a Republican rather than a Democratic monolith, with Southerners increasingly leading the party.

Blue-collar workers and middle-class whites in the North also abandoned the Democratic Party over its commitment to civil rights.²³ To a greater extent than party leaders cared to admit, working-class whites defined themselves in opposition to African Americans and measured their status in terms of the distance be-

tween themselves and black schools, neighborhoods, and people. Busing students across district lines was thus experienced as an attack on white working-class identity. Affirmative action in the labor market added insult to injury by forcing employers to hire African Americans into jobs that in the past would have been passed to whites through family and peer networks. Middle-class whites came to see affirmative action in education as “reverse racism,” unfairly taking scarce college admission slots away from “deserving” white students and giving them to “unqualified” black students.

In response to these racial “impositions” by liberal Democratic elites, angry working- and middle-class whites took to the courts. Parents in suburban Detroit filed suit to stop the busing of children across district lines to achieve integration, and in its 1974 *Milliken* decision, the Supreme Court agreed that such a remedy was constitutional only if there was direct evidence that district boundaries had been drawn to promote segregation, a condition that rarely held. Since school segregation after 1960 increasingly occurred between rather than within districts, this decision effectively eliminated busing as a tool for integration in the United States.

A few years later, a white applicant to the University of California, Davis, sued admissions officials when his application to the UC Davis medical school was rejected twice. He argued that because of affirmative action, less-qualified African Americans were unconstitutionally being admitted to medical school in his stead. In its 1978 *Bakke* decision, the Supreme Court agreed and prohibited the use of racial quotas in college admissions. Although it allowed race to be taken into account as one factor in admissions decisions, the Court later gave this policy an expiration date in its *Grut-*

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The Past & Future of American Civil Rights *ter v. Bollinger* verdict, which stated that “race-conscious admissions policies must be limited in time.”²⁴

With the *Milliken* and *Bakke* rulings in place, the racial counterreaction shifted from the judicial to the electoral arena. Political realignment reached its full expression during the 1980s. Republicans occupied the White House for all but eight years from 1980 to 2008 and wielded effective control over Congress during much of that time, especially between 1994 and 2006. By 2002, Republican Senate Majority Leader Trent Lott of Mississippi was crowing to constituents, “I want to say this about my state: When Strom Thurmond ran for president [in 1948], we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either.”²⁵ Thurmond’s campaign, of course, was based on the premise that “all the laws of Washington and all the bayonets of the Army cannot force the Negro into our homes, our schools, our churches.”²⁶

From 1980 through 2008, Republican administrations paid no more than lip service to antidiscrimination enforcement and filled the civil rights divisions of the Justice Department and HUD with either incompetent hacks or conservative ideologues openly hostile to black civil rights. In Republican hands, Congress de-funded not just the Great Society but much of the New Deal, slashing budgets for public assistance, urban development, public housing, and unemployment insurance, and ultimately ending welfare as a social entitlement.²⁷ Perhaps the most important development in the counterrevolution was the rise of a new race-making institution in the United States: a racialized criminal justice system that put record numbers of African Americans behind bars.²⁸

The origins of the new “criminal justice complex” lay in President Nixon’s 1970 State of the Union address, in which he declared a War on Crime, which evolved seamlessly into President Reagan’s War on Drugs. To prosecute these “wars” (both sardonic allusions to Johnson’s War on Poverty), former state-level crimes were federalized and mandatory minimum sentences and strict sentencing guidelines were imposed. Particularly severe penalties were enacted for nonviolent drug offenses, most notably for the use and sale of crack cocaine – a cheap form of the drug common in poor black communities. Criminal possession of a controlled substance became the principal legal instrument used by white authorities to regulate the behavior of poor African Americans, despite the fact that rates of drug use are much lower in the black community compared to the white.

In the wake of the twin wars on crime and drugs, legal infractions were more likely to result in arrests; arrests were more likely to result in imprisonment; imprisonment was likely to involve a long sentence; and long sentences were less likely to be shortened by parole. Between 1970 and 2003, the number of people in state and federal penitentiaries rose from around 200,000 to 1.4 million; thus, the United States achieved the highest incarceration rate in the world. As in all societies, the vast majority of crimes in the United States are committed by poor, young, socially unattached males. The new punishment regime was destined to have a disproportionate effect on members of any group fitting that profile.

By imposing harsher penalties on crimes committed by socially marginal groups, such as young black males, Congress effectively racialized the criminal justice system. Whereas only 0.7 percent of all Americans were imprisoned



in 2000, the figure was 2.1 percent for working-age adult males; and whereas among that group, the share behind bars was 1 percent for whites, it was 7.9 percent for blacks. Among young black men of working age, the incarceration rate was 11.5 percent; but among those without a college degree it was 17 percent, and among those without a high school degree, the share rose to one-third. The cumulative risk of incarceration by age 35 was 21 percent for young black men; and for those who were high school dropouts, it was 59 percent. By 2000, black males were more likely to be under criminal justice supervision than to be in college, the military, a marriage, or a labor union.

The election of the nation's first African American president in 2008 suggests that the momentum of the white racial backlash has shifted. Not only did Barack Obama win the presidency; he carried three states of the former Confederacy. In the wake of the civil rights movement and the Great Society, white racial attitudes changed despite resistance and opposition. Prior to the 1960s, a clear majority of white Americans favored racial segregation as a matter of principle: according to nationwide polls, two-thirds thought that blacks and whites should attend separate schools; 55 percent said that whites should have the first chance at any job; 54 percent favored segregation in transportation; 60 percent said that whites have a right to keep blacks out of their neighborhoods, and 63 percent said they would not vote for a black candidate. By the 1980s, these figures had dropped, respectively, to 4 percent, 3 percent, 12 percent, 13 percent, and 5 percent – a remarkable historical shift by any standard.²⁹

Principled racism has not disappeared, of course, and is currently enjoying a par-

tial resurgence, as indicated by portrayals of President Obama as a foreign-born Muslim terrorist hell-bent on executing elderly white people. Nonetheless, overt racism is progressively aging out of existence. Social change is only partly about changing the minds of living people; it also follows from a powerful demographic process known as cohort replacement. Older people socialized before the civil rights era may be less tolerant, but every year more of them die and are replaced by young people raised in an era when civil rights was the rule and open racism was not tolerated. In addition, owing to immigration and intermarriage, younger Americans are more likely to be minorities themselves and thus naturally sympathetic to civil rights. According to exit polls, two-thirds of persons aged 18 to 29 voted for Obama, compared with just 52 percent of those aged 30 to 44, 50 percent of those 45 to 64, and a minority of only 45 percent among those 65 and older.³⁰

Although overt racism may be on the decline, this outward shift does not mean that racial stereotypes and racial sentiments are necessarily disappearing.³¹ Indeed, a significant share of white Americans continue to hold negative stereotypes about African Americans. According to one national survey, nearly a quarter of white adults hold universally negative views about blacks. Among whites interviewed in Los Angeles, 46 percent viewed blacks as less intelligent, and nearly three-quarters said blacks preferred to live off welfare. Such expressions of explicit negative stereotypes are strongly associated with discriminatory actions in a variety of domains.

Despite the persistence of antiblack stereotypes, for most white Americans, racial stereotyping has shifted to become a more variegated, subtle, and contingent process.³² Stereotyping occurs within a two-dimensional space of social cogni-

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tion defined by the attributes of warmth and competence. We judge other people by whether they are trustworthy, approachable, and likeable (warm), and whether they are capable, effective, and worthy of respect (competent). People perceived as both warm and competent comprise societal reference groups, such as middle-class whites, and they tend to be esteemed and respected in society. In contrast, those perceived as low in warmth and high in competence constitute envied out-groups, such as the rich and certain middleman minorities. Those deemed high on warmth but low on competence define pitied out-groups, such as the elderly and disabled. Those seen as neither warm nor competent are generally members of despised out-groups, such as drug addicts and the homeless.

White racial stereotyping historically placed African Americans in the despised quadrant of low competence and low warmth: lazy, stupid, unmotivated people such as welfare queens, shiftless workers, and petty criminals. Other black stereotypes involve low competence and high warmth (minstrels, mammies, Uncle Toms) and high competence and low warmth (sexual predators, violent criminals). What historically has been missing in American social cognition has been the placement of African Americans within the zone of high competence and high warmth. This situation seems to have changed in recent years, however, and black professionals are now esteemed and respected in the social cognition of white Americans.

Although the emergence of positive black stereotypes is clearly progress, it nonetheless entails a subtle process of stereotyping by omission. In public discussions, whites tend to accentuate positive traits about African Americans while omitting stereotypically negative

traits; yet this omission implies the unspoken existence of these traits. The tendency to stereotype through omission is strongest among persons holding egalitarian attitudes – presumably those who least want to appear “racist” in discussing African Americans. Whites also routinely engage in stereo-subtyping, placing the smaller number of educated, middle-class, and professional blacks into the esteemed category of high warmth and high competence but relegating the much larger number of poor African Americans to the despised category of low warmth and low competence. Such negative stereotyping, however, is mitigated by habituation: that is, exposure to African Americans through the media and daily life brings familiarity and leads whites to evaluate blacks in terms of individual traits rather than gross stereotypes. Obama garnered white support not only because he is a black professional, but also because in the course of the campaign he became familiar and unthreatening.

People perceive the social world not only in terms of explicit, conscious stereotypes but also, as noted above, in terms of implicit biases that are expressed automatically and unconsciously. Although explicitly held stereotypes have long been known to affect behavior, research suggests that implicit prejudices appear to have greater power in predicting discriminatory conduct.³³ By virtue of growing up and living in a society that is filled with negative historical and contemporary images of blacks, virtually all Americans come to harbor implicit biases that unconsciously affect judgments and decisions in the social realm.

The prevalence of implicit, unconscious, automatic biases helps explain the nature of contemporary discrimination. Just as overtly racist attitudes are consciously rejected by most white



Americans, open discrimination against African Americans has largely disappeared from private markets and public spheres. One no longer encounters “whites only” signs or placards stating that “Blacks need not apply,” and African Americans are not told, “Sorry, but we do not sell to your kind.” Not only are such actions illegal, but the expression of racist sentiments is no longer publicly acceptable.

Although racial discrimination is no longer practiced openly, however, evidence suggests that it has not disappeared but has gone underground to be expressed in surreptitious and subtle ways that often are not directly observable.³⁴ Racial discrimination today is detected through a methodology known as the audit study, in which trained black and white testers are sent into markets to seek out proffered goods and services. How testers are received in various markets is recorded over a number of trials and compared by race to discern systematic differences in treatment. Numerous audit studies have documented the persistence of antiblack discrimination in markets for real estate, credit, jobs, goods, and services. Although discrimination may not be as intense or as open as it once was, it still exists.

To date there have been two major waves of forward movement on civil rights in the United States. The first occurred during the Civil War and Reconstruction, when slavery was abolished and African Americans achieved, for a brief time, significant political representation, something approaching equal treatment under the law, and substantial economic gains. The second wave of civil rights progress occurred during America’s “Second Reconstruction,” when landmark Supreme Court decisions in the 1950s and legislation passed in the 1960s and 1970s elimi-

nated the basis for legal segregation in the South, outlawed discrimination in the North, and sought to deracialize public policies throughout the nation. At the same time, social spending and affirmative action programs launched as part of Johnson’s War on Poverty brought significant economic progress for African Americans. As with the first Reconstruction, however, these forward steps sparked a white counterreaction that substantially blunted black progress after 1980.

Although progress toward racial equality may have stalled during the 1980s, the election of the nation’s first black president in 2008 suggests that we may have turned a corner. Overt racism still exists, of course, but it is rapidly fading; and while we cannot ignore the capacity of a dying racial order to wreak havoc and violence as it disintegrates, principled racism, open discrimination, and systematic exclusion are no longer the barriers to black social and economic progress they once were. We are now entering a new, third wave of civil rights in the United States. In this new age, the tools used to advance racial equality in the past are no longer appropriate and may even be counterproductive. New tools must be invented and applied if we are to move forward.

American race relations today are quite different from those that prevailed in the mid-twentieth century, when racist attitudes were freely expressed and challenges to white supremacy met by violent resistance. Under these circumstances, social change required direct, forceful actions such as sit-ins, demonstrations, boycotts, marches, rallies, prosecutions, and punishment. Today, however, open racism is no longer tolerated, racial discrimination is subtle, and although changes to the racial status quo are opposed po-

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litical, race-neutral language has replaced violently racist rhetoric. Scholars have conveyed the contradictory nature of contemporary race relations using a variety of labels: symbolic racism, modern racism, laissez-faire racism, color-blind racism, and aversive racism.³⁵ Whatever the label used, actions such as marching, demonstrating, prosecuting, and punishing will be of little use in expanding civil rights beyond this point.

Consider the realm of attitudes, for example. Although some whites no doubt remain “closet racists” who hold anti-black views and oppose actions to advance racial equality without admitting it publicly, most Americans consciously reject racism and sincerely seek a “race-blind” society, even though they may continue to harbor implicit racial prejudices. In the domain of behavior, notwithstanding a small population of racists who continue to openly discriminate against blacks, many do not wish to discriminate; they only do so under certain conditions because of unconscious biases. Finally, in the policy arena, although some white policy-makers may consciously despise African Americans and work to devise policies intended to harm them, many others support such discriminatory policies without consciously wishing to harm blacks or without ever fully understanding their racially disproportionate effects.

In sum, we have reached a point in American society where race is expressed subtly rather than overtly and where racial disadvantage is perpetuated in the shadows rather than in the open. Such a world requires a more judicious and refined politics of civil rights because the overt injustices that called for protest, boycott, and prosecution in the 1950s and 1960s have largely vanished. Since racial biases are now for the most part implicit, and mechanisms of racial stratification not readily observable, the pri-

mary goals in a new civil rights movement should be to render implicit biases explicit and to make transparent the obscured mechanisms of racial discrimination. In doing so, the intent should not be to root out and shame the hidden racists among us or to denounce the racist intent behind public policies. Rather, the goal should be to identify the unconscious biases and unintended consequences and bring them to explicit attention for remedial action. Even if some of the biases are conscious and the consequences intended, direct attacks will no longer work.

If we make the implicit biases that most people hold explicit in a nonthreatening way, and if we expose their dissonance with stated principles, we can overcome them.³⁶ Humiliating or shaming people for harboring implicit biases and unconscious prejudices in a society where it is difficult *not* to acquire them, through the media and other sources, is inevitably counterproductive and more likely to produce resistance than change. Likewise, casting racist aspersions on supporters of policies with racially disparate impacts will not influence the behavior of actual racists, but it may hurt and offend those who are not and thereby cause them to dig in their heels and defend a policy line they might otherwise have been persuaded to abandon. The goal should be to change policies and structure, not punish people. The focus of civil rights action in the next wave should be elucidation and persuasion rather than confrontation and attack.

In translating these principles into concrete policy actions, there are two domains in which social science research has clearly demonstrated the existence of disproportionate impacts and implicit biases: the criminal justice system and U.S. markets. The racially dispropo-



tionate effect of the shift from rehabilitation to punishment in criminal justice is well documented, as are the huge costs this disproportion imposes on both African Americans and U.S. society in general. To combat discrimination, the contemporary civil rights movement must make criminal justice reform a central goal, demanding a repeal of legal gimmicks such as three-strikes laws, mandatory minimum sentencing, and harsher penalties for crack than for powdered cocaine.

The persistence of significant racial discrimination in key U.S. markets is also well documented. Audit studies not only provide a means of measuring discrimination, they also offer a relatively cheap, easy, and legally valid way of enforcing antidiscrimination law. Up to this point, however, studies have been used only sporadically for civil rights enforcement, usually by underfunded nongovernmental organizations and civil rights groups in specific local areas. Court-ordered settlements have brought some justice to individual plaintiffs, but they have been too few and far between to mitigate discrimination in American markets.

A new civil rights movement should therefore demand the creation of federal programs to monitor levels of discrimination in key U.S. markets and take remedial action on a routine basis. If a society uses markets to allocate production, distribute goods and services, generate wealth, and produce income, then it is incumbent upon government to ensure that all citizens are able to compete freely in all markets. Lack of equal access to markets translates directly into a lack of equal access to material well-being and ultimately into socioeconomic inequality. Unfortunately, to secure passage of the Civil Rights Acts of 1964, 1968, 1974, and 1977 and circumvent a filibuster,

most of the enforcement mechanisms included in the original legislation were stripped away. As a consequence, the federal government was largely disempowered from playing an active role either in uncovering discrimination in key markets or instigating actions to sanction those engaging in discrimination.

The existing body of civil rights law must be updated to establish within the U.S. Departments of Treasury, Labor, Commerce, and Housing and Urban Development permanent offices authorized to conduct regular audits in markets for jobs, goods, services, credit, and housing based on representative samples of market providers. On the theory that at least some of the discrimination identified by audits stems from implicit bias rather than conscious discrimination, producers caught discriminating would not be singled out for prosecution and public shaming; instead, they simply would be issued a ticket they could dismiss by paying a fine. Those wishing to contest the ticket would have the right to challenge the audit evidence in court, but authorities would seek strong sanctions only in cases where a systematic pattern and practice of discrimination was uncovered across multiple audits. Annual publication of audit results for the nation and key regional markets would raise awareness and educate the public about the realities of discrimination; at the same time, it would provide information to federal authorities about where to target future audits and enforcement efforts.

Finally, a revitalized civil rights movement must return to and build on Lyndon Johnson's observation, "[I]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates." Here again, social science research offers a clear basis for policy action by increasing our national

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investment in early childhood education. It is now well established that key cognitive and noncognitive skills essential for later learning are produced early in childhood, well before the beginning of formal schooling. As economists James Heckman and Dimitriy Masterov have argued, “[S]chooling comes too late in the life cycle of the child to be the main locus of remediation for the disadvantaged....[R]edirecting funds toward the

early years is a sound investment in the productivity and safety of American society, and also removes a powerful source of inequality.”³⁷ Although increasing funding for preschool education may not seem like a civil rights policy, African Americans would be clear beneficiaries, and the evidence suggests it would significantly mitigate a major source of racial inequality in the United States.

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