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Post-Racial Leadership: Racialized Mass Incarceration in the Age of Obama

Ian F. Haney López

I. Introduction

President Barack Obama's election has inspired many to marvel that we now live in a "post-racial" America. Obama himself seems to embrace this notion, not perhaps as a claim about where we are now, but as a political stance that dictates how best to approach society's persistent racial problems. In this essay, I assess Obama's post-racial politics. To do so, I use the lens of racialized mass incarceration. Because race is so central to the contemporary administration of criminal justice, it constitutes a particular challenge to the post-racial narrative.

When measured in light of mass of imprisonment, what does the claim to be post-racial mean? Obama rejects this term as a temporal claim that we have come to the end of history as far as race is concerned, or as a descriptive claim that race in the United States no longer corresponds to advantage and disadvantage. "You know," the President recently remarked, "on the heels of [my electoral] victory over a year ago, there were some who suggested that somehow we had entered into a post-racial America; all those problems would be solved." Then he deadpanned, "That didn't work out so well."¹ The rejection of *post-racial* as a temporal or sociological claim seems entirely appropriate, as even the most cursory engagement with American criminal justice at the start of the twenty-first century demonstrates. The United States puts people under the control of the correctional system at an anomalously high rate, shutting behind bars an overwhelmingly disproportionate number of black and brown persons. A 2009 report shows that one in every 31 adults in the United States is in prison or on parole or probation; broken down by race, that is one in every 11 African Americans, one in 27 Latinos, and one in 45 whites.² Race remains a stunningly powerful predictor of super- and subordination, ensuring that race has not nearly played itself out in America's long struggle for a more perfect union.

This essay argues that Obama's post-racialism, rather than serving as a claim about our racial present, operates as a political or perhaps even an ideological approach toward the continuing astringent of race. One can conceptualize ideologies as normatively laden systems for understanding—and acting in—the world. To a certain extent, ideational entrepreneurs seeking to preserve or challenge the status quo forthrightly manufacture such idea systems. When most successful, however, ideologies achieve the status of common sense. They become accepted, taken-for-granted matrices that at a non-conscious level provide baselines for judging what is normal, moral, and legitimate in the world.³

Ideologies of race in particular typically do so by answering the following conundrums: First, what is race? Second, what is racism? Finally and most importantly, what is the relationship between race, racism, and inequality, and by implication, what—if anything—is morally required of us as a society?

As a framework for comprehending and maneuvering around race, post-racialism must be assessed against the dominant racial ideology of our time, “colorblindness.” That comparison forms the heart of this essay. To lay some groundwork, I first give an overview of contemporary colorblindness and then assess this racial stance against the rise of racialized mass incarceration, showing how colorblindness facilitated and today continues to protect this oppressive dynamic. I then turn to Obama’s racial politics, starting with his most direct engagement with race and crime control, the arrest of the prominent African-American professor, Henry Louis Gates, Jr. Building on this, and drawing on Obama’s more general statements on race and politics, I argue that post-racialism constitutes a liberal embrace of colorblindness. It differs in important particulars, but nevertheless largely tracks this ideology in a way likely to limit progress toward increased racial equality.

II. Colorblindness

Given the long, sorry history of racial subordination in the United States, there is tremendous rhetorical appeal to Justice John Marshall Harlan’s famous dissent in *Plessy v. Ferguson*, the case that announced the “separate but equal” standard that rationalized decades of Jim Crow racial oppression.⁴ Harlan declared—in what amounted to aspiration rather than description—that “[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens.”⁵ This utopian vision of a future society in which race no longer correlates with privilege or disadvantage, and so carries no meanings tied to established hierarchies, is powerfully compelling. Yet a sharp distinction must be made between colorblindness as an ideal and as a current strategy for moving in that direction. As a policy prescription, colorblindness seems downright perverse. To grasp this contradiction, consider colorblindness in historical perspective.

Over the course of the twentieth century, colorblindness shifted from being a progressive demand to a reactionary one. This metamorphosis finds reflection in the arguments made by Thurgood Marshall the lawyer and Thurgood Marshall the Supreme Court Justice. As counsel for the NAACP in the late 1940s and early 1950s, Marshall repeatedly encouraged his colleagues to cite Harlan’s famous injunction to argue that, as Marshall put it in a 1947 brief to the Supreme Court, “classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws.”⁶ Marshall sought to harness colorblindness to attack the racial degradation given constitutional sanction by *Plessy*.⁷ He did so recognizing that racial subordination relies upon racial distinctions. The use of race, Marshall argued, lacked moral and legal validity precisely when deployed to oppress.

Rather than adopt a colorblind rule proscribing every use of race, the Supreme Court opted to dismantle Jim Crow “with all deliberate speed.”⁸ Initially, this

reflected a decision to temporize. The Court feared taking on too much too rapidly, and particularly sought to avoid abruptly declaring unconstitutional—and implicitly immoral—the emotional core of white supremacy, the ban on interracial marriage. Over time, however, the decision not to flatly prohibit governmental distinctions based on race came to seem wise. By the mid-1960s, a simple truth became increasingly apparent to the friends and foes of racial emancipation alike: segregation readily continued in the presence of formal racial neutrality. As late as 1965, less than one in one hundred black children in the South attended schools with whites, and the number of whites in predominantly black schools was infinitesimal. Civil rights lawyers dropped their demands for colorblindness and began to stress the necessity of race-conscious remedies to achieve integration and substantive equality, winning support from the Court in a series of decisions spanning the late 1960s and early 1970s.

Meanwhile, the opponents of integration became the new patrons of colorblindness. Thurgood Marshall himself had recognized that while colorblindness posed a radical demand as a *right* to be immediately free from all Jim Crow oppressions, colorblindness as a *remedy* promised tepid change. It required only an end to explicitly segregationist laws, not actual remediation of the harms wrought by racial oppression.⁹ This insight was scarcely lost on the opponents of integration. A South Carolina district court articulated the colorblind counterargument to integration as early as 1955: “The Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.”¹⁰ From here, it was but a short step to the contention that colorblindness itself prohibited race-conscious integration measures. North Carolina grasped this in 1969, passing a law that, “No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin.”¹¹ In 1971, the Supreme Court unanimously struck this law down, declaring unequivocally that rigid limitations on government efforts to use race in a remedial fashion had no place under the Fourteenth Amendment. Seeing through North Carolina’s stratagem, the Court recognized that, “the statute exploits an apparently neutral form to control school assignment plans by directing that they be ‘color blind’; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*.” The Court continued: “Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.”¹² As the civil rights era drew to a close, colorblindness had shifted valence, from emancipatory to reactionary.

Although initially rejected by the Court, as its composition changed, so too did its stance toward reactionary colorblindness. By the end of the 1970s, the rhetoric of colorblindness had been repurposed as an attack on affirmative action. In 1978, Justice Marshall found himself urging the Court in its first full affirmative action case to reject colorblindness: “It is because of a legacy of unequal treatment that

we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”¹³ Marshall did not prevail, either *for* colorblindness as a lawyer or *against* it as a justice. Today, colorblindness as a presumptive bar on affirmative action has been firmly read into the Constitution. As the nation’s political culture swung from defending to dismantling white supremacy, courtroom proponents of colorblindness shifted *from* seeking to promote *to* seeking to defeat equitable racial change, and it was this reactionary version the courts ultimately embraced.

III. The Origins of Racialized Mass Incarceration

Contemporary colorblindness arose in opposition to demands for meaningful structural reform. So too did racialized mass incarceration.¹⁴ Sociologists and political scientists have persuasively argued that mass imprisonment developed out of a backlash against the civil rights movement. They point to the triumph of Richard Nixon’s “Southern Strategy,” whereby the Republican Party gained ascendancy by attracting previously Democratic voters from the South as well as the working and middle classes nationally through coded appeals to racial fears. “Crime” served as a potent synonym for the threatening presence and demands of nonwhites.¹⁵ “Nixon’s strategy was based on the linkages between racial conflict and lawlessness; indeed, in viewing [one of his own campaign ads], he remarked triumphantly that it ‘hits it right on the nose. It’s all about law and order and the damn Negro-Puerto Rican groups out there.’”¹⁶ Rather than challenging this politics of racial fear mongering, Democratic politicians almost immediately acceded to it, seeking to “out-tough” Republicans in “competitive upward bidding wars over the terms of punishment” that over decades created the carceral state we know today.¹⁷ This is not to say that the backlash to civil rights expressed itself exclusively in terms of imprisonment. On the contrary, reactionary politics also, and relatedly, targeted the state’s welfare functions. Nor is this to suggest that the current carceral system is rooted solely in racial dynamics. Factors beyond race doubtless also spurred the emergence of crime control as a modality of governance. Nevertheless, there is ample evidence that racialized mass incarceration finds its origins, as well as a persistent animating force, in racial politics.

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

Many elected officials opposing civil rights used the language of law and order to respond to, and in turn stoke, racial anxiety among whites. Recourse to such rhetoric partly reflected the ready availability of this frame. From the inception of the civil rights movement in the 1950s, southern politicians had disparaged racial activists as “lawbreakers”—as indeed they were.¹⁸ In the Jim Crow regions, citizens had long pressed basic equality demands through lawbreaking: sit-ins and freedom rides purposefully violated segregation statutes in order to challenge white supremacist social norms. Paradoxically, the very success of the civil rights movement created an incentive for its opponents to invoke crime tropes. Agitation for racial justice helped give birth to a national consensus condemning the frank espousal or brute enforcement of racial hierarchy, even as it generated opposition and insecurity among whites. With the moral triumph of the movement, such anxiety could no longer legitimately be expressed in openly racist terms. Quickly enough, however, political leaders mobilized white opposition to civil rights through a proxy language: “crime” became a coded vocabulary capable of marshalling racial fears without violating newly dominant egalitarian norms.

The contest pitting law and order against civil rights found especially momentous expression in the legislative arena. The 1964 Civil Rights Act provided a head-to-head showdown, with civil rights advocates eventually overcoming determined opposition expressed forcefully in the language of crime control.¹⁹ After 1965, however, “[c]rime became an excuse for not expanding civil rights and social justice. Civil rights and crime were inversely related on [Congress’] agenda; as action on civil rights withered, criminal justice was expanded.”²⁰ The crime rhetoric of the mid-1960s evolved into anti-crime legislation and programs that revolutionized federal, and subsequently state, approaches to crime control. Federal legislative hearings on crime increased dramatically, starting in 1968 and staying at historic highs through 2000.²¹ Federal crime spending increased four fold by 1990 before falling back a bit,²² and state spending on corrections increased three fold between 1980 and 2008.²³ The statutory laws that structured racialized mass incarceration seem firmly rooted in a politics of hostility toward civil rights.

A focus on race and the carceral system remains incomplete, however, without tying the racial politics of crime to the racial politics of welfare. Beginning in the 1960s, conservative political elites sought to use social anxiety generally and racial anxiety in particular to gain support for anti-welfare politics. Despite having been discredited by the Great Depression and repudiated by the New Deal, libertarianism recrudesced through the semiotics of criminality.²⁴ In stark contrast to a social consensus dominant since the creation of the modern welfare state that large-scale forces immune to personal effort largely trapped the poor, the language of lawbreaking relied on and promoted a social vision of individual failure rooted in moral depravity. Invocations of criminality conjured the specter of the undeserving poor.²⁵

On the hustings in 1965, then Speaker of the House and later President Gerald Ford demanded to know: “How long are we going to abdicate law and order—the backbone of any civilization—in favor of a soft social theory that the man who heaves a brick through your window or tosses a firebomb into your car is simply

the misunderstood and underprivileged product of a broken home?”²⁶ “Crime” conjoined minorities and the poor into a single, socially dysfunctional monolith, beyond the duty of the rest of society to care for and certainly beyond the ability of government to help. Gerald Ford’s philippic did not need to emphasize the racial identity of those who tossed bricks and firebombs and then hid behind the excuse of broken families. Daniel Moynihan left no doubt about their race in his famous 1965 report on blacks and welfare:

A community that allows large numbers of young men to grow up in broken families, dominated by women, never acquiring any stable relationships to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, disorder, are not only to be expected, but they are very near to inevitable. And they are richly deserved.²⁷

Since the late 1960s, Republicans and Democrats have competed to punish criminals and “welfare cheats.” Posturing through ever-more punitive crime policies and ever-more restrictive social programs, federal and state party politics drove mass imprisonment and simultaneously dismantled the social safety net.²⁸ A racialized fear of crime and a racialized distaste for the poor have remained central elements of American electoral politics for the last four decades. Racial politics have refashioned the state, building an enormous carceral system while hamstringing the willingness and even the ability of government to provide for the health, safety, and welfare of the public.

IV. The Colorblind Endorsement of Racialized Mass Incarceration

Most critiques of colorblindness, like that sketched earlier, focus on its role as a sword against affirmative action. In the law enforcement context, however, colorblindness serves more as a shield. In defining as racism any use of race, it simultaneously defines what counts as “not-racism”: all interactions not expressly predicated on race, no matter how closely correlated with racial hierarchy. A 1987 Supreme Court decision, *McCleskey v. Kemp*, epitomizes this defensive flip-side of colorblindness.²⁹ The Court famously shrugged off the most sophisticated and exhaustive survey of capital sentencing thus far undertaken when it rejected the claim that racism tainted Georgia’s death penalty machinery. Though it accepted that Georgia imposed the ultimate penalty on blacks who murdered whites at *twenty-two times* the rate for blacks who killed blacks, the Court nonetheless opined that these statistics proved “at most . . . a discrepancy that appears to correlate with race.”³⁰ *McCleskey*’s dismissal of the evidence rested on a particular conception of racism as the episodic expression of individual malice.³¹ Neither Georgia’s dual system of criminal enforcement, stretching back to slavery, nor the undeniable correlation between the excessive punishment of blacks and the persistence of a white-black hierarchy mattered to the majority. Enconced behind colorblindness, the Court insisted upon exceptionally clear proof of racial bias by a particular bad actor in

that specific case. The majority reasoned as if racial discrimination did not exist unless the record included a racial epithet or a confession of evil intent. Absent an explicit use of race, no basis existed for concluding that the glaring bias in the Georgia criminal system was “invidious.”³²

Though *McCleskey* involved the death penalty, the Court’s reasoning specifically encompassed the disproportionate incarceration of minorities. It did so not as a caution against but as a further spur to the reliance on an exceedingly narrow conception of racism. According to the Court, “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.” The dissent chastised the Court for its “fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.” Yet injustice is exactly what the colorblind logic in *McCleskey* rationalized. Colorblindness as a legal rule makes two moves. The first, and more widely critiqued, involves opposing every express use of race, now overwhelmingly confined to remedial efforts. The second, less often noted but key to the criminal law context, entails upholding as “not-racism” gross racial disparities corresponding directly to longstanding racial hierarchies, today typical of structural racism.³³

Colorblindness operates hand-in-hand with the crime control system on a broader cultural level as well. The insistence that race plays no role unless openly invoked ultimately facilitated the emergence of crime as a proxy language for race. Fear of crime could serve as a coded sop to white voters only because colorblindness provided a cover, however thin, for a patently racist narrative. Eduardo Bonilla-Silva identifies “cultural racism” as a key feature of what he terms “color-blind racism”: “*Cultural racism* is a frame that relies on culturally based arguments such as ‘Mexicans do not put much emphasis on education’ or ‘blacks have too many babies’ to explain the standing of minorities in society.”³⁴ Under the semiotics of colorblindness, only open references to skin color or the use of explicitly derogatory racial epithets count as racism. In contrast, alarmism about the cultural or behavioral deficiencies of minorities ostensibly bears no relation to racism and xenophobia. Recall the evolving vocabularies: super-predators, gang bangers, and welfare queens, or more recently, illegal immigrants and terrorists. Colorblindness is a form of racial jujitsu. It co-opts the moral force of the civil rights movement, deploying that power to attack racial remediation and simultaneously defend embedded racism. It defends racial injustice directly, for instance by insisting that massive racial disparities are “not racism.” It also does so indirectly, and perhaps ultimately more powerfully, by providing cover for racial stereotypes expressed in cultural and behavioral terms, for example through the imagery of minorities as criminals.

V. Racialized Mass Incarceration Today

With the blessing of the courts, the disproportionate incarceration of minorities has continued for four decades. The results, even when expressed in the cold nomenclature of statistics, are deeply disturbing. Between 1970 and 2003, the number of people in state and federal prisons serving at least one year behind bars rose from around 200,000 to 1.4 million.³⁵ At the end of that period, county jails warehoused another 700,000 persons either awaiting trial or serving sentences of under a year, while a further 4.7 million persons were on probation or parole.³⁶ Putting these numbers together leads to the harrowing truth that in 2003 the correctional system held under its coercive thumb *more than one in every twenty adult males* in the United States.³⁷ This incarceration rate, the highest in the world, exceeds the highest rate in Europe by 500 percent.³⁸ The United States has five percent of the world's population, but immures 25 percent of the planet's prisoners.³⁹

This “rage to punish” targets primarily poor African Americans and Latinos.⁴⁰ It does not, of course, entirely spare whites, who have also seen their rates of incarceration rise, if not as precipitously.⁴¹ Nevertheless, for poor blacks and browns—and for poor, young, uneducated black men in particular—a year or more in prison is now excruciatingly common. The hundred-to-one sentencing disparity between crack and powder cocaine has emerged as the quintessential example of how the war on crime, conjoined to race, especially targets blacks.⁴² Partly as a result, in 2000, black men were more likely to be in prison or jail (7.9 percent) than were white men in the high crime ages of twenty to forty who never completed high school (6.7 percent).⁴³ For young black men who failed to complete high school, the incarceration rate soared to 32.4 percent, meaning that at any given point nearly one in three languished behind bars.⁴⁴ Shifting from the rate of imprisonment within the population to the risk of incarceration during adulthood, by 1999, a black man born in the late 1960s had a one-in-five chance of having gone to prison for at least a year, while for men in that cohort who dropped out of high school, the risk of imprisonment surged to a staggering 59 percent.⁴⁵ Note that these last numbers *understate* the full reach of the criminal system, as they do not count the hundreds of thousands jailed for less than a year.⁴⁶ Nor do they count the dramatic increase in the number of incarcerated women, again primarily African American: “[B]etween 1990 and 2000 the number of women in prison increased by 125 percent, and at the start of the twenty-first century over 166,000 women were held in U.S. prisons and jails.”⁴⁷ Serious time behind bars has become overwhelmingly common, a destructive rite of passage for many young, disadvantaged nonwhites. It is thus also an omnipresent torsion on families and neighborhoods, an implacable pressure on poor communities of color. The crime control system, as Glenn Loury argues, is a “monstrous social machine that is grinding poor black communities to dust.”⁴⁸

VI. The President's Response

President Obama has been slow to address the grim reality superficially captured in the statistics on racialized mass incarceration. He was, though, perhaps too quick, in his own estimation, to respond to the arrest of the prominent African-American professor, Henry Louis Gates, Jr.⁴⁹ Gates, an internationally renowned Harvard faculty member and public champion of improved race relations, was arrested for disorderly conduct while at his home. Returning from a trip abroad on a Thursday in mid-July 2009, he initially had trouble opening his front door. A cautious neighbor called the police to report seemingly suspicious activity, though by the time the police arrived, Gates had secured access through the back entry and had managed to work open the front door. Sergeant James Crowley, a white police officer, questioned Gates, eliciting not only proof that Gates was in his own home, but an upbraiding for the interrogation. A verbal altercation ensued, with Gates alleging that the officer acted in a demeaning way and Crowley claiming that the professor was “tumultuous” in his conduct. Whatever the details, Crowley placed Gates under arrest for disorderly conduct, taking him in handcuffs to the local police station where he was held for four hours. The following Tuesday, amid swirling national attention, the Cambridge, Massachusetts, police dropped the charges against Gates.

On Wednesday, in a press conference otherwise dedicated to health care reform, Obama fielded a question about Gates arrest. After noting that he personally knew Gates and considered him a friend, Obama responded as follows:

Now, I don't know, not having been there and not seeing all the facts, what role race played in that, but I think it's fair to say, number one, any of us would be pretty angry; number two, that the Cambridge police acted stupidly in arresting somebody when there was already proof that they were in their own home; and, number three, what I think we know, separate and apart from this incident, is that there is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. And that's just a fact.⁵⁰

A political firestorm immediately enveloped Obama, with some charging him with inappropriately taking sides and even of being racist. Before considering Obama's response to this yowling, however, note the cautious substance of his remarks. Obama did not charge Crowley or the Cambridge police with racism. True, Obama castigated the police for acting “stupidly,” but he tied that to the decision to arrest a person who had already proved he was in his own home. On the issue of race and criminal justice, Obama was careful to cabin his point as “separate and apart from this incident.” At most, Obama's decision to talk about Gates' arrest and race in the same breath *implied* a connection—a connection Obama shied away from explicitly naming. Moreover, when he did discuss race, Obama objected to a police dynamic related to, yet at some remove from, Gates' experience. Obama did not criticize the sort of behavior perhaps demonstrated by

Crowley—a tendency among police to approach nonwhites, especially men, primed for a conflict over race and masculine status, and often expressed through an aggressive disrespect and a quick resort to physical domination. Instead, Obama chided the persistence of racial profiling, the “long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately.”

No doubt racial profiling constitutes a significant problem. Yet it is also (usually) a politically safe topic. Profiling conjures the image of the innocent black or brown person, typically someone with a high public profile and impeccable credentials, stopped and subjected to demeaning questioning for no reason other than the “wrong” skin color. Contextualizing Gates’ arrest in terms of profiling, the *Associated Press* gave this example: “Earl Graves Jr., CEO of the company that publishes *Black Enterprise* magazine, was once stopped by police during his train commute to work, dressed in a suit and tie.”⁵¹ The *Washington Post* provided another instance: “Billionaire media and sports entrepreneur Bob Johnson has described in interviews with *The Post* his experience [when] he was stopped by [hotel] security—locked in a revolving door—because a black man had committed a mugging in the building and they were stopping all black men coming out of the building.”⁵²

Gates surely shared with Graves and Johnson an enviable pedigree. As the *Associated Press* marveled, “This was, after all Henry ‘Skip’ Gates: Summa cum laude and Phi Beta Kappa graduate of Yale. MacArthur ‘genius grant’ recipient. Acclaimed historian, Harvard professor and PBS documentarian. One of *Time* magazine’s ‘25 Most Influential Americans’ in 1997. Holder of 50 honorary degrees.”

Yet Gates’ experience lacked the moral clarity—and hence the political safety—of the classic profiling episode. Instead, the Gates affair involved initially suspicious behavior and a concerned phone call. It also involved allegations of class conflict that sought to reverse the usual hierarchy between the white police officer and the arrested black civilian by pitting an elite Harvard professor against a working-class cop. As these slight permutations demonstrate, virtually any hint of culpability—of bad behavior—on the part of arrested minorities may serve for many to justify abusive police practices. In turn, hints of minority culpability raise the political costs of remonstrating against police abuse, for it can readily be portrayed as an attack on honorable police officers and an endorsement of undeserving and blameworthy troublemakers.

Whatever the distance between the Gates arrest and the stock semiotics of profiling, however, remember that Obama did not in fact raise a racial objection to Gates’ mistreatment. This is the central point. When Obama initially weighed in on the Gates affair, he did so in an extraordinarily cautious manner. Avoiding any direct allegation of bias, he did no more than implicitly tie Gates’ experience to the patent unfairness of racial profiling, a practice so indisputably objectionable that President George W. Bush had announced in early 2001, “It is wrong, and we will end it in America.”⁵³

What Obama did not do, even in his first unscripted remarks, was seize the moment to spark a much-needed conversation regarding the root causes and stark consequences of racialized mass incarceration. As Glenn Loury lamented:

It is depressing in the extreme that the president, when it came time for him to expend political capital on the issue of race and the police, did so on behalf of his ‘friend’ rather than stressing policy reforms that might keep the poorly educated, infrequently employed, troubled but still human young black men in America out of prison. This is to say that, if Mr. Obama were going to lose some working-class white votes to the charge of ‘elitism,’ I’d much rather it have been on countering the proliferation of ‘three strikes’ laws, or ratcheting down the federal penalties for low-level drug trafficking, or inveighing against the racial disproportion in the administration of the death penalty.”⁵⁴

Yet for all his caution, a political conflagration quickly engulfed Obama’s comments and, in the face of its heat, he retreated. Two days after his extemporaneous remarks, Obama explained that while he still considered the arrest “an overreaction,” he recognized that “Professor Gates probably overreacted as well.”⁵⁵ Describing his own choice of words as unfortunate, Obama praised the professionalism of Crowley, and proposed that he, Gates, and Crowley meet at the White House over beer. The event, subsequently described as the beer summit, took place at the end of July—with Vice President Joe Biden invited to sit in at the last minute, likely to avoid a photo shoot featuring two powerful black men facing down a white cop. The fest seemed to produce little more than a stiff civility summarized in the following terms by the *New York Times*: “They came, they met, they drank. They did not apologize.”⁵⁶

Many of the attacks on Obama, especially those tarring him with the charge of racism, arose within the parameters of colorblind ideology. Under this framework, any explicit reference to race amounts to racism, making the person who mentions race—perhaps Gates, certainly Obama—the racist. Obama did not respond by reiterating that profiling was a “fact,” let alone by deepening his analysis regarding the salience of race in the crime control system. Rather, he backed away from race almost entirely. Not only did he not mention race again, he created a symmetry between the conduct of Gates and Crowley, and ultimately between Crowley and himself. As all three sat down for a beer, each seemed equally innocent of anything more than a shared propensity to “overreact.” In this context, post-racialism can be understood as a rhetorical response to colorblindness. In the face of a charge that colorblindness has been violated by the mention of race, post-racialism retorts that race is not a factor at all.

Moving from the rhetorical to the pragmatic level, Obama’s reaction to the brouhaha also reflects a core tenet of post-racialism: race should not be allowed to become a distraction from issues ostensibly both more important and more amenable to political resolution. As Obama wryly observed in the same press conference in which he walked back his initial comments, “I don’t know if any of

you've noticed, but [in the last few days] nobody has been paying much attention to health care."⁵⁷ Obama's post-racial retreat should give us pause. As both rhetoric and strategy, post-racialism responds to colorblindness by adopting the latter's basic message, that race is irrelevant.

VII. Post-Racialism as Liberal Colorblindness

While a chasm separates the social visions of Obama and those who so quickly castigated him as a racist, when measured in terms of racial politics this distance shrinks disconcertingly. To understand this, reconsider colorblindness and post-racialism as racial frameworks that seek to answer the following questions: (1) What is—and is not—race?, (2) What is—and is not—racism?, and (3) what is the relationship between race, racism, and inequality, and by implication, what does justice require?

To provide a baseline, we might start by postulating the following points: First, race is socially constructed.⁵⁸ Yes, when in relative reproductive isolation, small groups of humans, for either geographical or cultural reasons, tend to share physical similarities. But this is not the same thing as saying that the overarching categories of white, black, brown, yellow, red, and so on reflect basic biological divisions. Humanity has been sundered into races not by nature but by historically contingent, culturally specific beliefs and practices.

Second, the process of dividing humans into supposedly descent-based hierarchies arose in conjunction with and in service to group-based exploitation. In other words, racism involves, on the one hand, the arrogation of resources through exploitation and efforts to preserve past illegitimate acquisitions, and on the other, justificatory efforts rooted in the manipulation of ideas of fundamental racial difference.

Third, as a result of their role in validating oppression, racial categories are imbued with social meanings and assumptions, whether about group culture, ability, values, or temperament. Fourth, these meanings explain (even as they receive support from) racial inequalities entrenched in the material reality of our society. The stereotype of most whites as honest, industrious, and ambitious contrasts with the calumny that most blacks and browns are thievish, lazy, and contented. In turn, these racial meanings seem to explain the distance between suburbs, ghettos, and barrios, even as this distance solidifies the seemingly obvious "truth" of these patent lies.

This conception blurs the line between race and racism. The meanings associated with race inevitably draw on notions of racial hierarchy, just as they justify and in turn are justified by the entrenched inequalities generated by racist practices. This conflation recalls the key insight captured in the early colorblind arguments of Thurgood Marshall that racism involves oppression and exploitation sanctified through the social construction of races. (It does not, of course, suggest the opposite, that all racial distinctions necessarily result in racial subordination.) This conception of race and racism is not offered to supplant more individualist notions of racism as involving, for instance, the virulent expression of racist hatreds or the cooler dynamics of cognitive bias. Nor is it intended to suggest the

primacy of more structural or institutional models of racism, for example those stressing deeply entrenched material inequalities and the inertial tendencies of privilege and disadvantage, even absent prejudiced actors. Rather, the point is to highlight the overarching dynamic of race and racism. Obviously, race works on many levels, not all oppressive, and racism often takes multiple forms, from conscious to cognitive to institutional. Yet at root, after serving for centuries to legitimize group exploitation, race and racism function today as deeply embedded expressions of group hierarchy.

Neither colorblindness nor post-racialism see race and racism this way. To begin with, both tend to divorce race from racism, and to understand race as little more than skin color. Colorblindness takes this position a bit further, seeing race as exclusively a matter of integument. In turn, this facilitates a colorblind understanding of racism as involving every express use of race. Because race by definitional fiat lacks all social meaning, colorblindness is able to present every use of race as equally without justification. To take cognizance of race, whether to segregate or to integrate, is ostensibly to treat people differently on the basis of an arbitrary characteristic that lacks social relevance and over which individuals have no control. Notice that this vision comprehends racism in individual and symmetrical terms; individual in that racism harms the person classified by race, and symmetrical in that nothing distinguishes the group positions of whites and nonwhites. Thus, affirmative action becomes “reverse discrimination.” The exclusion of minorities under white supremacy differs not at all from the preference given them in furtherance of social repair. In the words of Clarence Thomas, “government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination pure and simple.”⁵⁹ To recapitulate, under colorblindness, race is only skin color; it is not a categorical system constructed over a long history of group-based exploitation. Racism is any and every use of race; it has nothing to do with the imposition or defense of a racial hierarchy.

Post-racialism does not take such a hard line. It sees race not just as skin color, but as a historical artifact that gives race contemporary relevance. In the midst of the presidential campaign, Obama was thrown on the ropes by an uproar over some of the racial statements of his pastor, Reverend Jeremiah Wright. Choosing the National Constitution Center in Philadelphia as the venue in which to respond, Obama delivered a speech widely credited with saving his candidacy by offering a nuanced, compelling engagement with the continued pain of race. In doing so, he drew on a historically grounded vision:

Legalized discrimination—where blacks were prevented, often through violence, from owning property, or loans were not granted to African-American business owners, or black homeowners could not access FHA mortgages, or blacks were excluded from unions, or the police force, or fire departments—meant that black families could not amass any meaningful wealth to bequeath to future generations. That history helps explain the wealth and income gap

between black and white, and the concentrated pockets of poverty that persists in so many of today's urban and rural communities.⁶⁰

According to this insight, race carries social relevance today because of yesterday's discrimination. Thus, to talk of race is not, as in the colorblind conception, to commit the moral offense of racism, but rather to recognize a sorry history and its continuing legacy.

Nevertheless, post-racial thinking does not draw upon this memory of past and pervasive mistreatment in conceptualizing contemporary racism. Instead, in the post-racial vernacular, racism seems only to refer to individual bigotry. In one version of this, Obama in his Philadelphia oratory criticized "[t]alk show hosts and conservative commentators [who] built entire careers unmasking bogus claims of racism while dismissing legitimate discussions of racial injustice and inequality as mere political correctness or reverse racism."⁶¹ Obama correctly chastened colorblind partisans for alleging reverse racism every time someone seeks to raise the continued specter of race. But in doing so, he seemed to accept that claims about "racial injustice and inequality" might amount to "bogus claims of racism." Obama presents contemporary inequality as merely a vestige of the past, an inertial legacy of otherwise defeated history. The perpetuation of gross disparities—whether through commission or omission—does not count as an evolving form of racism. In another version of this, Obama rejected any role for race in the government's laggardly response to Hurricane Katrina, blaming instead "colorblind incompetence."

The implication that racism amounts only to personal prejudice is strengthened by the way in which Obama frequently reverts to the technique of symmetry. We have previously seen how he equated the "overreaction" of Gates and Crowley, and implicitly of himself. This technique was already much in evidence in Philadelphia, where Obama created parallels between white and black prejudice. He made congruent the outrage expressed by Wright and the prejudice harbored by his own white grandmother, linking "the bitterness and bias that make up [part of] the black experience in America" with "a woman who loves me as much as she loves anything in this world, but a woman who once confessed her fear of black men who passed by her on the street, and who on more than one occasion has uttered racial or ethnic stereotypes that made me cringe."⁶² Perhaps more powerfully, Obama also equated black resentment and white anger. Because this equation not only made symmetrical the outlooks of blacks and whites in the United States, but did so by validating the backlash politics that justified racialized mass incarceration, it bears quoting at some length. After explaining that black resentment must be understood in the context of a legacy of racial mistreatment, Obama continued:

[A] similar anger exists within segments of the white community. Most working- and middle-class white Americans don't feel that they have been particularly privileged by their race. Their experience is the immigrant experience—as far as they're concerned, no one's handed them anything, they've built it from

scratch. They've worked hard all their lives, many times only to see their jobs shipped overseas or their pension dumped after a lifetime of labor. They are anxious about their futures, and feel their dreams slipping away; in an era of stagnant wages and global competition, opportunity comes to be seen as a zero sum game, in which your dreams come at my expense. *So when they are told to bus their children to a school across town; when they hear that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they're told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.*

Like the anger within the black community, these resentments aren't always expressed in polite company. But they have helped shape the political landscape for at least a generation. Anger over welfare and affirmative action helped forge the Reagan Coalition. Politicians routinely exploited fears of crime for their own electoral ends. . . . And yet, to wish away the resentments of white Americans, to label them as misguided or even racist, without recognizing they are grounded in legitimate concerns—this too widens the racial divide, and blocks the path to understanding.⁶³

Post-racialism understands racism as individual bias and bigotry, something practiced symmetrically and with equal facility by whites and minorities. It rejects (or at least avoids any mention of) the notion that racism is rooted in asymmetrical group hierarchy. It ignores the way race plays out through efforts to preserve illegitimate group advantage, for instance through opposition to school integration or to affirmative action in employment or higher education contexts. It uncritically accepts and even seems to endorse efforts to harness group anxieties about declining racial status, treating the backlash politics that drove opposition to welfare and favored increased policing of minority communities as expressions of “legitimate concern.” Committed to a model of racism as private bias, post-racialism legitimates rather than challenges the dynamics that produced racialized mass incarceration.

VIII. Race and Public Policy

What, then, of the relationship between race, racism, and inequality? Here again slight differences mask fundamental agreement. Having stripped race and racism of almost all content, colorblindness would seem unable to explain the continued correlation between race and inequality in the United States. It resolves this dilemma by recourse to the notion of group cultures. Though colorblindness pictures race as empty of content, it also, contradictorily, conceptualizes races as associated with cultures. Recall that colorblindness facilitates discussions of group attributes in behavioral and cultural terms, excusing such stereotyping as

“not-racism” as long as biology is not explicitly invoked. In turn, this narrative answers the question of continued group inequality thusly: groups have earned their relative advantage, or deserve their relative disadvantage, because of choices, values, and abilities inherent in the groups themselves. In this light, to seek to alter the maldistribution of privilege and hardship is to engage in illegitimate “social engineering,” taking from those who value hard work to reward those with an entitlement mentality.⁶⁴ In the face of inequality rationalized as legitimate, warranted, earned, and deserved, colorblindness tells us society is morally forbidden to do anything to ameliorate the situation.

Post-racialism does not explain the connection between race and inequality in terms of failed minority cultures, but instead by reference to past discrimination. Yet, this does not translate into an obligation to specifically remedy persistent harms to minorities, for example in education, housing, health care, or disproportionately high rates of incarceration. Post-racialism does not posit that specifically seeking to remediate harms to minorities is immoral, as in the colorblind version. But it does contend that such efforts are pragmatically unwise. In his 2006 book, *The Audacity of Hope*, Obama argued that, “[a]n emphasis on universal, as opposed to race-specific, programs isn’t just good policy; it’s good politics.”⁶⁵ To explain this position, he recounted a formative experience while sitting in the Illinois senate, listening to a black colleague from an inner-city district decry racism, only to have a liberal white colleague lean over and explain, “You know what the problem is with John? Whenever I hear him, he makes me feel more white.”⁶⁶ Calling his white colleague’s comments “instructive,” Obama drew the following lesson: “Rightly or wrongly, white guilt has largely exhausted itself in America; even the most fair-minded whites, those who would genuinely like to see racial inequality ended and poverty relieved, tend to push back against suggestions of racial victimization—or race-specific claims based on the history of race discrimination in this country.”⁶⁷ The implication, for Obama, is that social justice should be pursued not through “proposals that solely benefit minorities and dissect Americans into ‘us’ and ‘them,’” but through “universal appeals that help all Americans (schools that teach, jobs that pay, health care for everyone who needs it, a government that helps out after a flood) . . . even if such strategies disproportionately help minorities.”⁶⁸ As president, Obama has recently reiterated this position: “I can’t pass laws that say I’m just helping black folks. I’m the president of the United States. What I can do is make sure that I am passing laws that help all people, particularly those who are most vulnerable and most in need. That in turn is going to help lift up the African-American community.”⁶⁹

Colorblindness and post-racialism differ fundamentally. Quite frankly, the present incarnation of colorblindness seems geared to preserving a status quo of continued white dominance—dominance, not supremacy. “White dominance” invokes a sociological understanding of group social, economic, and political position. It points toward the reality of racialized mass incarceration; to disparities in access to adequate housing, schools, and healthcare; to startling differences in economic security. Black median wealth currently stands at \$6,000 and Latino median net worth at \$8,000, while white median net worth is \$88,000. In contrast,

“white supremacy” recalls a particular racial ideology that justified dominance through bald claims about racial superiority and inferiority. The great triumph of the civil rights era lies in the defeat of white supremacy, not only as a set of ideas but in its most egregious practices. In turn, colorblindness stakes its claim to moral legitimacy on the basis of a robust repudiation of these defeated ideas. But the overthrow of white supremacy did not dismantle white dominance. On the contrary, as the current differences in wealth—and, more pointedly, in rates of incarceration—demonstrate, white dominance continues. Contemporary colorblindness defends such inequality by forestalling race-conscious remediation, by providing cover for stereotypical rationalizations masked in cultural and behavioral terms, and by attacking as racists all those who speak forthrightly about continuing racial distortions.

The post-racialism of Barack Obama is a million miles from this sort of ideological defense of inequality. His racial sensibility speaks movingly about the past injustices wrought in the name of race and to the current devastation of many minority communities. Discussing blighted neighborhoods in his adopted hometown of Chicago, Obama strongly rejects the explanation offered by conservative think tanks, the colorblind rhetoric that blames “cultural pathologies—rather than racism or structural inequalities.”⁷⁰ For Obama, these desperate places tell:

the stories of those who didn’t make it out of history’s confinement, of the neighborhoods within the black community that house the poorest of the poor, serving as repositories for all the scars of slavery and violence of Jim Crow, the internalized rage and the forced ignorance, the shame of men who could not protect their women or support their families, the children who grew up being told they wouldn’t amount to anything and had no one there to undo the damage.⁷¹

And yet, for however powerful his insight and however heartfelt his empathy, Obama’s post-racial politics take him to a terminus close to that of the colorblind ideology he otherwise rejects. Post-racialism reduces racism to individual, unreconstructed bigotry. It rejects the argument that racism also describes structural practices, deeply entrenched cultural beliefs among whites, or political efforts to mobilize the electorate to vote its racial fears. By truncating the meaning of racism, post-racialism helps diffuse our moral responsibility to directly challenge these dimensions of race as well as the persistent inequality they produce and protect. Instead, like colorblindness (if for very different reasons), post-racialism tells us to eschew the divisive politics of race-conscious efforts, and instead urges that we throw our weight behind universal solutions to the nation’s ills. More than thirty years ago, responding to the ascendance of a colorblind legal regime that increasingly turned its back on *just* outcomes, Alan Freeman trenchantly warned, “The net effect is that the victim of racial discrimination must persevere until the utopian day when everyone is entitled to distributive justice.”⁷² Is the net effect of post-racialism very different?

IX. Conclusion

The previous question need not be treated as a rhetorical one. We should ask whether Obama might not be correct that universalism is good politics. Is it possible that Obama can get us closer to racial justice by not talking about race? This question treats post-racialism as a matter of strategy, rather than as a framework for substantively conceptualizing race, racism, and inequality. Imagine, it says, the not far-fetched idea that Obama understands race and racism in group hierarchical terms, but has made the calculated decision to offer a more palliative vision in the hope of pushing a racial justice agenda further. Is it clear that he is wrong to do so? Framed in this way, let me acknowledge uncertainty. As a strategic response to recalcitrance among whites to dismantle the edifices of racial privilege, perhaps post-racialism is the better bet. Especially in light of the conflagration that followed Obama's tepid remarks about Gates' arrest, it is entirely plausible that a more direct engagement with racism and its legacies would achieve less. Thus, to be clear, my objection is not to post-racialism as a maneuver. Nor do I object to a certain amount of public dissimulation about race by racial change advocates. In the face of deep commitments to the racial status quo, it behooves leaders and activists alike to be strategic about how we pitch calls for much-needed change.

My concern, rather, is with post-racialism as a racial ideology, as an unexamined way to understand and act in response to race in our society. Obama may or may not embrace post-racialism in this way. Yet many of the folks he is speaking to do view race this way. In couching his remarks in post-racial terms, he not only appeals to a sentiment already present in the body politic, he legitimates and strengthens this zeitgeist. Return for the last time to the subject of racialized mass incarceration. Obama seems prepared to do nothing about it, and perhaps as a practical matter that is the correct political choice. Yet it is hard to swallow a decision to ignore the continuation of such rank injustice, and I strenuously object, even as I recognize that attempting to redress mass imprisonment head-on might produce more backlash than positive change. But it should be possible to take strategic, even ostensibly non-racial or universal approaches, to racial remediation, without promoting a post-racial narrative.

My deepest concern, then, is the use of post-racial framing in a way that fosters a liberal parallel to colorblindness. This sort of post-racialism tells us that racialized mass incarceration is not, in fact, a rank injustice. Post-racialism, even as given voice by Obama, limits racism to individual bias and dismisses the racial politics of anti-welfarism and the war on crime as responses to "legitimate concerns." For those who accept this perspective, racialized mass incarceration becomes little more than yet another lingering vestige of past discrimination, a statistical distortion to be remedied someday, when finally a "universal" appeal convinces whites that they too have an interest in not sending to prison one in every three young black men without a high school degree.

In *The Audacity of Hope*, Obama poignantly notes that as a society we now indifferently accept dramatic racial injustices. He writes, "Black men filling our

prisons, black children unable to read or caught in a gangland shooting, the black homeless sleeping on grates and in the parks of our nation's capital—we take these things for granted, as part of the national order, a tragic situation, perhaps, but not one for which we are culpable, and certainly not something subject to change.”⁷³ Post-racialism does not challenge this indifference, this sense that we are not responsible for, or capable of, remedying racial injustice. It rather reassures us that there is no injustice there to be remedied. Surely such expiation can only delay racial justice.

Notes

1. Remarks by President Obama in remembrance of Dr. Martin Luther King, Jr., Vermont Avenue Baptist Church, Washington, D.C., January 17, 2010.
2. Pew Center on the States, “One in 31: The Long Reach of American Corrections,” (2009), p. 7.
3. See Ian Haney López, *Racism on Trial: The Chicano Fight for Justice* (2003), pp. 110–133.
4. This discussion draws on Ian Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness,” *Stanford Law Review* 59 (2007): 985.
5. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). J. Harlan dissenting.
6. Brief for Petitioner, *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948), (No. 369), p. 27.
7. Op. Cit.
8. *Brown v. Board of Education* (Brown II), 349 U.S. 294, 301 (1955).
9. Christopher W. Schmidt, “*Brown* and the Colorblind Constitution,” 94 *Cornell Law Review* 203, 234 (2008). Recording a colloquy wherein Marshall sought to reassure a hesitant Felix Frankfurter that the NAACP was “not asking for affirmative relief,” but only for an end to “state-imposed segregation.”
10. *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955).
11. N.C. Gen.Stat. § 115-176.1 (Supp.1969), quoted in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 44 n.1 (1971).
12. *Swann*, at 45–46. See also *McDaniel v. Barresi*, 402 U.S. 39 (1971), which unanimously held that a school board could properly take race into account in attempting to achieve racial balance.

13. *Regents of the University of California v. Bakke*, 438 U.S. 265, 402 (Marshall, J., concurring in part, dissenting in part).
14. This discussion draws upon Ian Haney López, “Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama,” *California Law Review* (forthcoming 2010).
15. See Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (1999); Naomi Murakawa, “Electing to Punish: Congress, Race, and the American Criminal Justice State” (Ph.D. diss., Yale University, 2005); and Vesla M. Weaver, “Frontlash: Race and the Development of Punitive Crime Policy,” *Studies in American Political Development* 21 (2007): 230.
16. Weaver 2007, p. 259.
17. Murakawa 2005, p. 5.
18. Beckett 1999, p. 30.
19. Weaver 2007, p. 242.
20. *Ibid.*, p. 258.
21. Beckett 1999, p. 241 (Fig. 3).
22. *Ibid.*
23. Pew Center on the States, p. 11.
24. See Beckett 1999, pp. 28–61.
25. See generally Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (1994).
26. Quoted in Thomas Byrne Edsall with Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (1992), p. 51.
27. Quoted in Beckett 1999, p. 33.
28. Over the last two decades, state allocations to corrections have increased by 303 percent; meanwhile, state spending on public assistance has increased by just 9 percent (Pew Center on the States, p. 11). See also Solomon Moore, “Prison Spending Outpaces All but Medicaid,” *New York Times* (2 March 2009).
29. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

30. Ibid., pp. 286, 312.
31. Ibid., p. 292.
32. Ibid., p. 313.
33. To be clear, colorblindness does not describe the actual operation of the criminal law system in this country. On the contrary, crime control is often quite explicitly racialized, as both police and prison guard culture emphasize the irreducible importance of race. Indeed, police and prison routines are in many ways *formally* race-conscious, as suspect descriptions, profiling, and prison segregation demonstrate. R. Richard Banks, “The Story of *Brown v. City of Oneonta*: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause,” in *Constitutional Law Stories*, edited by Michael C. Dorf (2004), p. 223. Notably, when the Court recently struck down California’s express policy of racially segregating incoming prisoners, Justices Scalia and Thomas, the Court’s two most strident proponents of colorblindness, dissented, abandoning their prior racial principle. *Johnson v. California*, 543 U.S. 499 (2005).
34. Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States* (2003), p. 28.
35. Bruce Western, *Punishment and Inequality in America* (2007), p. 3.
36. Ibid.
37. Ibid.
38. Ibid., p. 15.
39. Paul Butler, *Let’s Get Free: A Hip-Hop Theory of Justice* (2009), p. 27.
40. Lois G. Forer, *A Rage to Punish: The Unintended Consequences of Mandatory Sentencing* (1994).
41. Among white men with no high school degree born between 1945 and 1949, the cumulative risk of incarceration was 4.0 percent. The risk of incarceration for this same group born at the end of the baby boom was 11.2 percent (Western 2007, p. 27).
42. Mauer, *Race to Incarcerate* (1999), pp. 154–56; Western 2007, pp. 52–81.
43. Western 2007, p. 17.
44. Ibid.

45. *Ibid.*, pp. 26, 27.
46. *Ibid.*, p. 24.
47. Candace Kruttschnitt and Rosemary Gartner, "Women's Imprisonment," 30 *Crime & Just.* 1, 2 (2003), internal citations omitted. See also Western 2007, p. 15.
48. Glenn Loury, *Race, Incarceration, and American Values* (2008), p. 27.
49. Peter Baker and Helene Cooper, "Obama Shifts Tone on Gates After Mulling Debate," *New York Times* (25 July 2009).
50. Quoted in Katharine Q. Seelye, "Obama Wades into a Volatile Racial Issue," *New York Times* (23 July 2009).
51. Jesse Washington, "Scholar's Arrest is a Signpost on Road to Equality," *Associated Press*, updated 6:18 a.m. ET (22 July 2009).
52. Krissah Thompson, "Scholar Says Arrest Will Lead Him To Explore Race in Criminal Justice," *Washington Post* (22 July 2009).
53. Washington 2009.
54. Glenn C. Loury, "Obama, Gates, and the American Black Man," *New York Times* (25 July 2009). See also James Forman, Jr., "Why Care about Mass Incarceration?," Georgetown Public Law Research Paper, online at ssrn.com/abstract=1488764, pp. 13–14. He notes that while many professional African Americans experience discriminatory policing, primarily the poor end up in prison. He ties this observation to Obama's outrage over the mistreatment of Gates and his silence concerning the almost one million blacks in prisons and jails.
55. Baker and Cooper 2009.
56. Helene Cooper and Abby Goodenough, "Over Beers, No Apologies, but Plans to Have Lunch," *New York Times* (31 July 2009).
57. Baker and Cooper 2009.
58. This discussion builds on Ian Haney López, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice," 29 *Harv. C.R.-C.L. L. Rev.* 1 (1994), as well as Haney López, *Post-Racial Racism*.
59. *Adarand v. Peña*, 515 U.S. 200, 240-41 n. 1 (1995).

60. Remarks of Senator Barack Obama, “A More Perfect Union,” Constitution Center, Philadelphia, March 18, 2008.
61. Ibid.
62. Ibid.
63. Ibid. (*italics added*).
64. Morris Abram, “Affirmative Action: Fair Shakers and Social Engineers,” 99 *Harvard Law Review* 1312 (1986).
65. Barak Obama, *The Audacity of Hope* (2006), p. 247.
66. Ibid.
67. Ibid.
68. Ibid., p. 248.
69. Sheryl Gay Stolberg, “For Obama, Nuance on Race Invites Questions,” *New York Times* (9 February 2010).
70. Obama 2006, p. 253.
71. Ibid., p. 252.
72. Alan Freeman, “Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,” 62 *Minn. L. Rev.* 1049, 1061 (1978).
73. Obama 2006, p. 253.