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# "Same Story Every Time / Being Black is Not a Crime": Gun Regulations and Recurrent Patterns of Government Control of Black Americans in the Nineteenth and Twentieth Centuries

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"Same Story Every Time / Being Black is Not a Crime": Gun Regulations  
and Recurrent Patterns of Government Control of Black Americans in the  
Nineteenth and Twentieth Centuries

An Honors Thesis  
Presented to  
The Faculty of the Department of Politics  
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Degree of Bachelor of Arts

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### A Note on Language:

In this project, I deliberately refer to *Black* Americans, with a capitalized B, for a number of reasons, some grammatical and others political. First, “[w]hen speaking of a culture, ethnicity or group of people, the name should be capitalized. Black with a capital B refers to people of the African diaspora. Lowercase black is simply a color.” (Tharps 2014). Just as labels identifying other cultural, ethnic, or otherwise unified groups of people, such as “Jewish” or “American”, are capitalized, so too should “Black”. Second, American Blackness is a *politicized* identity, having been coercively assigned political meaning through centuries of social and political divisions along racial lines. Whether or not there exists a biological basis or clear empirical boundary of Blackness, differential treatment for those labeled Black has long been an American tradition. It is thus a matter of respect and recognition. For both the grammatical and political reasons, “white” as an identifier is deliberately *not* capitalized because “whiteness” is not a true ethnic, cultural, or unified label, but rather was created, and exists only to negate, Blackness. As such, it is neither a unified nor cultural group, but rather the exclusion of a group, and bears no real political nor semantic value.

“Must I strive toward colorlessness? But seriously, and without snobbery, think of what the world would lose if that should happen. ... Life is to be lived, not controlled; and humanity is won by continuing to play in face of certain defeat...

And the mind that has conceived a plan of living must never lose sight of the chaos against which that pattern was conceived. That goes for societies as well as individuals. Thus, having tried to give pattern to the chaos which lives within the pattern of your certainties, I must come out, I must emerge.” *The Invisible Man*, Ralph Ellison

## **Introduction: Contemporary Relevance, Conceptualizations, and a Preview**

### **I. Contemporary relevance: an incident**

On a Saturday afternoon in August of 2014, a young Black man named Michael Brown was walking down a street in Ferguson, Missouri, when he was shot and killed by a police officer. Factually, this is about as much as has been agreed upon in this closely followed and highly visible case (Chuck 2014).

A friend who was walking with Brown presented a hostile and violent depiction of the officer involved. According to the friend, the officer drove up to the two young men and verbally harassed them, first telling them to “get the fuck on the sidewalk” and then singling out Brown, saying “I’m gonna shoot you”. Eventually, according to the friend, the officer fired shots at Brown, even after Brown ran away from the officer, with his empty hands displayed in the air, and killed him in what would seem to resemble an execution-style murder (Chuck 2014).

The Ferguson police department painted a very different picture of the encounter, portraying Brown as the hostile instigator of violence. According to the police department, the officer politely asked the two young men to move to the sidewalk, which angered and provoked Brown, who subsequently initiated a fight. Amidst a chaotic battle in the police car, one in which no neutral party can presumably *really* know what happened, the officer’s gun went off and Brown was killed (Chuck 2014).

Following this incident, there was born a tremendous racial consciousness, first locally in Ferguson, and then nationally across the United States. Residents protested loudly and visibly in the streets of the otherwise unremarkable St. Louis suburb, challenging and grieving the



killing—the individual act of the officer—as well as the systemic failures that followed, including a horrifically unprofessional handling of the case by local and state authorities. The protests garnered national attention, as the protestors, largely Black, were met by an almost exclusively white police force armed with tanks, snipers, and suited in riot gear (Davey and Bosman 2014). The asymmetry was striking and absurd, but also informative—the stark juxtaposition of unarmed Black individuals with white figures of authority, fingers on their triggers, revealed the same racialized fear, mistrust, and anxiety that shaped the asymmetric, lethal encounter between the white police officer and Michael Brown just a few days earlier.

Three months later, the cynicism of those protestors was largely vindicated when the police officer involved was not even indicted, let alone convicted, on any charges resulting from the lethal encounter. After a process riddled with unprofessionalism and racism on so many levels, protestors again took to the streets, this time having seen their cynicism confirmed. Not only had a police officer taken the life of their brother, neighbor, friend etc., but the criminal justice system, the system in place to protect and serve its citizenry of all colors, had shrugged in response (Davey and Bosman 2014). Now, the anger, despair, and cynicism were directed not just at the police officer who had taken Brown's life, toward an individual, but toward systems and institutions at the heart of American civic life and politics more generally.

### **A systemic trend**

It would be naïve and myopic at best, disingenuous and deceptive at worst, to tell the story of the shooting of Michael Brown without including the other stories of other young unarmed Black men who were killed under similar circumstances. The story of Michael Brown's death at the hands of the criminal justice system is neither unique nor unremarkable—as an

anecdote, it merely personifies a trend in American criminal justice. Indeed, beyond the death of Michael Brown in Ferguson, the killing of young Black men, and subsequent excusal by the criminal justice system and, oftentimes, general public, has become, in many ways, a sick tradition in the culture of American policing, criminal justice, and public opinion thereof.

It is far beyond the scope of this project to address fully this epidemic of state-sanctioned violence against young unarmed Black men. However, it is worth briefly recalling a few of the more recent egregious and well-known tragedies to illustrate the pattern. In November of 2014, Akai Gurley, a 28-year old Black man was killed, unarmed, in a public housing unit in Brooklyn (Goodman 2014). Before that, in Staten Island in July of 2014, a 43-year Black man named Eric Garner was killed over a dispute that followed from a few officers forcefully arresting him for selling untaxed cigarettes (Goldstein and Schweber 2014). The officers, who put Garner in a forceful chokehold, were not indicted (New York Times 2014). Before that, Trayvon Martin, a 17-year old Black teenager, was killed in Sanford, Florida by a self-designated “neighborhood watch coordinator” who was later acquitted on grounds of self-defense (Alvarez and Buckley 2013). Before that, in 2006, Sean Bell, a 23-year old Black man, was killed the morning of his wedding day when five police officers fired fifty bullets at him. Three of the officers involved were acquitted (Wilson 2008). And before that, in 1999, though by no means the first iteration of the pattern of racialized police violence, Amadou Diallo, a West African immigrant was killed by four officers who fired forty-one shots while Diallo was standing in the doorway of his apartment in the Bronx. All four officers were subsequently acquitted of all charges (Fritsch 2000). These incidents tell the stories not only of *agents* of the criminal justice system killing young Black men, but the *system* designed to carry out criminal justice sanctioning those actions.

With this wider perspective, we can see that those individuals protesting in the streets of Ferguson were not angry about an isolated incident nor any singular event, but rather a brutalizing pattern of events—what has been, for many of those people, the norm. They were not protesting one action by a system that has *failed* to hold perpetrators of racial violence accountable, but rather only the latest action by a system that has *succeeded* in maintaining indifference to, if not endorsing, racial violence. Indeed, an exceptional string of what appears to be systematic failures can only stretch so long until they ought to be seen as systemic successes.

## **II. Same story every time / Being Black is not a crime: a pattern**

The systemic and repeated failures of the criminal justice system to account for state-sanctioned violence against young, unarmed Black men became abundantly clear to me on a personal level when I attended a massive rally in New York City following the announcement of the non-indictment in the Michael Brown investigation. At this rally, there were many slogans and phrases that spoke to the specific incident in Ferguson (“Hands up, Don’t Shoot”); more striking to me, however, was that many, if not most, of the phrases I heard were not limited to this one incident, but instead spoke to a larger trend in policing, law enforcement, and the criminal justice system. Many condemned “stop-and-frisk” policing in New York or the system of mass incarceration as a whole. The phrase that seemed most explanatory to me, and the phrase from which this thesis borrows its title, was “Same story every time / being Black is not a crime”.

The first part of the phrase, “Same story every time”, suggested a pattern. As such, I was compelled to explore questions of race and the criminal justice through a methodology that explicitly valued long time horizons. By extending the time frame and including in analysis

historical context and past “stories”, what may seem to be isolated incidents can be more readily identified as recurrences of one singular pattern that manifests itself time and time again. What appear as countless stars, randomly situated in entropic clusters, actually constitute a constellation that has a purpose, story, and deeper meaning. The importance of seeing a pattern, of identifying a metaphorical forest from the tress, is paramount to the substance of this project, the purpose of which is largely to connect legislative instances, separated temporally and geographically, to identify a pattern of state-sanctioned control. From this pattern, then, we can draw meaning.

The second part of the phrase, “being Black is not a crime” is perhaps more straightforward and obviously linked to the substance of my project. If the first part describes a methodology, of seeking patterned constellations, the second describes the pattern’s substance: the criminalization of Blackness. When state-sanctioned authorities have shot and killed unarmed Black men, and juries and often public opinion acquit or otherwise refuse to hold those individuals accountable, the killing of those Black individuals by police officers is deemed somehow excusable, the logical, though implicit, conclusion of which is that those Black individuals were criminals, or, more accurately, were criminalized. This concept, the criminalization of Blackness, is essential to my project, as my project addresses ways in which the criminal justice system, through contrived and strategic definitions and redefinitions of who is criminalized, has been used to control Black populations. Essentially, this thesis considers when, where, why, and how being Black has been made a crime.

Reading the two phrases together as a whole, “same story every time, being Black is not a crime”, we can see a repeated and systemic pattern of the criminalization of Blackness. We can see that the deaths of those young Black men, all presumed to be criminals and treated as violent

and dangerous criminals, are all iterations of the same story that keeps resurfacing time and time again, a story of criminalizing young Black men and excusing their murders. We can see that a number of events that appear individually to be tragically meaningless are actually quite tragically meaningful in what they tell us about the nature of, and historic use of, the criminal justice system—my hope is that this project can expose and reveal even the slightest bit of that meaning.

### **III. Concepts**

#### **White supremacy – Racial fear and demand for control**

The meaning of that tragic story, told time and time again, is born from an American tradition that has critically shaped the trajectory, path, and character of American politics, society, and culture. In this project, that American tradition is conceptualized as a thirst for racialized control, a thirst that is largely the product of a fear of racial egalitarianism.

Such thirst, perhaps more recognizable as its fundamental ideological tenet, white supremacy, has existed at, and in fact shaped, the most critical stages of maturation of the country. Ta-Nehisi Coates of *The Atlantic* writes: “white supremacy is not merely the work of hotheaded demagogues, or a matter of false consciousness, but a force so fundamental to America that it is difficult to imagine the country without it.” (Coates 2014). Its most visible, if distant, manifestations compose our nation’s greatest moral shames and tragedies—slavery, the Civil War, Jim Crow, and perhaps mass incarceration— and its alleged defeats our greatest moral triumphs—emancipation, the Civil Rights Movement, etc. It was written into the founding document that established American exceptionalism—the Constitution— and remains one of the last vestiges of American politics, culture, and society—mass incarceration—that makes

America truly exceptional. Indeed, the legacy of white supremacy and racialized control is inextricably bound with the legacy of American politics, culture, and society.

The fear that underlies white supremacy exists in this project as a response to sociopolitical movements demanding racial egalitarianism. Such moments include Reconstruction—when slavery was formally abolished and Black Americans were granted legal equality—and the Civil Rights Movement—when Black individuals sought to further deepen and enjoy such equalities. In such moments, my project shows, there existed an anxiety in the collective consciousness of white supremacist America, an anxiety of losing control over Black bodies and upsetting the sociopolitical order that has treated them, the white power elite, so well. A fear of Black encroachment into white sociopolitical territory is presumably a very similar anxiety to that which has motivated police officers to shoot and kill so many young Black men.

This racialized fear is not an impotent nor immobile one; rather, it produces, or demands, *control*, often manifest in racialized violence and terror. In the cases of the young Black men who were killed, the control came in the form of a bullet and subsequent non-indictment or acquittal. In my project, the mechanism of instituting racialized control is more clever, though no less effective—institutionalized racism.

### **Institutionalized racism**

Institutionalized racism, in this project, is the racialized construction of institutions, particularly the criminal justice system, to serve a racialized purpose. Racism, in this way, precedes the institution—racism exists as such, as the constant thirst for racialized control that has so profoundly shaped the American character, and seeks a mechanism through which it can be realized. The institution functions as a channel for and tool of racism. This should be

contrasted to what can be understood as racist intuitionism, in which the institution precedes racism, but is infected by it. Racist institutionalism would suggest that the criminal justice system has incidentally racialized effects, but they are just that – incidental. Because my project focuses on the former rather than the latter, it considers not just the role of race in the criminal justice system, but also the role of the criminal justice system in race relations. It sees racism as an agent of the criminal justice system, but more insidiously, sees at least parts of the criminal justice system as agents of racism.

Institutionalized racism is the product of racial fears and demands for control. In the case of the state-sanctioned deaths of so many young unarmed Black men, the racial anxiety or fear at hand is a response to, as mentioned earlier, the blurring of sociopolitical racialized divisions, of young Black men transgressing and leaving their designated Black space by wearing hoodies or talking back to white authorities, officers of the state. Such fears, products of white supremacy's anxiety, demand a systematized way to control that encroachment of white supremacist sociopolitical borders, to reinstate racialized sociopolitical control to bolster its supremacy. This results in an institutionalized mechanism of excusing the deaths of young Black men, subsequently institutionalized lethal control of their bodies and actions. Institutions of the criminal justice system thus have become slaves to the anxieties and demands of white supremacy, to the same constant thirst for racialized control that bolstered slavery and Jim Crow.

In my own project, racial fears and anxieties are revealed at a number of transformative moments in the development of American politics and society, moments at which the country became a little more racially egalitarian, at least in law. The project reveals at such moments the institutionalized products of those racial fears and anxieties, namely pieces of legislation that, on their face, appear to conform to social or political standards that demand neutrality in regards to

race, but in actuality have deeply racialized purposes that bolster and institutionalize white supremacy. Such pieces of legislation are born from that constant American anxiety that demands racialized control, and demands further its systemization.

### **Colorblindness**

If white supremacy and the racialized control it establishes rest on the logic of seeing and constructing lines of racial difference, then an opposing ideology, racial egalitarianism or racial equality, would *not* see race, in order to afford all humans equal opportunity and equal treatment *regardless* of their race. If white supremacy sees you *because* of your race, equality sees you *despite* it. If white supremacy talks about race, equality ignores it. Perhaps this is best, and most famously, expressed by Dr. Martin Luther King, Jr.'s dream, that his "...little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." (King 1963).

Racially progressive developments in American politics and society have thus sought to eradicate, if not loosen the grip of, white supremacy by demanded varying degrees of racial neutrality in legal, political, and social relations with the purpose of advancing racial equality within them, of forming a more perfect union. By ignoring race, according to the logic, our little children will be judged only on the content of their character, only by that which is morally judicable. Following the end of the Civil War, this type of legal and political equality became codified through the passage of Constitutional Amendments; a hundred years later, the Civil Rights Movement further codified and entrenched that approach to racial equality through progressive legislation.



However, as this project will show, this approach to rooting out white supremacy by choosing not to acknowledge, mention, or see race, an approach known as colorblindness, is overly superficial and has proven quite ineffective. Political and legal mandates of colorblindness have not rooted out institutionalized racism, but only forced the adoption of a race-neutral façade on top of racialized intent. Rather than becoming less invidious or insidious, racism merely became more clever and elusive to the progressive eye.

The institutional means through which the state has sanctioned those who have killed young unarmed Black men, the institutionalized racism, surely does not reference nor acknowledge race—this would offend the public’s sensibilities concerning the inappropriateness of overt racism in both politics and society. Instead, a number of institutional mechanisms, none of which explicitly reference race, work together to achieve a racialized effect, to maintain racialized control, while appearing ostensibly colorblind on their face. Both transformative eras, Reconstruction and the Civil Rights Movement, thus presented new challenges to America’s white supremacist racial order, though, as I show, not any challenges that proved insurmountable to America’s unique sociopolitical legacy.

#### **IV. The Road Ahead**

The first chapter of the project is a literature review. It describes the subfield, methodology, and aims of American Political Development, namely pattern identification over long periods of time, and situates this project within that subfield. It describes and justifies the critical-race perspective that this project adopts, and, in doing so, details literature relevant to institutionalized racism in three policy areas—disenfranchisement law, mass criminalization, and colorblindness.

The second chapter provides a blueprint for what iterations of the identified pattern look like by describing and analyzing the convict leasing system following the Civil War. It provides an instance of racial progressivism in which white supremacy was challenged to re-establish the control over Black bodies it lost when slavery was abolished, and to do so in a way that would appear not to acknowledge race. It describes that response, the convict leasing system, as an ostensibly colorblind form of institutionalized racism, resulting from white supremacy's racialized anxieties, designed to re-exert control over the Black population.

The third chapter describes the first iteration of the pattern, by evaluating a particular policy area, gun law, in the wake of the Civil War. Restrictive gun laws were passed amidst racial progress and increased egalitarianism, remarkably soon after Constitutional Amendments demanded colorblindness with the purpose of realizing the dream of racial egalitarianism. The laws appeared colorblind on their face; however, a number of factors, I show, point to a deeply racialized purpose, and moreover support an argument that these gun laws, which are facially neutral and thus ostensibly colorblind, are actually quite potent instances of institutionalized racism constructed to quell white supremacist anxiety.

The fourth, and final, chapter describes the second iteration of the pattern, a restrictive law passed in the wake of the Civil Rights Movement. At the time, there existed a number of multifaceted challenges to white supremacy, diverse in philosophy and ideology. One such challenge, I show, required the possession of guns to carry through their particularly revolutionary challenge to white supremacy. I argue that an ostensibly colorblind law passed in the geographic hotbed of that group's activity and following an event showcasing their gun-centered ideology was motivated by purposes of racialized control, fueled by white supremacist anxiety concerning a racially egalitarian revolution. This instance of institutionalized racism thus

bears tremendous resemblance to the earlier instance of restrictive gun laws, as well as to the convict leasing system, in that racialized control was institutionalized to re-exert control over a Black population whose new racial freedoms threatened white supremacy's grip on American politics, culture, and society.

Viewing this pattern as a whole, “zooming out” from the narrow context and iteration of each individual occurrence, reveals a meaningful conclusion concerning the development of gun law in America—that white supremacy and a thirst for racial control have played profound roles in shaping it. Such conclusions are so meaningful not only because of their intrinsic value, but also because they hold a number of important implications. Extended vertically (temporally) and applied to a more modern context, they explain contemporary sociopolitical events that seem anomalous and puzzling without an informed historical analysis. Extended horizontally, into other policy areas, they point to a disturbing possibility, that more than just gun policy, American white supremacy has shaped and manipulated the development of the criminal justice system as a whole.

## **Chapter I: A Review of Relevant Literature: Patterns, Institutions, Race and Control**

### **Introduction**

This project seeks to identify a specific pattern within the development of the criminal justice system: *in times of racial liberation and expanded racial freedoms in the United States, the criminal justice system (in the cases studies to which this project is limited, the criminal justice system as limited to restrictive gun laws) has been used as a reactionary mechanism of racial control to respond to an increasingly egalitarian racial order, and it has done so through the use of “colorblind” statutes that have racial effects.* Both in content and approach, this argument is entirely indebted to the literature on APD, critical race studies, and sociology of race. Methodologically, it seeks to *explain current political and social circumstances by identifying a pattern of political behavior and institutional development.* Substantively, it seeks to *analyze race and racial dynamics as crucial factors in the development of institutions and politics.* The project is grounded in a rich body of literature that adopts a critical race perspective in considering political and institutional development. This chapter provides a review of that literature, and does so in distinct sections to provide background for each relevant concept and perspective utilized throughout the thesis.

First, the chapter summarizes some of the aims, objectives, and methods associated with the subfield of American politics, American Political Development (APD). APD emphasizes that current political conditions are part of an identifiable historical pattern, and, as such, can only be explained in light of those past dynamics. To identify such patterns, it demands a particularly

historical perspective on racial politics, one that is typically empirically and normatively synchronous with critical race studies.

Second, I discuss methodological approaches in APD that emphasize the importance of timing, sequencing, and identifiable patterns. In particular, APD scholarship advocates a long-term historical perspective, which this project adopts. In addition, often these longer time horizons are punctuated by more short-term changes, so-called “critical junctures,” which “place institutional arrangements on paths or trajectories, which are then very difficult to alter” (Pierson 2004: 135). As such, concepts of time will also be a critical organizational device in the analytic narrative this thesis aims to construct.

Third, I evaluate the APD approach to race, and more specifically so-called “ascriptive hierarchies”, as parallel to certain roles of institutionalized racism. Then, in keeping with the historical and institutional focus of APD, I illustrate three relevant policy areas in which institutionalized racism has been made particularly manifest, policy areas whose developments in American politics are particularly important to addressing how seemingly colorblind policies have been racialized the criminal justice system. These include: (1) disenfranchisement law, (2) mass criminalization, and (3) the concept of “colorblindness” lawmaking more generally. This chapter summarizes literature and key findings in each of these topic areas and considers both how they are related to one another and how they motivate this thesis.

Finally, this chapter makes explicit the research gap that motivates this project. That gap is two-fold. First, as a project of APD, it provides order and understanding to the emergence and recurrence of systems of racial subordination in the historical development of American politics. Although Rogers Smith’s “multiple tradition” thesis provides insight into the dynamic terrain of American Political Development and the thought traditions that shape it, it does not provide

insight into under what conditions or when those traditions emerge to define the political terrain. Second, as a substantive analysis of criminal justice and racial control, it converses with the landmark scholarship of Behrens et. al., which highlighted how criminal justice functions as a system of racialized political control. Nevertheless, this work is both too broad and too narrow. It is too broad because it considers the criminal justice system as a monolithic, singular entity without regard to specific laws or trends over time; it is too narrow because it only considers the criminal justice system as a form of political control, and thus omits analysis of social or economic control that it may influence. By contrast, my project is more specific in that it focuses on a specific policy area and thus looks at particular institutions within, or uses of, the criminal justice system, and is broader in that it considers methods of control implemented through the criminal justice system that are not limited to political participation, including social, economic, and cultural control.

## **I. Patterns Over Time: Aims of American Political Development**

This thesis project seeks to identify and explain a unique pattern in the development of race, politics and, the criminal justice system in the United States, by considering how past political legacies of race and criminality are inextricably linked and contribute to contemporary politics on questions of race equality and justice. In this regard, it is grounded in and aims to contribute to American Political Development (APD), a subfield of political science that seeks to identify patterns in the development of American institutions and politics by placing a particularly strong emphasis on the context of traditions and historical legacies of institutions. Writer, and perhaps informal advocate of APD, Ta-Nehisi Coates, similarly explains contemporary racial dynamics by exposing historically racialized institutional development. In

doing so, he has used a thought experiment that effectively captures the fundamental question of American Political Development: if an alien landed on Planet Earth and read certain current socioeconomic statistics, and then “measured that against the history and policies of this country”, would they be surprised about “who we are and where we are”? (Coates 2014).

American Political Development is, at its core, a challenge to make meaning of institutional, ideational, and policy change by identifying and explaining patterns. APD holds the view that only by identifying patterns can we understand and explain individual episodes of political change. This fixation with patterns is essential; it is the “sine qua non” of the subfield (Francis TBD: 26) (Orren and Skowronek 2004: 9). In APD, patterns, understood as “political regularities observed over time” (Orren and Skowronek 2004: 7), are what give meaning to a series of political events that, when assessed individually, amount to “...a relentless succession of events impervious to any larger meaning...” (Orren and Skowronek 2004: 7), or more colloquially but succinctly, “...just ‘one damn thing after another’” (Orren and Skowronek 2004: 7). By identifying patterns, we are able “...to locate the key components of a situation and...identify meaningful points of change...” (Orren and Skowronek 2004: 7) The process of pattern identification most commonly used in APD literature, and the one that I use in this project, requires the researcher to “...first...classify historical material according to certain general characteristics and the circumstances of their occurrence and then to employ this classification in the analysis of material drawn from other times or places to determine the presence or absence of these same general characteristics and circumstances.” (Orren and Skowronek 2004: 8).

APD traces institutional developments over long time horizons to explain, in particular, political problems or inequalities in contemporary society. This historical approach is perhaps

the field's defining quality. APD scholars Stephen Skowronek and Karen Orren write: "...the characteristic that most readily identifies APD schools among other political scientists is their dedication to analyzing American politics through intensive research in American history." (Orren and Skowronek 2004: 5). Justifying this historical focus of APD, they write: "because a polity in all its different parts is constructed historically, over time, the nature and prospects of any single part will be best understood within the long course of political formation." (Orren and Skowronek 2004: 1). Megan Francis, a prominent APD scholar whose work has been essential to this project, similarly emphasizes the importance of this historical account of political change: "APD scholars are not simply interested in explaining a particular moment in time; their inquiry is about asking big questions concerning how institutions form and in identifying reasons for stability and change." (Francis 2014: 12). A political occurrence, in other words, cannot be fully explained without consideration given to the historical context that shaped it. Research in APD thus aspires to explain the present as a consequence of past political, institutional, cultural, and/or constitutional configurations.

Although APD research deliberately employs a historical perspective, the subject of the actual projects, the puzzle presented or question asked, is typically about the present. According to Orren and Skowronek, APD, "...has a decidedly 'presentist' orientation... and because the bearing is toward the present, the insights practitioners seek from the past tend to be more analytic and overarching than those usually found in historical work on particular periods." (Orren and Skowronek forthcoming: 2-3). Historical context is considered in as far as it pertains to present politics. The value of historical developments thus lies principally in its relevance to some aspect of current politics. The scholarly objective is ultimately to understand how we got to



where we are *today*, how to explain our *current* politics, with the foundational assumption that history matters, that the present is always already constructed by past experiences and actions.

## **II. A Historical Approach and Methodology: Both Long-Term and Immediate**

Part of what makes this thesis project unique and worthwhile, as well as part of what defines the subfield of American Political Development's distinct position within political science, is the heavy emphasis that it places on history, time, and patterns and regularities in policy and institutional development over time.. In the case of my own project, the general task is, by analyzing historical developments within the criminal justice system, to identify patterns of racial control and backlash despite overt rhetoric of equality. It is not at all dissimilar to Megan Francis' work, which identifies "...the pattern of expanding African American political rights and the resulting contraction of these very rights through the criminal justice system..." (Francis TBD: 26).

My deliberate approach to considering time is largely grounded in the historical institutional methodologies as outlined by Paul Pierson in his study, *Politics in Time*. In that book, Pierson aims "to flesh out the often-invoked but rarely examined declaration that history matters." (Pierson 2004: 2). When embarking on a social science research project, Pierson argues, the researcher ought to make history central to their question (Pierson 2004: 2). Logically, he argues that because sequence and order and other historical factors change the way institutions develop, if we are going to study institutional developments, we ought to account for their histories as well. This argument should not be familiar, as it is a central principle in the subfield of APD.

Pierson, in favoring what he calls a “moving picture” view over a “snapshot” view, of placing each moment “in time”, values the historical long-term approach that I utilize. I consider institutional developments across time rather than showing how they appear at certain snapshots in time. However, in doing so, he also created a separate category of historical inquiry, namely thinking about short term, “snapshot” history. His long-term approach on its own is not sufficient for the same reason it is necessary: history matters. Each episode, though part of a larger pattern, is unique in its particular events and context. There exist, within patterns, “...meaningful critical junctures or ruptures in political practices, ideas, laws, or institutions...” (Engel TBD: 9). These critical junctures, transformative moments within political and institutional development, are why the “episodes” are not identical. The immediate economic context plays a significant role in defining how a pattern is realized in a political climate. It is impossible to fully understand systems of racial control and punishment in the Reconstruction South without knowing at least a little bit about the Reconstruction South.

I will thus seek to explain laws using both a longer historical context, thinking about how this pattern has looked historically and thinking about events leading up to the event or development under study, as well as their immediate temporal context, thinking about what was happening at certain times in American politics. I will consider both the “episode” and the “series”. This will allow me to consider how certain short-term episodes and political, social, and economic climates (Reconstruction, New Deal, Civil Rights Era) influenced the manifestation of the long-term pattern I identify, in order to better understand how such long-term trends and patterns have influenced the present state.

My project, exposing a pattern that has been present throughout American political development, grows largely out of a body of literature surrounding criminalization and racial

control during one particularly critical juncture: Reconstruction. The literature on post-Reconstruction criminalization and race relations can be divided into three areas: political, social, and economic. The political literature details the political forces and dynamics that defined the era, showing how white supremacist race relations shaped political relations (Kousser 1999:3) (Valelly 2004:23). Scholars expose and explain political methods to silence Black political participation during the Reconstruction Era. The social literature, by contrast, details the sociological and cultural forces that defined the era, again considering how white supremacy and criminalization defined relations, though this time focusing on culture and society (Dubois 1935) (Ayers 1985) (Takaki 2008). This, of course, is critical background information for my own project because those sociological dynamics that relate to race and criminalization have travelled historically with American political development, shaping politics and our understandings of race and criminalization along the way. Lastly, a great deal of the research concerns economic practices, race relations, and criminalization in post-Reconstruction United States. Here, the defining development or event is the practice of convict labor, a clear intersection among many different distinctly American legacies, including criminality, capitalism, and white supremacy. These sources detail the practice and the political and economic relations surrounding the practice, which again, will inform my project because those same dynamics, those same connections between racial domination and criminalization, reappear consistently through American political development (Lichtenstein 1996) (Ayers 1985) (Blackmon 2009).

Similarly to Reconstruction, there is a significant body of literature that focuses on the time period of the next major, sudden expansion of minority rights: the Civil Rights Era, occurring largely between the mid-1950s to early 1970s. Because this episode of American history was such a critical juncture for race relations and mechanisms of control, the literature is

worth reviewing to provide a context and understanding of what was happening then. Political scientists and historians detail the simultaneous expansions and methodic political exclusion of racial minorities that occurred during the Civil Rights Era (Kousser 1999) (Valelly 2004). Alexander, in *The New Jim Crow*, provides detailed descriptions of political and social circumstances during and immediately after this time period—description that is invaluable to my project because it contributes to a body of literature that provides insight into the immediate temporal context that shapes the developing legacies (Alexander 2010). Murakawa details the longer-than-commonly-thought lifespan of “law-and-order” rhetoric, and, in doing so, provides insight into the tense racial dynamics of post-WWII American politics. Though she explicitly rejects providing a “snapshot” into Civil Rights Era America, she does seek to “...retrace how concerns for racial order were articulated as ‘law-and-order’ over the entire post-war period, even before the perfect-storm conditions of increased crime and accelerated riots.” (Murakawa 2008: 29). This historical glimpse into the dynamics of race and criminalization in post-war, pre-Civil Rights Era is supplemented by other sources that detail only racial dynamics in the same time period and enhance our understanding of racial tensions going into the Civil Rights Era (Frymer 2007) (Francis TBD) (Katznelson 2006).

### **III. Critical Race Perspectives and Legacies of Institutionalized Racisms**

The lens through which I view the development of American politics and the criminal justice system is primarily through race and racial subordination. That is, when considering the ideas and traditions that shape our institutions, as well as the outcomes and manifestations of those traditions, I privilege ideas grounded in and resulting in racial hierarchies. This perspective

is obviously not original, and has a deep genealogy in American Political Development and critical race studies.

Rogers Smith writes about three traditions, which, together, he understands as defining American political culture: “liberalism”, “republicanism”, and “ascriptive hierarchy”. The latter, the most important for my project, includes “inegalitarian ideologies and conditions” (Smith 1993: 549), the subjugation and subordination of one identity group or class of individuals. This, of course, does not have to be race—he writes “For over 80% of U.S. history, its laws declared most of the world’s population to be ineligible for full American citizenship solely because of their race, original nationality, or gender.” (Smith 1993: 549). This history of exclusion extends to a multitude of inegalitarian orders in U.S. political history, but surely one of them, and I would argue one of the most prominent, is along racial lines. If “ascriptive hierarchies” have been a fundamental tradition in shaping American political development, and one of the most influential and prolific “ascriptive hierarchies” is racial hierarchies and racial subordination, then it is worth paying particular attention to how racial ideologies have shaped American political development and, more specifically, the American criminal justice system.

The implications of adopting this perspective are not entirely straightforward. Within the subfield of American political development, it can be said that there are generally two schools of thought: “historical institutionalism”, which privileges the assumption that “...the goals that actors choose to pursue, and those that they are able to pursue effectively, are shaped by the institutional arrangements through which they and other political actors must operate.” (Glenn 2004: 154); and an “ideational” school, in which “ideas matter..., especially ideas about the nature of American identity, about ‘us vs. them’ and about what ‘we’ the people owe each other versus what we owe outsiders.” (Glenn 2004: 156). Whereas critical race historical

institutionalists may limit their analytical focus to the racialized institutional make-up of the criminal justice system over time, a critical race ideational scholar would likely limit their scope to the racialized ideas, “norms, narratives, or ideology” (Glenn 2004: 156) that have surrounded the development of the criminal justice system. My project, however, seeks to bridge these two schools in that it puts forth an explanation of *when* those racialized ideas and ideologies, Smith’s “ascriptive hierarchy” tradition, are translated into empirical institutional outcomes. Put into more common and recognizable terms, my project considers not just racism, and not just institutions, but the motivations, conditions, and effects of one example of institutional racism.

There is additional literature that tracks and seeks to explain institutional racism in American political development. The literature generally considers how and why racism can persist in a supposed post-racial society, how “...systematic racial inequalities remain embedded within a society that, outwardly at least, increasing integrated”. (Lieberman, x).

Where APD scholars evaluate race, they treat it not as just a demographic category, but instead as a critical dynamic that has shaped, and continues to shape, political institutions and ideas. There is substantial research within APD dedicated to each of these concepts, critical perspectives focused on gender, race, sexuality, etc. (Frymer 2007) (Katznelson 2006) (Clemens 1997) (McDonagh 2009). My approach in this thesis is informed by the critical race perspective adopted by APD scholars, which always views political changes and events through a racial lens and constantly asking what race has to do with it. For example, Joseph Lowndes, Julie Novkov, and Dorian Warren, editors of the central anthology on race and American Political Development aptly titled Race and American Development, articulate this perspective: “Race is present at every critical moment in political development in the United States, shaping political institutions,

political discourse, public policy, and its denizens' political identities." (Lowndes, Novkov and Warren 2008: 1).

Some political scientists, sympathetic to the historical institutionalist perspective, including Paul Frymer and Lowndes, Novkov, and Warren respond to this puzzle by providing a theoretical conceptualization of racism as a defining factor of institutional development. In short, in the development of American politics, race matters. Racism is, more than merely an individual attitude, is "...burrow[ed] deep into the core of American political institutions" (Lieberman 2001: x). Frymer writes that "[racism] is continually reproduced by politics; it is constitutive of the American state, its rules, its norms, and its forms of democracy" (Frymer 2007: 18). He criticizes in particular social science disciplines that treat racism as individualized and exogenous to their studies of systems and institutions, relegating it to the realm of individual rationality and psychology (Frymer 2007: 19). Similarly, Lowndes, Novkov and Warren utilize Chief Justice John Roberts' particularly narrow, individualized conception of racism, which he voiced in *Parents Involved ...* (2007) as illustrative of what Frymer criticizes. They contend that Roberts' superficial construction of racism as an individual's attitude "...blinds him to the institutional, cultural, and economic embedding of racial discrimination and its production of intractable patterns of hierarchy, exclusion, and diminished possibilities based on one's racial position in society." (Lowndes, Novkov and Warren 2008: 10).

Other political scientists define institutionalized and structural racism by providing case studies of the phenomena that Frymer and Lowndes et al. conceptualize theoretically, instances in which racism was built into social and political structures and ultimately existed more as a structural, institutional factor than a person's attitude. Ira Katznelson, in his book *When Affirmative Action Was White*, exposes and thus implicitly conceptualizes institutional racism

by illustrating the deeply racialized nature of New Deal programs, institutions that we typically think of as liberal, progressive, and immune from biases. He shows "...how policy decisions dealing with welfare, work, and war...in the 1930s and 1940s excluded, or differentially treated, the vast majority of African Americans." (Katznelson 2006: x). The racial inequities, he argues, resulted not from a single person who treated Blacks as inferior, but rather from the deliberate architecture and structuring of the institution itself. In Shifting the Color Line, Robert C. Lieberman similarly exposes the racialization of supposedly progressive programs by constantly asking how race shapes politics and politics shapes race in welfare policy development. He argues that "[p]olitical institutions and public policies take distinctive shapes at particular moments that reflect racial biases...in political power" (Lieberman x), and proves it by showing that the story of institutional welfare policy development in the United States is one of exclusion and consistently racial politics (Lieberman 2006: 6). Both of these case studies tell stories of institutionalized racism, a type of racism that eludes the overt rhetorical racism that is extinguished in our allegedly post-racial politics (Mendelberg 2001), but also one that is intrinsically linked to the historical development of institutions in addition to the evolution of norms and ideas.

To illustrate the notion of institutionalized racism, this section discusses three relevant policy areas—disenfranchisement, mass incarceration, and colorblindness—in which institutionalized racism is made manifest. In each of these policy areas or focuses, the ideologies of "ascriptive hierarchy" and racial subjugation are translated and made manifest into measurable structures that control the targeted racial group. In other words, the end goal and net effect of institutionalized racism is very specific and deliberate—control over Black bodies.



### *Disenfranchisement Law*

One of the policy areas in which institutionalized racism has been most widely manifest is in disenfranchisement law, an area of policy closely related to my project. My project is about the institutionalization of racial control, and considers how episodes of increased racial control over Black Americans are actually closely related and part of the same pattern, a pattern that is neither exclusively ideational nor institutionalist. A particularly clear method of racial control that has existed in American politics is that of political control via racial disenfranchisement.

Before the Reconstruction Amendments, i.e., the Thirteenth, Fourteenth, and Fifteenth Amendments passed between 1866 and 1871, race-based discrimination was allowed to exist explicitly. Racial control was not subtle, nor hidden, because it did not need to be. After the passage of these Amendments to the Constitution, however, open racism was made to run afoul of constitutional principle; voter disenfranchisement, and other forms of non-political racial control, could not be explicitly grounded in racial discrimination (King 2007: 249). In this regard, "...the passage of the Fourteenth and Fifteenth Amendments during Reconstruction...created a new norm of limited political equality." (Mendelberg 2001: 29).

The new racial "equality", however, proved to be a superficial and insufficient "equality". It was "...weak and as short-lived as Reconstruction." (Mendelberg 2001: 29). It allowed for the development of a legalized "implicit racism", a racism that "...convey[s] a message that may violate the norm of racial equality by submerging it in a nonracial content." (Mendelberg 2001: 9). The "older norm of racial inequality" was thus able to thrive under the newly introduced norms and limitations. In this way the two "equality" norms—the original norm of white supremacy and the new norm forbidding explicit racism—, norms we think of as mutually exclusive and logically contrary, were allowed to "co-exist" (Mendelberg 2001: 29).

The coexistence of white supremacy with legal colorblindness created the opportunity for a more “burrowed” and subtle form of racial exclusion.

What followed were some of the earliest and least subtle examples of institutionalized racial disenfranchisement that have ever been implemented, including poll taxes and literacy tests (King 2007: 249). While these policies were all racially neutral, they all had racialized effects, each serving to disenfranchise, and politically control, large swaths of the newly freed African Americans in the wake of the Civil War. Although many of these Jim Crow laws have been dismantled either through Constitutional Amendment (in the case of the poll tax) or through statutory measures (in the case of the literacy tests), their legacy is clearly still alive and relevant today, and there is a wealth of literature that addresses a continuing legacy of racial disenfranchisement. What is most important to draw from this literature is less an understanding of the details of the concept, as it is fairly straightforward, but more so that it persists in changing forms. For example, in Colorblind Injustice, J. Morgan Kousser details a variety of modern case studies in which racial disenfranchisement was implemented in different institutional ways including the manipulation of election laws, racialized redistricting policies, and majority-vote requirements (Kousser 1999: 2-3). Writing only a few years after the passage of the Voting Rights Act, William Keech documents the false enfranchisement that the supposedly landmark legislation brought, and details ways in which minority votes have been restricted or rendered meaningless in his The Impact of Negro Voting: The Role of the Vote in the Quest for Equality (Keech 1968: 1). An appreciation of the intensity and longevity of this ongoing legacy of racial disenfranchisement is essential to my argument, which considers racial disenfranchisement as a fundamental development and legacy in the development of American politics.

Related to disenfranchisement, there is a great deal of literature surrounding the racialized nature of institutionalized felon disenfranchisement, literature which is important to my thesis in that it is a distinct legacy of political control via the criminal justice system. The United States' particular and unique legacy of felon disenfranchisement is not entirely independent of the other legacies detailed above. American politics is defined, to some extent, by a number of legacies and conceptualizations that contribute to the system of racial control that this project identifies: a unique legacy of institutionalized racism, a unique history of racial disenfranchisement, a unique conceptualization and formation of "colorblindness", and a unique association of criminality/"felon" with racial minorities within a massive expansion of criminalization. In many ways, the disenfranchisement of felons, the political control of the "felon" class through the criminal justice system, is the intersection of all of these legacies. This thesis aims to draw out these connections explicitly by discussing particular policies in which institutionalized racism, colorblindness, and criminalization intersect to establish a racialized, but ostensibly colorblind, system of control that operates through the criminal justice system. In fact, the interrelatedness of all of these legacies, and their intersection at felon disenfranchisement, is largely the motivating idea behind my project. For that reason, I will not discuss in great detail the overlapping of legacies, but will rather divide the literature into two familiar, sometimes overlapping, camps: contemporary/expository and historic/explanatory.

Like the expository literature on mass criminalization, the expository literature on felon disenfranchisement is largely meant to portray a shocking truth about our society today, especially in its race relations. This similarity is expected, if not mundane, because of the obvious connection between increasing racial criminalization and increasing number of felons, and especially those who are not white, who cannot vote. Uggen, Manza, and Behrens, a group

of scholars who have contributed perhaps more than anyone else to the question of felons and voting rights, often frame their work by first showing striking statistics that show the importance of the question at hands: they write that “The incarceration rate of African Americans today is about seven times that of whites, and because many Southern states...maintain the most extensive set of voting restrictions..., African Americans are significantly overrepresented in the disenfranchised population.” (Uggen, Manza and Behrens 2007: 240) and that “...nearly 7.5 percent of of the African American voting-age population is disenfranchised, constituting almost 2 million citizens in all.” (Uggen, Manza and Behrens 2007: 240.). Others give statistics that show racially differential effects of felon disenfranchisement laws and troubling statistics (Harvey 1994) (Goldman 2004). Similarly to mass criminalization, a great deal of the expository statistical literature comes from political advocacy or otherwise agenda-defined organization. Marc Mauer, of the Sentencing Project, in an information brief, writes: “[The impact of felon disenfranchisement laws] is now greater than at any point in U.S. history, given the six-fold increase in the number of people entering the criminal justice system during the past three decades.” (Mauer 2004: 16).

The explanatory literature, generally historical in perspective, seeks to explain the phenomenon of disenfranchising felons. While the expository literature shows the facts, the explanatory literature seeks to give meaning to them and explain how they came to be. This literature almost invariably includes race as a contributing factor. Uggen et al. explain that “[h]istorically, felon disenfranchisement has been an effective means of reducing the voting power of African Americans because of racially disparate incarceration rates.” (Uggen et al. 2007: 240). Other sources more specifically compare disenfranchising felons to other historic means of disenfranchising minorities, providing a clear racial explanation for felon

disenfranchisement (King 2007) (Goldman 2004). Perhaps most substantially, Behrens, Uggen, and Manza, in a particularly crucial paper, write that “racial threat” is responsible for the existence of passage of felon disenfranchisement laws. They study the racial composition of prison populations and conclude that a more racially disproportionate prison make-up motivated more restrictive voting laws: such laws “...may be intentionally cast to dilute the voting strength of minority groups” and that “...racial threat is reflected in the composition of state prisons and...that such racial disparities in punishment drive restrictions on felons and ex-felons” (Behrens et al. 2003: 599).

### *Mass criminalization*

A second form of institutionalized racism out of which my project grows is detailed in the scholarship on mass criminalization. This research discusses data and implications of the changing nature of the American criminal justice system. Much of the literature, generally statistic and quantitative, is expository: it reveals and presents striking statistics and suggests that something is wrong. It implicitly calls for public policy and reform. Other research, more rhetorical, theoretical, and qualitative, is generally explanatory in nature: it asks and responds to the “why” questions, considering, among other puzzles, what institutional and historic forces brought us to where we are. This literature generally favors a more revolutionary restructuring over reform, asking us to reconsider the American criminal justice system as a whole rather than asking us to consider its effects.

The expository literature, generally in the form of numerically-supported articles or chapters, presents alarming statistics to shock the reader and expose disturbing trends in mass criminalization. This literature, by presenting us with facts and data, defines and conceptualizes

the problem to be considered. When these authors write that the United States' incarceration rate is "5-12 times the rate of Western European countries and Japan" (Gottschalk 2008: 236) or that "[i]n less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million" (Alexander 2010: 6) or that "[t]he United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in highly repressive regimes like Russia, China, and Iran," (Alexander 2010: 6), it becomes clear that America has an incarceration situation worth noticing, if not addressing.

Data released by organizations and other activist sources outside of or tangential to academia, which advocate for prison reform, also provide a coherent conceptualization of mass incarceration. The Sentencing Project, led by Marc Mauer, is an example of a nonacademic, mission-oriented organization that provides an inexhaustible source of data on incarceration and related issues in the form of graphs and information briefs (Sentencing Project n.d.). The Brennan Center for Justice, an institute at New York University Law School, is an institute that grows out of an academic environment that provides statistical data on mass criminalization in the United States (Brennan Center for Justice n.d.).

Other expository sources add nuance to this argument, looking beyond the problem of "mass incarceration", to the problem of "mass criminalization", considering the greater political-sociological problems of "criminalization" that leak into different aspects of social life. The problem being exposed, in other words, extends beyond the walls of a prison. "...[t]he lives of black and Latino youth who are labeled 'deviant' are enforced by institutional entities that treat them as serious criminal threats ready to commit savage acts of violence... This collateral consequence of mass imprisonment has brought about a network of criminalization... that serves as a main socializing and control agent for black and Latino youth..." (Rios 2007: 19).

Alexander, additionally, writes that when she speaks of “mass incarceration”, she “...refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals in and out of prison.” (Alexander 2010: 13). Because this literature on mass criminalization describes not only prison populations, but a vast system that includes sociological understandings and labels of criminality, I will refer to this legacy as “mass criminalization” rather than the more limited “mass incarceration”.

This literature that exposes the stark realities of mass criminality, however, only addresses the problem of mass criminalization at a superficial level. Other explanatory sources, by considering history, rhetoric, policy, and ideology, seek to explain the phenomenon from a deeper, more historical perspective, one more in line with APD’s core commitments. If the earlier, expository sources address the “what” questions of mass criminalization, explanatory sources answer “why” and “how” it has happened. This literature, generally critical in nature, typically attributes the rapid growth of mass criminalization to institutionalizations of power and control. There are other explanations, but these perspectives are what motivate my own project, which seeks to prove that the criminal justice system and its tremendous expansion has been an effort to expand or maintain control over certain populations.

There is a split, however, in the temporal perspectives of the explanatory literature. Some sources seek to give an explanation for mass criminalization as a post-Civil Rights Era phenomenon, while others develop a longer, more historically exhaustive memory.

The sources that explain mass criminalization as a more recent phenomenon tend to emphasize statistics and incarceration rates, and consider factors occurring at that time. This makes sense, because the clear and obvious explosion in criminalization is very conspicuous in a recent time frame. They write, with citations in recent statistics, that “America since the 1980s

has created a historically unique penal form that some sociologists and criminologists have called ‘mass imprisonment’” (Simon 2009: 141), and define mass criminalization by explosions in numbers. Because they conceptualize mass criminalization as a recent phenomenon, the explanations they give are confined to very recent history. Similarly, Alexander, in The New Jim Crow, views our modern era as what she calls “the Age of Colorblindness” and views it as largely distinct from other eras. In her view, institutional development or progress is when one institution crumbles and another replaces it: “. . .the seeds of the new system of control—mass incarceration—were planted during the Civil Rights Movement itself, when it became clear that the old caste crumbling and a new one would have to take its place.” (Alexander 2010: 22). According to Alexander, mass criminalization is a “reincarnation” (Alexander 2010: 22) of the Jim Crow system of control, a distinct, even if similar, institution. As such, she explains mass criminalization using only recent events—for her, the War on Drugs.

Others use a longer scope, explaining the recent version of mass criminalization by considering it as part of a longer trend. Naomi Murakawa, a scholar of both American political development and the rise of the carceral state, details a long history of racial politics and crime and complicates the mainstream understanding of a racialized mass criminalization. She identifies the concept of “law-and-order” and traces its infusion with racial politics back to the post-World War II United States, before the statistical explosion of mass criminalization (Murakawa 2008). She argues that at the birth of statistical mass criminalization, or what Alexander and others view as the birth of mass criminalization, “[t]he U.S. did not confront a crime problem that was then racialized; it confronted a race problem that was then criminalized.” (Murakawa 2008: 236). The period of the 1970s that Alexander and others view as the beginning of mass criminalization was only a reiteration and resurgence of a familiar law-and-order tension



that had been prevalent in American racial politics for decades. Murakawa views this most recent mass criminalization, then, not as a “New Jim Crow”, but rather as an episode in a longer, more hidden American legacy. Her explanation, involving historic associations of racial civil rights developments with chaos and questions of law-and-order, is not confined to the recent explosion in statistics, but holds a longer and more historic memory.

Marie Gottschalk holds a similarly historical view, contending that the United States’ current mass criminalization problem “...has deep historical and institutional roots” and that “...law and order has been a central, not incidental, issue...” (Gottschalk 2008: 242). She places a great importance on rejecting the nearsighted approach by other explanatory theorists, who “...adopt a relatively short time frame as they focus on trying to identify what changed in the United States since the 1960s to disrupt its generally stable and unexceptional incarceration rate” (Gottschalk 2008: 237). While acknowledging that this approach seems legitimate, given stark and conspicuous trends, she, like Murakawa, asserts that the recent trend of mass criminalization is not a new, sudden era, but rather an episode in a continuing, ongoing undercurrent in American political development (Gottschalk 2008).

### *Colorblindness*

A third policy area in American political development critical to a full understanding of the background and forms of institutionalized racism discussed in my project is the concept of “colorblindness”. While institutional racism shapes the development of American policy at a structure level, and operates a mechanism through which racial disenfranchisement is often realized, “colorblindness” is what this institutionalized, racialized disenfranchisement looks like

on the ground. The literature on colorblindness greatly overlaps the literature on institutionalized racism, as the concepts are so closely related.

Michelle Alexander, in her landmark work The New Jim Crow, provides a comprehensive conceptualization of colorblindness. For her, racial oppression is operationalized through a criminal justice system that is racialized institutionally, rather than explicitly. Explicit racism is prevented by the gains and protections on the rights of racial minorities, but these gains do not protect racial minorities from the colorblind tactics and policies of the criminal justice system, which she proves have profoundly racialized effects. According to Alexander, “Rather than rely on race, we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.” (Alexander 2010: 2). If race-based discrimination is no longer acceptable, the criminal justice system, she argues, provides a façade for that same discrimination; it uses a racialized label, “felon”, instead of “Black” as the operative descriptor. Since race is not directly or explicitly evident in these policies, since they are colorblind, they are not only socially acceptable but in full accordance with a particular reading of equal protection as guaranteed by the Constitution. Her central thesis is that colorblindness is the deceptively harmless appearance of racialized oppression in public.

A significant amount of the literature that addresses institutionalized racism and racial disenfranchisement discuss colorblindness as well, although often in implicit terms. These authors implicitly conceptualize colorblindness by exposing deep racialization where we naturally assume colorblindness. Lieberman, when arguing that the development of the American welfare state has been racialized and uneven, traces the racialized path of the American welfare state, which we typically think of as colorblind, and contributes to an understanding of its position with respect to racial politics. Katznelson (2006) similarly criticizes

other New Deal welfare programs that we naturally assume have nothing to do with race, but proves that they are not in fact colorblind, and rather are deeply racialized. Kousser (1999), more explicitly, dispels the myth of colorblindness in election law, showing that elections, the institution that we perhaps most hope and expect to be colorblind, are themselves structured on racialization. By showing the reader what colorblindness is *not*, these authors contribute to a clearer and more profound understanding of what colorblindness is and ought to be.

#### **IV. Research Gap**

The research gap that my project addresses is ultimately two-fold. First, there is significant literature, including Rogers Smith's article mentioned earlier, that discusses recurring traditions in American political culture, including an "ascriptive hierarchy" tradition, which in his work, amounts to racial subordination (Smith 1993). However, his argument provides little to no insight into *when* these traditions surface and are made manifest in institutions. This project seeks to address that gap by identifying one pattern in which Smith's "ascriptive hierarchy" surfaces to shape institutions. Second, my project is in many ways, the next stop from Behrens et. al.'s conclusions. While they found that the criminal justice system has historically been used to control Blacks politically, if we are to identify the pattern of criminal justice system as racial control over Blacks in times of Black political freedom expansion, their work is both too narrow and too broad.

As discussed earlier, Smith identifies three traditions whose interactions have defined and shape American political development, especially after the Civil War: liberalism, republicanism, and ascriptive hierarchy. His novel contribution, however, is the assertion of the third, more pessimistic and inherently inegalitarian American political tradition. In addition to the high and

celebrated ideals of liberalism and republicanism, he claims, "...the nation has also been deeply constituted by the ideologies and practices that defined the relationships of the white male minority with subordinate groups..." (Smith 1993: 20).

His account of the three traditions that define American political culture are compelling. He uses an illustrative geologic metaphor to explain the constant presence, but only occasional visibility of, the ascriptive hierarchy tradition:

"[When the ascriptive hierarchy tradition is] kept in view, the flat plain of American egalitarianism...looks quite different. We instead perceive America's initial conditions as exhibiting only a small, recently leveled valley of relative equality nestled amid steep mountains of hierarchy. And though we can see forces working to erode those mountains over time, broadening the valley, many of the peaks also prove to be volcanic, frequently responding to seismic pressures with outbursts that harden into substantial peaks once again." (Smith 1993: 549).

While his evidence supports his conclusion, however, he does not answer the question of when, why, or how these traditions are made manifest into policies or a set of institutional practices. Or, sticking with his metaphor, when, why, and under what conditions the seismic pressure ever reaches a threshold point that causes the "...outbursts that harden into substantial peaks..." (Smith 1993: 549). This is particularly important in the field of political science, in which research should not only be reactionary and narrate the past, but also be predictive and anticipate the future.

There is also a research opportunity presented by Behrens et. al's work on criminology and political control. Their work only considers political disenfranchisement. Though my project considers felon disenfranchisement and mechanisms of political control, it looks beyond that to consider forms of racial control that are not immediately political. It identifies manifestations of the racial control pattern that clearly restrict and control Blacks, and do so after a time in which Black Americans experienced a step toward a more egalitarian racial order, but these

manifestations will not only operate politically. The Jim Crow Laws, for example, were far more than a scheme to keep Blacks politically silent. Rather, these laws operated as a vast system of control to maintain a more unequal and hierarchical racial order, political, but also social and economic.

Furthermore, the work of Behrens et. al. is too broad because it considers all of the criminal justice system at once, and does so over a tremendous period of time. It is certainly easy to conceptualize the criminal justice system as a monolithic entity. The reality, however, is that it is composed of many different individual laws and statutes, existing within many different policy areas, that originated at different times, in different environments, and for different reasons. My project will be more limited in scope in that it will consider only one policy area, one “arm”, of the criminal justice system—restrictive gun control measures— rather than the entire system itself. By limiting the investigation to one policy area, it produces a more narrow and specific reading of institutionalized racism in policy development. It considers specific laws, with their alleged intent, effects, policy precedents, and social, political and economic contexts, rather than just the largest trends and demographic effects. It will thus be a more targeted investigation, and one that will focus on details and immediate context significantly more than Behrens et al.’s sweeping investigation of the criminal justice system over one hundred and fifty years was able to.

## **Conclusion**

Methodologically, this project seeks to *explain current political and social circumstances by identifying a pattern of political behavior and institutional development*. This approach draws upon research practices common within the field of APD. Substantively, it seeks to *analyze race*

*and racial dynamics as crucial factors in the development of institutions and politics.* This content-focus is grounded in a rich body of literature, APD and otherwise, that adopts a critical race perspective in considering political and institutional development. This chapter provided a review of the literature that motivated the substance and process of the project, a review which is necessary to moving to the argument of the project.

First, the chapter summarized the goals and methods of APD. APD emphasizes that current political conditions are part of a pattern, and as such can only be explained in light of past political dynamics. To identify such patterns, it demands a particularly historical perspective on racial politics, one synchronous with critical race studies.

Second, I discussed methodological approaches in APD that emphasize temporality when identifying patterns. In particular, APD scholarship advocates the long-term historical perspective, which this project adopts. In addition, often these longer time horizons are punctuated by more short-term changes, so-called, “critical junctures,” which will also be a critical organizational device in the analytic narrative this thesis aims to construct.

Third, I justified and described my choice to adopt a critical race perspective, one synchronous with critical race studies. I discussed others adopt this similar race-privileged position in writing about different manifestations of institutionalized racism. Then, in keeping with the historical and institutional focus of APD, I delineated three key policy areas that, in the development of American politics, are particularly important and conspicuous manifestations of institutionalized racism. These three areas are crucial to addressing how colorblind policies have been developed at particular critical moments in American lawmaking to achieve racially-conscious and discriminatory effects. These include: (1) disenfranchisement law, (2) mass criminalization, and (3) the concept of “colorblindness” constitutional lawmaking. This chapter

summarized literature and key findings in each of these topic areas and considered both how they are related to one another and how they motivate this thesis.

Lastly, this chapter made explicit the dual research gaps that motivate this project. It expands upon, by providing order to, Smith's argument that an "ascriptive hierarchy" tradition often lingers and resurfaces in American political culture, and made explicit how the project will address that gap. Additionally, it showed the limitations of Behrens et. al., a landmark work that highlighted the racialized political control function of the criminal justice system over a long period of time.

The following chapter introduces, in greater detail, the project's argument and method through a case study analysis. It describes and evaluates the convict lease system, a system which I show is in many ways the intersection of the legacies discussed earlier. As advocated by APD scholars, the "general characteristics and circumstances of occurrence" (Orren and Skowronek 2004: 8) will be analyzed so that they can be applied to other case studies concerning race, control, and the criminal justice system. This analysis and description of the convict lease system will serve as a case study of much of the substantive literature discussed in this chapter, so that later chapters will be able to "connect-the-dots" and identify a larger pattern composed of individual "episodes" that resemble the convict lease system.

## **Chapter II: A Model for Future Analyses: The Reconstruction Convict Leasing System as the First Iteration of a Historical Racial Pattern**

### **Introduction**

This chapter examines one of the earliest instances of the identified pattern, namely the passage of ostensibly colorblind criminal laws that have racially-conscious effects, and, more specifically, the emergence of these laws occurring at or immediately following, presumably in response to, an emergence of racial liberalism in political development. Because the case discussed in this chapter is the initial iteration of the pattern, it provides a general model of how the pattern is made manifest. With this general architectural framework in mind, the reader is equipped to identify and scrutinize later iterations detailed in the chapters to follow. In short, this chapter both defines and provides an architectural blueprint of the pattern animating this thesis, and the ideas elaborated upon in this chapter will be points of reference, explicit or implicit, in subsequent case studies.

That earliest incarnation that this chapter discusses is the convict leasing system in the southern United States in the years following the end of the Civil War. The chapter begins with a detailed description of the context that shaped and informed the system, and then a description of the system itself. The convict leasing system, I argue, functioned largely as a system of racial control in a time of sudden expanded racial freedoms. Crucially, this system functioned by employing and relying on a fundamental constitutional principle of “colorblindness” in laws, such as statutes that criminalized vagrancy and low-level theft offenses, and subsequently empowered the private sector to control the people convicted under those offenses. Thus, laws



that appeared racially neutral were actually targeted systems of racial control that functioned largely through empowerment of the private actor.

After describing the convict leasing system, the chapter evaluates the system and considers how and why it illustrates the general pattern identified in this thesis. To do so, I will identify a number of “takeaways” or key points to understand and remember that will remain to be relevant throughout the course of the project. The first “takeaway” point addresses the question of *why* the system existed in the first place, and argues that the abolition of slavery, the sudden and dramatic expansion of racial freedoms, created a demand for systematic white supremacist racial control. The convict leasing system responded to and fulfilled that demand in a number of ways, which I will detail. The second, third, and fourth “takeaways” derive from *how* the system operated, and consider why it had to operate that way. The second “takeaway” point is that by capturing Blacks and recently freed slaves with ambiguous statutes that criminalized vagrancy and small-level theft, among other ambiguous actions, it adhered to a principle of colorblindness, using racialized but facially neutral laws to institutionalize racial control in a Constitutionally-acceptable way. The system operated this way because it *had* to, due to Constitutional considerations. The third “takeaway” is that the government, the public sphere, empowered the private actor to enforce and maintain racialized control. At this moment of racial progress in political development, the public sector gave the private sector the means to assume a more prominent role in maintaining a white supremacist system of racial control, and did so when its own ability to do so was weakened. The fourth and final “takeaway” asks the reader to consider another specific aspect of how the convict lease system and its laws operated, namely as part of the criminal justice system. It did so, I contend, because of limitations imposed by the Constitution. Perhaps the most obvious but also the most valuable “takeaway”, that the

convict leasing was a system of racial control that existed because of, was controlled by, and enforced through the criminal justice system, could not be of greater importance to the rest of the project.

## **I. Post-bellum Historical Context: The End of an Era and A New Racial Order**

After the end of the Civil War, the southern United States entered into a profoundly racialized restructuring of its political, social, and economic institutions. The “peculiar institution” that had divided the United States – the institution of slavery – had been forcefully interrupted, and “...four million black slaves [had been freed] in an effort to stop a great civil war, to end forty years of bitter controversy, and to appease the moral sense of civilization.” (Dubois 1935: 3).

The end of slavery, along with other new freedoms for Black individuals, came about because of a series of amendments to the Constitution that, together, sought to establish a more egalitarian racial order. Known collectively as the Reconstruction Amendments, these three amendments to the Constitution, passed between 1865 and 1870, granted successive protections to the vulnerable Black population. The Thirteenth Amendment abolished slavery and “involuntary servitude, except as a punishment whereof the party shall have been duly convicted...” (U.S. Constitution. Amend. XIII, Sec. 1). Importantly, this amendment established a principle that slavery is never acceptable, *except as a punishment that follows a conviction*. This principle will remain extremely relevant, as we will see that this largely relegated slavery to the realm of the criminal justice system. The Fourteenth Amendment guaranteed “due process of law” and “equal protection of the laws” to all citizens of all state (U.S. Constitution. Amend. XIV, Sec. 1). The Fifteenth Amendment guaranteed the right to vote to all citizens and

specifically forbade discrimination on the basis of “race, color, or previous condition of servitude” (U.S. Constitution. Amend. XV, Sec. 1). The Fourteenth and Fifteenth Amendments also produced a relevant principle—the principle of colorblindness as a standard of constitutionality. The principle, deceptively logical, claims that these laws demand only a race-neutral approach to law-making, in which a law is unacceptable only if it specifically references race.

After the passage of these Reconstruction Amendments, the predominant racial order—the institutionalized political, social, and economic relations of control that had defined the South—was overthrown. No longer were slaves, subjugated because of their race, subject to the control of landowners, and no longer did landowners, who had set up and profited from the system based on racial difference, have the power to control and subjugate their slaves. Newly freed slaves experienced “...a desire for independence from white control, for autonomy both as individuals and as members of a community itself being transformed as a result of emancipation.” (Foner 1988: 78). These newly free men and women had gained the freedom to commit themselves to more autonomous institutions that “...were consolidated, expanded, and liberated from white supervision” (Foner 1988: 78) and form a “...modern black community...whose roots lay deep in slavery, but whose structures and values reflected the consequences of emancipation.” (Foner 1988: 78).

For the white slave-owners, who were now without their institutionalized control power, the “...end of slavery ushered in a difficult period of adjustment to new forms of race and class relations and new ways of organizing labor” (Foner 1988: 130). The former relations of control through which whites formally and systemically subjugated Blacks was delegitimized and “...the former relation [had] to be unlearned by both parties...” (Foner 1988: 131). The unlearning of the

asymmetric antebellum power relations proved a tough adjustment for the white landowning class, however: "...the end of slavery produced...a nostalgia for the days when the lash could be freely used to compel slaves to labor." (Foner 1988: 132).

But claiming that the restructuring of racial relations produced a "difficult period of adjustment" and "nostalgia" that required "unlearning" makes the split sound more like an inevitable-but-amicable divorce between a long-married couple than the violent rupture that it truly was. More than simple "nostalgia" and readjustment, it was "clash" and "...conflict [that were] endemic on plantations throughout the South." (Foner 1988: 136). Black demands for independence and autonomy in all sectors of life produced "clash[es] between [white slave-owners'] determination to preserve the old forms of domination and the freedmen's desire to carve out the greatest possible independence for themselves and their families." (Foner 1988: 136). White former slave-owners, desperate to reinstate the power relations and reclaim the authority that institutionalized slavery afforded them, "...sought through written contracts to reestablish their authority over every aspect of their laborers' lives" (Foner 1988: 135). Through a number of avenues, including violence through lynching, "...state governments across the South sought to construct a system of racial and economic domination reminiscent of slavery." (Francis 2014: 3). "Between the planters' need for a disciplined labor force and the freedman's quest for autonomy, conflict was inevitable" (Foner 1988: 135), and that inherent conflict would prove to be a powerful, reactionary force.

## **II. The Convict Leasing System: The Perfect Solution**

The white reactionary response to the void of racial control, the expansion of racial freedom, caused by the Reconstruction Amendments proved to be disturbingly productive. To

fill the void, to react to the more egalitarian order, white slave-holders designed a new system that bore striking resemblances to the institution that had just been done away with. It was the convict leasing system, an institution in which convicts, almost invariably and exclusively Black, were "...leased as laborers to the region's capitalists, or worked as state slaves on the chain gang." (Lichtenstein 1996: 19). Though the system was "...distinctly different from [the slavery] of the antebellum South in that for most men...this slavery did not last a lifetime and did not automatically extend from one generation to the next..." (Blackmon 2009: 4), the similarities between the two are far more compelling than the differences: it was "...a system in which armies of free men, guilty of no crimes and entitled by law to freedom, were compelled to labor without compensation, were repeatedly bought and sold, and were forced to do the bidding of white masters through the regular application of extraordinary physical coercion." (Lichtenstein 1996: 4). Notably, in both institutions, slavery and convict leasing, the private actor was empowered to enforce and maintain a racialized power relations through private control sanctioned by the state. Particularities aside, the convict system seemed to be a clear, and rather suspicious, reincarnation of the now-defunct slave system. Though according to written law, ruled by formalities and technicalities, slavery was forbidden and all citizens guaranteed "equal protection" regardless of race, the reality was that "[a] world in which the seizure and sale of a black man—even a black child—was viewed as neither criminal nor extraordinary had reemerged (Blackmon 2009: 9).

The convict leasing system was widely embraced as the form of racialized social control that reactionary white slave-owners were looking for, the institutionalized racial hierarchy to fill the void, with relatively little resistance, created by the Reconstruction Amendments. By 1877, a mere twelve years after slavery was formally abolished, "...every formerly Confederate state

except Virginia had adopted the practice of leasing black prisoners into commercial hands.”, and employed the practice enthusiastically. (Blackmon 2009: 56). In Texas in 1867, Blacks, who only a few years earlier were privately controlled by the institution of slavery, composed one third of the state convict population but almost 90% of the population leased for free labor, and thus private control, to railroad companies (Foner 1988: 205). In Georgia, the practice of convict leasing began in 1868 (Lichtenstein 1996: 41). From 1871 to 1880, the first decade it was in use, the state’s convict population skyrocketed from 385 to 1,186. Of that increase of 805 convicts, 747, or about 93%, were Black (Lichtenstein 1996: 60).

Clearly, the convict leasing system had developed successfully into an exploitative system to force Blacks, and almost only Blacks, caught in the criminal justice system into private, unpaid labor, a system that bore a tragic but uncanny resemblance to the horrifying institution that a series of Constitutional amendments had supposedly banished a few years earlier.

### **III. Functional Mechanisms of Control**

Essential to the punishment system mentioned above is the closely related, and equally striking, law enforcement system that, by providing Black bodies for labor, supported it. If white business owners wanted to lease convicts for private labor, and were to legitimize this practice by naming it as a punishment within the criminal justice system, they needed a supplemental mechanism within the criminal justice system to recruit the Blacks bodies they, as private actors, would punish. In other words, the private actors who would enforce and maintain white supremacy over the freed Blacks needed an effective enforcement mechanism to deliver to them the bodies. This demand for a racialized mechanism to recruit Black bodies for the

racialized punishment and labor system would have to turn free Blacks into slaves, essentially “privatizing them”, by convicting them and only them. It was satisfied by vague, almost meaningless, statutes that were enforced unevenly, and, importantly, at the discretion of state governments and public officials.

Perhaps the most notorious of these racial statutes were those that outlawed “vagrancy”. Vagrancy, understood extraordinarily vaguely as “...the offense of a person not being able to prove at a given moment that he or she is employed” (Blackmon 2009: 1), became sufficient grounds to be captured by law enforcement, integrated into the criminal justice punishment system, leased to a private source, and subsequently forced into a private system of slave labor. The bar for capturing freed slaves and forcing them back into slavery, though, was not just low, it was practically nonexistent. It was almost a guarantee that any person at any time could be technically guilty of vagrancy at any time—its absurdly broad included ambiguous terms, such as “idle, disorderly” behavior (Foner 1988: 200). By the end of 1865, every single Southern state except Arkansas and Tennessee had statutes in place outlawing vagrancy (Blackmon 2009: 53). The tremendously vague wording and nature of these statutes created a justification to round up almost any Black person in the street, and thus to build an army of recently freed Blacks who could be returned to their controlled position, though this time in a “punitive”, convict-leasing system. Through the enforcement of such vague statutes, the private sector was thus handed Black bodies on a silver platter, empowered by the government to take up the reigns of white supremacist racial control.

Another breed of statutes that were facially neutral but had the effect of capturing freed blacks and forcing them into the convict leasing system were the infamous “pig laws”.

In Mississippi, Alabama, Georgia, and Florida, small misdemeanor theft violations were increased to felony charges, making them charges that now rendered the perpetrator eligible to enter the convict leasing system (PBS 2012). In Mississippi, "...theft of a pig, worth as little as a dollar, could mean five years in prison. In Tennessee, hard labor might result from stealing an eight-cent fence ring." (PBS 2012).

The racially disparate effects of the pig laws are not just inferred, but evidentially obvious. The infamous "pig law", which made "theft of property valued at more than ten dollars, or of any kind of cattle or swine" an offense punishable by up to five years in state prison, was passed in 1876 (Francis TBD: 13). In 1874, two years before the law was implemented, the state prison population was 272. In 1878, two years after the law was implemented, the prison population was 1, 239 (Francis TBD: 13). Though that enormous jump is striking on its own, even more striking is that 1,124 of the 1,239 incarcerated people in 1878 were Black (Francis TBD: 13). The "pig laws" then, had a clear disparate impact on Blacks and were a powerful, facially neutral mechanism to re-privatize those newly freed individuals by incorporating them into the criminal justice system and subsequently sending them to private capitalists. All of this together, arrest, privatization, and private racial control, thus functioned as a multifaceted and extremely powerful system of racial control which, when understood as inextricably linked to the convict leasing system, was itself a powerful institution of racial control.

Less important than the substantive details of these laws, the specific behavior that they outlawed, however, are the greater structural purposes that such laws served. More than anything else, these laws outlawed Blackness. Their function was necessary because it was only if Blackness was outlawed that the antebellum racial hierarchy, the social order that reactionary white slave-owners fought so hard to return to, could be restored. The racialized order of white



supremacy and the institutionalized forced labor of Blacks as they existed could no longer be feasible once the Reconstruction Amendments were passed and colorblindness mandated, so the system of racial control was shifted to an area in which it was feasible and guided by mechanisms that passed Constitutional muster: a facially colorblind system of forcing Blacks, now convicted through supposed due process of law, into privatized “involuntary solitude”.

#### **IV. Analysis: Colorblind Laws Have Racially Conscious Effects**

It is worth remembering and reiterating that my project, at its core, is not about convict leasing, nor is it about vagrancy laws. It is not about a particular system of racial control, nor is it about a specific law, or even set of laws. More than those overly specific reductions, my project is about larger *patterns* and *connections* between those systems and trends over time. It is about an identifiable pattern in American political development: in times of sudden and intense expansions of racial freedoms and progressive racial developments, white reactionary forces respond by using the criminal justice system, and more specifically “colorblind” laws that implicitly target minorities, to restore a more racially controlled order. Convict leasing and vagrancy laws only serve my project in that they are the first identifiable iteration of this pattern, and thus serve as a model for what iterations of this pattern will look like in the future.

More valuable than description of the details, then, is analysis of its societal purpose and structural function. This section of the chapter will thus move from description to analysis, a deliberate attempt to avoid losing the meaning of the convict leasing system and its accompanying laws for its details and particularities. In the following analysis section, I will discuss four “takeaway” points that will make clear why this case study of convict leasing, and vagrancy and pig laws construct a nearly perfect model for iterations of the pattern that I

identify. I will refer back to these takeaway points at the conclusions of the subsequent data chapters, as a way to review the data findings in a concise and organized manner, and conclude the chapter with succinct analyses of the most important points. The first “takeaway point” will consider what societal role the system served and what its primary function was. Why did it exist, or what purpose did it serve? Next, I will consider the operational mechanisms of the system. How did it accomplish that primary function, and why did it use that particular path to serve its societal function? Who was in charge of enforcement and who was in charge of control? Lastly, I will consider what the convict leasing system looked like from a very high-level, general sense, noting that it functioned as part of the criminal justice system in particular. With this mind, why did it exist as a part of the criminal justice system? All of these questions will be invaluable to keep in mind and apply to the case studies that will follow in this project.

### **Takeaway 1: Expansions of Freedom Are Followed by Backlash Policies of Control**

As discussed earlier, the abrupt attack, and subsequent quasi-collapse, of the white supremacist institutionalized racial order in post-Civil War South unleashed clash and conflict between a nascent, free, autonomous Black community and a grieving, reactionary, once-slave-owning white community. The reactionary response was so potent largely because slavery was more than just a cruel legal arrangement or a means of economic production: it was a complex system of power, relations, and ultimately racialized control. W.E.B. DuBois complicates our simplified, cruel, and perversely economic image of slavery-as-oppression (DuBois 1935: 8) when he writes:

It was in part psychological, the enforced personal feeling of inferiority, the calling of another Master; the standing with hat in hand. It was the helplessness. It was the defenselessness of family life. It was the submergence below the arbitrary will of any sort of individual... They represented in a very real sense the ultimate

degradation of man...The tragedy of the black slave's position was precisely this; his absolute subjection to the individual will of an owner and to "the cruelty and injustice which are the invariable consequences of the exercise of irresponsible power. (DuBois 1935: 9-10)

If slavery is considered not only as a legal and economic arrangement but also and, perhaps more fundamentally, as a power relation that was internalized and constantly present, it seems to make sense to understand it as a wide-reaching and fundamental system of racialized control, rather than one limited to politics and economics. It drew lines of racial difference, and selected victims along those lines, to control not just through the hard economics of unpaid labor and limited political conceptions of citizenships, but also extending to the victim's psychological, social, and cultural personhood as well. This perspective provides a unique sociological emphasis on the effects of a pervasive racial order on societal relations in all realms, not just limited to politics or economics. When the Reconstruction Amendments were passed and formal slavery abolished, then, it was not just the law that changed, nor was it only a mode of economic development that was threatened – it struck a much more profound blow to Southern life, and created a vast, deep void of racialized control that had previously been settled by an entrenched institution.

Because the blow struck to Southern life was so profound, given that the institution of slavery itself was so deeply and widely penetrating, as DuBois shows us, that there would emerge a significant demand for a new system to replace it seems fairly clear. If an institution that established an asymmetric power relation that was internalized and pervasive at so many levels of society collapses, those who were in control will seek to replace it. Surely it should not be expected that a dominant, supremacist class willfully surrender the control that they employed for generations.

We can thus see that and why there was such a high demand for a system of racialized control; if we analyze the control provided by the system of convict leasing, we can better

understand why it developed as a supply of racial order. I break down the racial control that it provided into three categories, all of which were in high demand after the abolition of slavery. These categories, however, are neither comprehensive nor completely distinct. I will discuss first social control, then economic control, then political control.

That the convict leasing system and the ambiguous laws that recruited its victims were a form of social control is perhaps fairly obvious. However, I will argue that it had a two-fold social control effect. First, I will focus on how convict labor as punishment acted as social control. Then, I will consider how ambiguous laws and uneven law enforcement functioned as another source of social control.

### **Social Control**

The social control is perhaps most obvious when it is physically manifest as forced labor, or “involuntary servitude”, in which case the private controller exercises all types of control over his laborer, or his “chattel property”. When the controlled social relations of slavery were formally abolished, “. . .the bound labor of convicts must have seemed a welcome opportunity to return to accustomed ways, to a control of every facet of the worker’s life impossible even in slavery.” (Ayers 1985: 191). When DuBois discussed “the personal feeling of inferiority” (DuBois 1935: 9) and the potent ways in which slavery defined social relations, he was referring to the controlling “accustomed ways” of slavery, the social norms of domination and control that slavery promised. Taken out of context, however, he could just as easily have been talking about convict leasing, a punishment practice that promised a nearly identical practice of privatized white supremacist social domination of the laborer. The oppression, and subsequent social control, inherent in “the submergence below the arbitrary will of any sort of individual”, “the

absolute subjection the individual will of an owner”, or the internalized “helplessness” (DuBois 1935: 9-10) were present in convict leasing as well as slavery. Blacks who were laboring, unpaid, in private spaces were subject to powerful social control from the lessee, a type of control that bares no meaningful difference from the control to which a slave would be subject. This facet of social control occurred as punishment, and, importantly, by the hand of and in the realm of the private actor, given his Black bodies to control by the state.

If the punishment side of the convict leasing system established a system of social control over Blacks after they were swept up into the system and had become privatized by the state, the ambiguous statutes discussed earlier exercised a social control over Blacks who had been so-far free from the grasp of the criminal justice system. It thus constituted a public form of social control, exercised over individuals not yet incorporated into the control of the private sector. The constant threat of arrest and capture for even the smallest, most insignificant violation, would conceivably be enough to modify and control behavior, establishing a new power differential and set of relations. The ambiguity and vagueness of these statutes, given that they were “capriciously enforced, ...recorded haphazardly or not at all...[and] reserved almost exclusively for black men” (Blackmon 2009: 1), allowed them to provide a mechanism of social control over Black bodies via the constant threat of capture and privatization.

### **Economic Control**

The capture, domination, and exploitation of convict labor also functioned as a form of economic control over a recently freed Black community. The convict lease system, by recapturing parts of the recently abolished mode of production and establishing a system of racialized forced labor, attacked the emancipatory, and inherently egalitarian, economic ideology

of free labor. Because economic control will be the least consistent and present form of control in the overall pattern this project identifies, and because of my own reluctance to provide an economic analysis, the discussion of this form of control will be the briefest.

Emancipation, the freeing of an enormous labor force, introduced a fundamental shift in the Southern economy. Because slavery was largely the foundation of the Southern economy, its destruction equated to the near-destruction of the economy it supported. The effects of this change were not insignificant: "...southern states were strapped for resources...and increasing taxes...was not a viable option....In addition...the South had to rebuild most of its roads and penitentiaries. Both of which had been demolished by Union troops." (Francis TBD: 15). After the destruction of the Civil War and the cessation of slavery as a system of economic production, "...southern states were...concerned about the shortage of labor and their depleted treasuries." (Francis TBD: 15).

The shortage of labor and subsequent economic crisis created a related racial-economic crisis for white supremacy—a surplus of free Black workers paired with a void in economic production. This created development potential for a growing Black working class. Profits from Black labour would no longer be extracted by white slave-owners, but would, in theory, remain with those who created it, within the labour class. This posed a grave threat to the racially stratified antebellum Southern economy in which Blacks were controlled economically, a political-economy characterized by "...two most prominent concerns of white southerners after Reconstruction: economic scarcity and freed African Americans." (Francis TBD: 23).

Economic concerns thus collided with racial concerns, and convict leasing was the perfect two-sided solution (Francis TBD: 15). Convict leasing did an excellent job of neutralizing the racial-economic threat by establishing a new system that reasserted racialized

economic control by exploiting Black labour for private profit and inhibiting the development of a more independent Black economy. It greatly resembled slavery, in that Black labor was "...a commodity inseparable from the convicts themselves..." (Lichtenstein 1996: 20-21). It "...reflected the refusal by many whites to accept the ideological tenets of emancipation and free labor relations, even in an economy undergoing transformations brought about in part by the destruction of slavery." (Lichtenstein 1996: 20). The convict leasing system thus controlled the nascent free Black community by subjugating freed Black citizens resisting their economic development as an independent class.

### **Political Control**

Lastly, the convict lease system, and more specifically the vague laws that supported it, functioned as a system of political control over Blacks by working in tandem with laws that disenfranchised felons and thus equated felony convictions with political voicelessness. This, the political control and disenfranchisement of minorities through criminalization and felon disenfranchisement laws, will be a running theme throughout the project. It will be the primary way in which the criminal justice system is considered as a mechanism of *political* control in times of expanded racial freedoms. In this section, however, the discussion will be limited to political control and disenfranchisement of felons during Reconstruction.

Behrens, Uggen, and Manza have written in detail on felon disenfranchisement during Reconstruction. The crux of their argument is the following: "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws. States with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionately fewer nonwhites in the criminal justice system." (Behrens et al.

2003: 596). Because the paper details statistics from 1850-2002, they identify this trend, which essentially argues that felon disenfranchisement has historically been racialized and thus a method of racial control, over a time period much longer than that which this chapter considers, which is only the period of post-Civil War Reconstruction. Their work thus provides a solid foundation for understanding felon disenfranchisement, and thus the categorization of felons, as a racial control mechanism, and will be referred to throughout my own project.

More specifically, however, they find that “States were particularly likely to pass punitive felon disenfranchisement laws in the Reconstruction period following the Civil War and through the 1870s.” (Behrens et. al. 2003: 597). If, as argued earlier, states had racialized mechanisms in place to label Blacks felons, and if states began to institutionalize the political disenfranchisement of felons, then it seems that the Southern states would have effectively developed a clever two-part tool of political control over minorities

The data provided in their work confirm this. Behrens et al. show that Alabama disenfranchised its felons in 1867, Arkansas, Mississippi, South Carolina, Georgia, and Florida all in 1868, and Texas in 1869 (Behrens et al. 2003: 555). This data set is extraordinarily suspicious and fits quite well into the narrative I am telling. These states, whose primary system of racial control had just been dismantled, were implementing a number of vague laws that allowed the states to disproportionately capture Blacks and trap them in the criminal justice system. Once in the criminal justice system, the Blacks were subject to a number of control mechanisms inherent in the convict lease system. And now I am adding that at the same time this was happening, at the same time Blacks were being disproportionately labeled felons and systems of control were using this label to control them, voting restrictions were imposed on felons. The logical conclusion, then, is that such laws were another system of control, this time



exclusively political, over Blacks who had, only a few years earlier, been granted expanded political freedom in the form of a Constitutional amendment explicitly granting them the right to vote.

The “...simultaneous expansion of voting restrictions for criminal offenders in the period following Reconstruction amendments...” (Behrens et al. 2003: 560) should ultimately come as no surprise, given the tendency I have laid out for systems of racial control via criminalization to develop to fill voids in racial control that resulted from expanded racial freedoms. After the Reconstruction Amendments granted the right to a vote to a population that had previously been disenfranchised, the white supremacist racial order was threatened by the possibility of a stronger black political constituency (Behrens et. al. 2003: 560). As Behrens et. al explains, “The expansion of citizenship to racial minorities, and the subsequent extension of suffrage to all citizens, threatened to undermine the political power of the white majority.” (Behrens et. al 2003: 598). The response, by those who felt threatened, was to use the criminal justice system, a source of racialized control in many facets, to fill the void of political control that the restrictions of the Fifteenth Amendment imposed.

It is thus clear that the convict leasing system filled a void of, and served a primary purpose to, *control* and, importantly, *control as response to a threat*. When the Reconstruction Amendments were passed and the slavery-era racial order overthrown, the white supremacist racial order was threatened with a more egalitarian one. That threat, of abolition and Reconstruction ushering in a more racially egalitarian order, is why the convict leasing system was utilized and implemented. In this regard, it was, at its core, a backlash response of control to a threat of expanded freedom.

## **Takeaway 2: Facially Neutral Laws as a Form of Racial Control**

The second "takeaway" point illustrated by this account of expanded racial freedoms and subsequent racial control via criminalization is the principle of "colorblindness". This principle is a crucial theme of my project, and is essential to the story of American political development in general, but especially to understanding the criminal justice system as one of racial control. In this section, I will discuss the Constitutional origins of colorblindness as a principle and show how it shaped the system of racial control that developed after slavery was abolished.

An obvious tenet of the Reconstruction racial control system, composed duly of convict leasing and vague, racially enforced laws, is that it was not explicitly grounded in racial categories. In this way, it used the principle of colorblindness quite effectively. Rather than capturing blacks explicitly because of their race, it captured them because they were "felons", a labeled that was deliberately charged with racial connotations. The criteria for being labeled a "felon", and thus incorporated into the system, may not have been explicitly "Blackness", but it was vague, undefined offenses, including "vagrancy" and small-level thefts that were enforced so as to refer mainly to Black offenders. This clever conflation of criminality and race allowed for an indirect attack on "felons", who are usually Black, rather than Black citizens themselves. The products of the two strategies, of course, are at their essence the same—a system in which Blacks are controlled socially, economically, and politically by private, white, landowners. The racism in the composition of the system is still present, but it is now implicit, no longer in the language of the laws. What differentiated this system from slavery, for the purpose of this project, was not so much the details of the system itself, as both were effectively systems of racial control, but rather that the system of convict leasing and vague laws was colorblind and employed a capturing and label mechanism that was not explicitly grounded in race.

The reason that systems of racial control shifted from being race-conscious to “colorblind”, from the in-your-face explicitly racist institution of slavery to the (slightly) more subtle, implicit, and strategic racialism of the convict lease system and its vague laws, is very straightforward—they *had* to because of Constitutional developments. The Civil War ended with the Reconstruction Amendments striking blow after blow to the South’s established racial order. The Fourteenth Amendment, which I argue is responsible for the birth of colorblindness as a principle, was perhaps most responsible for the attempted dismantling of this racial order. It is perhaps best known for its “equal protection” clause, which reads: “No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Constitution. Amend. XIV, Sec. 1). The amendment was meant to be “...strong federal action to protect the freedmen’s rights, short of the suffrage.”, a codification of a “...national guarantee of equality before the law.” (Foner 1988: 257) Though the language of the Amendment “...transcended race and religion, it challenged legal discrimination throughout the nation” (Foner 1988: 257-258) and mandated “...the principle of equal civil rights...” (Foner 1988: 257). This clause has, not unreasonably, been widely accepted to forbid explicit racism, and in doing so, forbid legal, explicit institutional racism. This claim was not uncontested, as its ambiguous language caused much debate, but it was ultimately the winning interpretation (Foner 1988). It would no longer be Constitutionally acceptable for a state to allow a system of control like slavery to exist as explicitly racist.

The response, then, was a superficially “colorblind” system that, while not explicitly racist, functioned implicitly in a way that was profoundly racialized. This new “colorblind” system, of course, had similar effects to the prior, explicitly racist system, even if it seemed different on paper. The new system, which purportedly did not deny equal protection or equal

civil rights to anyone except felons, which is generally constitutionally acceptable and will be addressed shortly, was, in reality, a system that created racialized labeled and punished those labels, simply adding another step to punishing those whose "...offense was blackness..." (Blackmon 2009: 1). The racialized control system of the South was dealt a blow by the lofty Fourteenth Amendment, but the Southern racial order proved resilient and was revived in an effective, if contrived, colorblind way.

### **Takeaway 3: Dynamic of Empowerment of Private Actor**

The third takeaway point involves the empowerment dynamic mentioned in earlier description and analysis. As shown throughout the chapter, because of the Reconstruction Amendments and described racial progress, the state lost its ability to formally control and subjugate Black individuals as slaves per se. However, these constitutional and statutory protections of rights regardless of race or previous condition of servitude clearly did not erase the political and cultural demand for racialized control and subjugation. The result, or subsequent development, of this collapsed supply of slave labor despite constant demand was a new system in which the state took deliberate measures to empower private individuals to impose that control and subjugation.

In practice, this action by public governmental bodies occurred through the state literally delivering Black bodies to private actors for the purposes of racialized control. As discussed in this chapter, an essential arm of the mechanism, one without which the system of racialized control could not exist, was racially disparate law enforcement by the government. The nature of the system was such that in order for individuals to fall under its grasp, the government had to select them through a public process of criminal justice. The government did this by deliberately

passing “vagrancy” laws and enforcing other vague laws unevenly in order to disproportionately capture Black individuals (Blackmon 2009). In short, the racially targeted enforcement of seemingly colorblind laws turned Black individuals into criminals and criminals into laborers. It was only through this deliberate government action, then, that the private actor was able to enforce and maintain racialized control of the Black individuals recently freed.

This, importantly, occurred through the empowerment of the private actor by the government when the government could no longer act sufficiently on its own. When the Reconstruction Amendments denied the government the ability to formally subjugate Black individuals through differential citizenships and efforts to force Blacks into slavery, it had to find a more clever way to maintain racialized control, one in which they were not its primary face. It did so by *empowering* and *supporting* the private sector to take up the duties of white supremacy, the duties that slavery carried out so effectively, by essentially handing over slaves as convicts to private landowners who then could maintain control over them. This dynamic is important and will re-surface, namely that paired with public sector’s action of colorblind control measures passed through the criminal justice system, the government additionally has taken measures to *empower* the private sector to maintain racialized control in whatever way possible, in this case through a privatized forced labor system.

#### **Takeaway 4: Colorblindness as Criminal Justice**

The fourth, and final, “takeaway” point to consider from the case study of convict leasing and accompanying vague statutes is similar to the second in that it considers why the system developed as it did. While the second showed why the system existed as a “colorblind” institution, it existed as a function of the criminal justice system for a reason. Slavery was

located outside of the realm of the criminal justice, so the task of racial control shifting to the criminal justice system is a puzzle worth considering, especially because the central argument behind this project concerns the use of the criminal justice system, as an institution, for purposes of racial control. In this section, the Constitutional origins of a criminal-justice-based system of control are addressed to show what shaped and defined the system of racial control that developed during Reconstruction.

Another obvious tenet of the convict leasing system, a fundamental principle that is so obvious that it is hard not to overlook, is that it was located in the criminal justice system. This is yet another distinction between slavery as an institution of racial control and convict leasing as an institution of racial control—convict leasing involved a separately established pillar institution of American society. Racialized punishment in the South became a matter of “criminal justice”, or at least came to be controlled by criminal-justice authorities. This shift represented a “...dramatic transformation in the form, function, and racial implications of southern punishment...” during the “...political, social, and economic upheavals of Reconstruction.” (Lichtenstein 1996: 20).

The reason systems of racial punishment shifted from the private institution of slavery to the public criminal justice system is, similar to the adoption of the principle of colorblindness, quite straightforward—they *had* to. The Reconstruction Amendment that directly addressed the question of slavery was the (thankfully more straightforward) Thirteenth Amendment: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States...” (U.S. Constitution. Amend. XIII, Sec. 1). Involuntary servitude, slavery, and forced labor, remained acceptable then, *only as punishment for a crime*. After the passage of this amendment, slavery became exactly that—

except the law was manipulated so that “Blackness” essentially came to be a crime (Blackmon 2009: 1). The white supremacist racial order was allowed to stand as an institution of racial control if and only the appearance changed, if the forced labor was justified as a punishment for a crime. To the white supremacist racial order, “...the criminal justice system served as a prime means of racial control and labor exploitation” (Lichtenstein 1996: 17-18) under the guise of a criminal justice mechanism that, technically and constitutionally, subjected those “duly convicted” to “involuntary servitude”.

## **Conclusion**

This chapter illustrated one of the earliest post-Civil War instances of a pattern of racial control over time, the convict leasing system and the employment of vague, seemingly neutral laws that ensured the creation and maintenance of a cheap Black labor supply in the wake of emancipation. Because this example was the first manifestation of the broader pattern to be detailed in this thesis, it functions as a theory-building case. It provides a solid foundational understanding going forward, a clear picture of what manifestations of the pattern look like, and isolates at least three claims that will structure the analysis to come.

This chapter focused on the convict leasing system in the southern United States in the years following the end of the Civil War, and it described the historical context, replete with racial tensions, as well as the operational dynamics of the convict leasing system itself. The central argument was that the convict leasing system served a distinct function in its temporal and geographical context, fulfilling the demand, not only for cheap labor, but more broadly for a system of racialized political and social control in a time of sudden expanded racial freedoms allegedly guaranteed by the Reconstruction Amendments. Finally, the chapter explored *how* the

system functioned, arguing that vague laws that criminalized ambiguous offenses such as “vagrancy” and low-level theft served as a mechanism to disproportionately capture Blacks, many or most of whom were former slaves. As an analytical matter, the chapter ended by abstracting three key themes or “takeaway” points from the case. Subsequent cases will be evaluated insofar as they reveal these themes or not. The remainder of this concluding section briefly discusses how each “takeaway” point will remain relevant to later chapters.

The first “takeaway” argues that the Reconstruction racial control system described earlier satisfied a demand for a white supremacist racial order that a changing racial order created. When slavery was abolished and Blacks were granted greater substantive rights via the Reconstruction Amendments, the convict lease system developed as an alternative system to re-impose some measure of racial control. What is important, here, is noting the certain dynamic that will reoccur: an expansion of racial freedoms that creates a void of racial control preceding a colorblind attack, via the criminal justice system, on the controlled group. In this chapter, the expanded racial freedom and move toward a more egalitarian racial order appeared as the end of slavery and passage of Reconstruction Amendments; later, it will appear as a number of different moments in American history in which there were sudden and substantial expansion of Black freedoms, including the Harlem Renaissance, the “first civil rights movement” during FDR’s presidency and the Civil Rights movement in the mid 20<sup>th</sup> century. In these cases, I will show how the criminal justice system responded to Black freedom developments with attacks that utilize the operational principle of colorblindness to in effect criminalize, and thus control, blackness.

The second “takeaway” point argued that the Reconstruction racial control system employed the principle of colorblindness to capture Blacks, leaving race explicitly out of



criminal statutes and replacing it with vague terms that allowed racism in practice, though not word. It also argued that the system functioned this way, leaving race only implicitly in the written law, because it *had* to due to newly imposed Constitutional restrictions. The cases I consider in this project all refer to laws and trends that ignore race, but were implemented for the purpose of racial control, and thus employ, and are allowed to stand, because of the standard of colorblindness. All of the laws I will consider, including drug laws and gun laws, are examples of ways in which the criminal justice system utilized colorblindness to control newly empowered racial minorities.

The third “takeaway” showed that when the state was limited in its ability to sanction the system of racialized control that it had been supporting, it empowered private actors to form a very similar system. At this moment of racial progress in political development, the private sector assumed a more prominent role in maintaining a white supremacist system of racial control, and was enabled to do so by a newly weakened public sector.

The fourth and final “takeaway” emphasized that the Reconstruction racial control system used the criminal justice system as its shell for racial control. I argued that, similar to the second “takeaway”, the criminal justice system was the institution used because it was the only Constitutionally feasible way, because of the specific wording of the Thirteenth Amendment. All of the cases that will be considered in this project are cases of racial control as realized through the criminal justice system, they are all laws and thus, I argue, use criminalization to implement a regime of racial control.

Moving onto the next chapter, and into the portion of the project that considers later iterations of the pattern of racial control via colorblind criminalization, I am asking the reader to remember the convict leasing system and the laws that supported it. Remember the environment

in which it came to fruition—that a more egalitarian racial order was in the making. Remember that white reactionaries, the ones who held the power and were in control, felt threatened by new racial progress and felt the need to institute a regime of racial control, whether political, economic, social, or all of the both. Remember that the regime they chose was colorblind on its face, but very clearly and deliberately targeted to capture racial minorities. And lastly, remember that the system they set up, the reactionary institution of racial control, was a function of the criminal justice system. With all of these points in mind, it will become abundantly clear that this dynamic was not a unique occurrence in American political development, but rather has been a pattern across generations and through racial rights movements. It is a pattern whose grasp we are not free from today, a pattern that shapes our current politics in profound and transformative ways, whether in Ferguson, Missouri, Harlem, New York, or anywhere in between.

### **Chapter III: Colorblindness, Racialized Control, and Gun Policy in the Reconstruction South, 1865-1870**

#### **Introduction**

This chapter will describe and analyze an iteration of the pattern in the policy area of gun regulations. It takes as its moment of progress—its critical juncture—the end of the Civil War and beginning of Reconstruction, illustrating the staggered introduction of this sociopolitical change through staggered passage of Constitutional Amendments. It illustrates the criminal justice system’s parallel response to that threatening sociopolitical change, in the form of gun control laws passed with increasing degrees of colorblindness that match the evolving requirements of the sociopolitical context. The claim is that at this critical juncture, at the end of the Civil War and beginning of Reconstruction, the increasingly egalitarian racial order was neutralized through measures of the criminal justice system, measures controlling Black armament but colorblind in nature, that served to impose backlash and control against the expanded racial freedoms.

I first discuss three periods, each of which was characterized by unique sociopolitical contexts and thus produced arms-control measures that differ in content and approach. Considering the context and resulting product of each era will reveal a sustained intent and effect of arms-control measures, manifest through varying degrees of “colorblindness”. The end result will be the presence of “colorblindness” in arms-control measures of the criminal justice system, passed after the Fourteenth Amendment threatened to usher in a significant moment of sociopolitical racial progress.

The first period will be antebellum United States. The defining characteristics of this era, for the sake of this project, were the presence of slavery and the lack of Equal Protection colorblindness mandates. The defining arms-control products, for the sake of this project, were racially explicit bans on slaves and freed individuals of color from owning or carrying arms. I will show that these racially-explicit arms-control measures were largely a response to historical patterns of armed resistance among slaves and freed Black individuals. Thus, before the end of the Civil War and the beginning of the era of so-called “colorblindness”, there was already an established history and tendency of individuals of color using arms to resist racial control, as well as the subsequent passage of arms-control to enforce racial control.

The second period, a brief window of time situated directly after the Civil War between the passage of the Thirteenth and Fourteenth Amendments, lasted from roughly 1865-1870. Its defining contextual characteristics, for the sake of this project, were the abolition of slavery and the lack of an Equal Protection “colorblindness” mandate. Its defining products, for the sake of the project, were the passage of racially-explicit arms-control measures and racially-restrictive Black Codes more generally. The passage of these racially-explicit arms-control measures, often as part of restrictive Black Codes, reiterate the pattern of using arms-control as racial control, and do so to control a newly freed and threatening population.

The final period began after the passage of the Fourteenth Amendment in 1870. Its defining contextual characteristics, for the sake of this project, were the abolition of slavery and ratification of the Fourteenth Amendment/codification of a “colorblindness” mandate. The defining products of this era, as my project is concerned, are the passage of “colorblind” arms-control measures, the manifestations of the larger pattern that my project identifies. This instance of the pattern includes a body of state-passed legislative measures that followed the pattern of

using arms-control measure as a means of racial control, and did so at the beginning of Reconstruction, at the beginning of what was to be America's first post-racial era.

After discussing the three eras, and tracking the appearance and characteristics of arms-control across them, I analyze a puzzle that emerges from the analytical narrative. If the true nature of gun control is to control the Black population, iterations and reiterations of racialized gun control measures should be more apparent within individual states over a longer temporal horizon. I respond to this puzzle first by challenging its premise—that a lack of racialized gun control necessarily means a lack of racialized control. Rather, racialized gun control is a response to a new racialized threat, and perhaps the passage of the Fourteenth Amendment characterized a new racial threat that did not exist before. If that is the case, then racialized measures would only be visible after the appearance of such a threat, rather than historically reiterated across a longer time horizon. I then respond to the puzzle by challenging its conclusion. Granting that there may not be reiterations of racialized gun control within individual states, I will put forth two complementary hypotheses to explain why that does not necessarily mean that there was no racialized control.

I first argue that racialized control via gun control was made *invisible* through primarily extra-legal means. In this explanation, racialized gun control was still the reality on the ground and the everyday practice, but a Southern contempt for federal law and the principle of Equal Protection established a set of conditions in which local Southern governments felt no need to pass formal statutes to restrict access to guns.

I then, as a response to the puzzle, identify a mechanism concurrent to legal colorblindness that, though structurally different, enabled racialized control via gun control to flourish *underground*. This occurred through the empowerment of the private actor. Rather than

actively restricting Black access to arms through the criminal justice system, this mechanism, triggered by the Supreme Court and in particular the *Cruikshank* case and *Civil Rights Cases of 1883*, limited the ability of the federal government to prevent local, extra-legal arms-confiscation raids conducted by the Ku Klux Klan and other violent white supremacist terror groups that shared the aim of disarmament of the Black population. The functional result was the strengthening and enabling of extra-legal, racialized arms-control, without leaving traces of iterations and reiterations within individual state legislative bodies.

### **I. The First Era: Racialized Armament and Disarmament in Antebellum South, Before 1860**

Prior to the Civil War, abolition of slavery, or ratification of the Fourteenth Amendment, there existed a dynamic crucial to understanding the role of colorblindness in pre- and post-Reconstruction gun law. Half of the dynamic includes a prolific and established tradition of slave resistance through armed rebellion, and the other half entails the fear-based responses from the landed class including restriction of access to arms.

Before discussing the details of this historical dynamic, however, it is worth considering how, in a country whose Constitution explicitly names that “the right of the people to keep and bear arms, shall not be infringed” (U.S. Constitution Amend. II), entire populations of people were explicitly and unabashedly denied that right. This can be a difficult and multifaceted question that, when considered in detail may be beyond the scope of this section, partly because bans and adherence to federal law varied so widely across Southern states and the question was not addressed by federal courts until later cases. There is, however, a simpler and more

fundamental answer: slaves and freed Blacks were not considered whole people or citizens, and as such, did not enjoy Constitutional rights.

This view, which allowed for the unlimited contraction of Black and slave rights, was perhaps best and most infamously articulated later, in the 1857 Supreme Court decision of *Dred Scott v. Sanford*. In the decision, Justice Taney, largely assuming and taking for granted that slaves had no citizenship rights, famously nullified any hope of any rights for freed slaves and free Blacks by supporting, and finding foundational to American law, the view that Black individuals, even if not enslaved, "...had no rights which the white man was bound to respect." (Taney 1856). And more closely relevant to this discussion, Taney wrote, in an excerpt meant to evoke fear and point to the absurdity of universal rights, that extending rights of citizenship to freed slaves and free Blacks would grant them the right "...to hold public meetings upon political affairs, and to keep and carry arms wherever they went." (Taney 1856). Extending these rights, including the right to own guns, to free Blacks, he hypothesized, would "...produc[e] discontent and subordination among them, and endanger...the peace and safety of the State." (Taney 1856). Thus, less than a hundred years after the Constitution effectively negated mandatory recognition of slaves' rights, the Supreme Court, in reaffirming a long-held view within Southern states, voiced and codified a negation of even the possibility of recognition of rights, including the right to bear arms, for Black Americans.

The dynamic identified in this section, allowed to occur because of the history of rights exclusion of Blacks and slaves, produced legislation explicitly disarming slaves, and was motivated by the fear and perceived threat of racial uprisings. Such uprisings threatened white lives and a deeply-held white supremacist sociopolitical order. Perhaps the most famous racialized slave rebellion, the one that also provoked the most visible and measurable legal

backlash, was Nat Turner's Rebellion. Conducted on August 22, 1831, Turner, a slave, and seven co-conspirators unleashed largely indiscriminate violence against local white slave-owners, beginning with their own. In total, the rebellion consisted of "...60 to 80 active rebels who killed no more than 57 to 60 whites..." (Greenberg 2003: xi). As is often the case with political violence/terrorism, however, its greatest lasting effects were in the fear it struck in the victimized class, rather than confined to the events of that day. As will be made apparent in the following description of gun legislation, the event sparked a substantial effort by the landed white elites to restrict slaves' and free Blacks' access to guns (Burkett 2008: 26).

Gun control in the antebellum South, then, was, unsurprisingly, a high priority for the white landed class and, in many ways, a no-brainer. White southerners were enslaving, dominating, and violently controlling an entire population of human beings, and those human beings were, at times, fighting back—it should come as no surprise that "...[their] fears...were easily defined: armed blacks" (Bellesiles 2001: 157). Consequently, "...every Southern state gave priority to..." legal measures to restrict access to weapons for slaves, as well as freed Blacks who were likely sympathetic to the suffering of slaves, measures which could be found in "every Southern state" (Bellesiles 2001: 157).

It is worth differentiating the disarmament of free Blacks from the disarmament of slaves, as though the lines are blurred between "Black" and "slave" at this point in American history, later this distinction becomes much more meaningful. Not slaves but also not legal citizens, as the Dred Scott decision would later express and mandate, freed Black individuals posed a two-fold threat to the white slave-owners and their social order—they represented possibilities of freedom and autonomy for enslaved Black individuals ("A slave with horizons limited to a continued existence in slavery was a slave who did not threaten the system, whereas a slave with



dreams of freedom threatened rebellion.” (Cottrol and Diamond 1991: 335), and they posed a potential militant threat if there formed a racial slave-freedmen coalition (Cottrol and Diamond 1991: 335). Limiting gun ownership among free Black individuals thus served a two-fold purpose to suppress that threat—it disempowered those who slaves turned to for visions and freedom, thus neutralizing those visions and suppressing revolutionary sentiments, and it also served the more practical purpose of suppressing “...the threat that free blacks might instigate or participate in a rebellion by their slave brethren.” (Cottrol and Diamond 1991: 335).

The laws, disarming both slaves and freed Blacks for the purposes of suppressing revolutionary sentiment and violent, armed rebellions, were thus conceptualized as “public safety” measures (Bellesiles 2001: 157). It should not be lost on the modern reader *who* was considered “the public” (whites—the only people whose safety would be threatened rather than protected by the arming of their “chattel property”), and what was meant by safety (probably more “the absence of conflict” and less the “the presence of justice”) (Bellesiles 2001).

The laws were as plentiful as they were restrictive. In 1806, Louisiana denied to slaves ownership of firearms “...and all other offensive weapons, unless the slave carried written permission...” (Cottrol and Diamond 1991: 337) Just a few years later, in 1811, the state took further measures to disarm slaves, forbidding “peddlers” to sell arms to slaves (Cottrol and Diamond 1991: 337). In 1810, the state of South Carolina “...prohibited slaves outside the company of whites or without written permission from their master from using or carrying firearms unless they were hunting or guarding the master’s plantation” (Cottrol and Diamond: 337). In 1825, Florida passed an act titled “An Act to Govern Patrols” that declared that groups of white citizens “shall enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms,

weapons and ammunition...” (Cottrol and Diamond 1991: 337) (1825 Acts of Fla. 52, 55). Then, in 1831, Nat Turner led his armed slave rebellion, and state legislatures responded unsurprisingly. Florida reiterated and further strengthened its slave disarmament provisions by repealing all firearm licenses for free Black individuals in 1831 (Cottrol and Diamond 1991: 337). In 1831, Maryland and Virginia “...entirely prohibited free blacks from carrying arms”. Georgia did too, two years later in 1833 (Cottrol and Diamond 1991: 338). In 1840, Texas passed a law banning gun ownership by, and sale to, all slaves, and in 1842 banned slaves from *using* guns (Clark 2013). In 1845, South Carolina made sales of guns to slaves a criminal offense (Clark 2013).

To be sure, these laws were not the only means of preventing gun ownership by Blacks and slaves, and as such a lack of an explicit provision banning gun ownership does not signify legal gun ownership. Because slavery was largely understood as a private realm, at times impermeable to government interference, “...the vigilant master was presumed capable of denying arms to all but the most trustworthy slaves, and would give proper supervision to the latter.” (Cottrol and Diamond 1991: 336). Arms-control, then, would be understood as almost too obvious and private to write into law. Just as current law would not always universally or explicitly restrict gun ownership by children, with the implicit understanding that parents will take care of that, so too did some states leave arms-control of slaves, viewed legally as property, to the individuals who “owned” them.

## **II. The Second Era: Postbellum Color-Consciousnesses in Black Codes and Disarmament, 1865-1870**

Following the end of the Civil War, the sociopolitical context of the southern United States was fundamentally transformed by pieces of legislation that attempted to restructure American racial relations. This transformation, I will show, raised concerns about racial rebellion and revolution, concerns that motivated the passage of racialized arms-control measures. The very specific and short-lived political context shaped how those manifestations of racial fear and control appeared, while their passage points to a consistent pattern of arms-control as racial-control.

The Thirteenth Amendment to the Constitution, in effect a punctuation mark at the end of the Civil War, formally declared that “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” (U.S. Constitution, Amend. XIII). This event marked a significant evolution in America racial relations, as an entire population of people that had been controlled so fundamentally was now, in the eyes of the law, free of that control. This transformation, as discussed in the previous chapter, was fundamental and momentous, and changed the political landscape.

Importantly, however, racial progress in the eyes of the law came gradually, and, at this point, the Fourteenth Amendment was not yet law. This awkward gap in between the amendments that freed the slaves and that gave them legal protections created the conditions for a different kind of “strange” and “peculiar” set of legal and political developments. These developments seem especially “strange” or “peculiar” to the modern reader in that they do not adhere to the colorblindness standard that was later articulated in the Equal Protection Clause of the Fourteenth Amendment. That the abolition of slavery had already occurred but the Fourteenth Amendment had not yet been ratified were the unique conditions that produced race-

explicit arms-control measures on free individuals. Prior to the abolition of slavery, as seen earlier, arms-control provisions disarmed either slaves or people of color—at this point, however, there were no slaves, and so the measures targeted only individuals of color. As will soon become apparent, after the ratification and codification of the Fourteenth Amendment, the laws could no longer, by Constitutional mandate, specifically target individuals of color, so there developed a more subtle, colorblind scheme to disarm individuals of color while neither explicitly naming their status as (former) slaves, nor their race.

With the rise of a new free Black class, so too came the sociopolitical threat of progressive egalitarianism and the economic threat of an undermined production system to the white supremacist sociopolitical-economic order. And with the lack of Fourteenth Amendment Equal Protection guarantees, the class posing that sociopolitical threat was vulnerable to sociopolitical control. The white slave-owning class was not oblivious nor unafraid of this threat nor of this opportunity, and so they took a number of measures to ensure and reassert control over those newly freed Black individuals.

“Immediately after emancipation destroyed [slavery’s] ornate system of social and political control, the Southern legislatures restored it by enacting the Black Codes” (Kates 1979: 12). Such measures had the sinister effect of limiting the freedoms Black individuals gained after the abolition of slavery. “These fixed the black population in serfdom, denying all political rights [and] excluding them from virtually any chance at economic or social advancement...” (Kates 1979: 12). At a period in which great ambiguity, as well as vulnerability, surrounded the civic status of free Blacks, the laws “intended to define the freedmen’s new rights and responsibilities...” (Foner 1988: 199). Sort of a new, profoundly uneven negotiation of citizenship for free Blacks, the codes at times “...authorized blacks to acquire and own property,

marry, make contracts, sue and be sued, and testify in court...” (Foner 1988: 199), but had the much more fundamental purpose of dramatically *restricting* rights and renegotiating citizenship in a racialized, controlling way.

Much of this sociopolitical control was through government enforcement of economic labour-contracts. In Mississippi in 1965, for example, all Black residents were required to possess “...written evidence of employment for the coming year” and faced penalties of forfeited wages and even arrest for violating those profoundly coercive contracts (Foner 1988: 199), and even “...were forbidden to rent land in urban areas.” (Foner 1988: 200). But these measures, it should be noted, did not have strictly economic motivations. Rather than simply re-establishing a Black production class, Black Codes put forth the “...attempt to stabilize the black work force and limit its economic options apart from plantation labor.” (Foner 1988: 199). The Black Codes thus had an economic motivation and incentive, to retain Black free or cheap labor, but also a more punitive, controlling sociopolitical effect—to “...getting things back as near to slavery as possible.” (Foner 1988: 199).

It should come as no surprise, given the imaginable potential for violent rebellion and the documented history of racialized uprising including Nat Turner’s, that arms-control was integrated into many states’ Black Codes. As discussed early, there was not always explicit legislation outlawing slavery, as slaves were the property of their owners and “...the vigilant master was presumed capable of denying arms to all but the most trustworthy slaves, and would give proper supervision to the latter.” (Cottrol and Diamond 1991: 336). Now, however, the slaves, even the least “trustworthy slaves”, were free people, no longer the property of “vigilant masters” who would supervise their disarmament, but also subject to the discriminatory and immobilizing restrictions of the states through the Black Codes.

The states thus assumed the responsibilities of the “vigilant master” and implemented arms-control legislation, as we see the dynamic of guns-as-threats paired with gun-control-as-racial-control resurface. Mississippi soon passed the 1865 “Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes”, after a white planter wrote to the state legislature proclaiming that “It is well known here that our negroes...are well equipped with fire arms, muskets, double barrel shot guns & pistols...it would be well...to prohibit the use of fire arms until they had proved themselves to be good citizens in their altered state.” (Halbrook 1998: 2) The part of the law concerning firearms prohibition reads as follows:

no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie-knife, and on conviction thereof in the country court shall be punished by fine...and pay the costs of such proceedings, and all such arms or ammunition shall be forfeited to the informer; and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with any such arms or ammunition, and cause him or her to be committed to trial (Halbrook 1998: 2).

Mississippi, though certainly a forerunner an innovator in integrating racialized gun control policy into institutionalized racial hierarchies, was certainly not alone. Less than a year later, in 1866, the Alabama state legislature passed a law providing that “...it shall not be lawful for any freedman, mullatto, or freeperson of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon...”, and also making illegal “...to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro, or mullatto..” (Halbrook 1981: 22). Louisiana passed a similar law in 1865, “...prohibiting blacks from carrying firearms without licenses, a requirement to which whites were not subject.” (Cottrol and Diamond 1991: 344-5). Though it is difficult to find surviving evidence of explicit arms-control provisions in Black Codes passed after the end of the Civil War, it is worth remembering that,

before the outbreak of the Civil War, other states had already implemented race-based bans, bans that would presumably still hold, as it was the slavery identity status that changed, and racial classifications were still allowed by Constitutional law.

### **III. The Third Era: Gun Control in an Era of Colorblindness, 1870—**

The beginning of the next period was marked by the momentous passage of the Fourteenth Amendment in 1870. Because this moment was discussed in an earlier chapter in greater detail, it will not be considered in depth here. What is important to recall and understand in this context, however, is the colorblindness mandate that the Amendment set forward. The text of the relevant clause is:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Constitution, Amend. XIV)

One effect of this Amendment, “...aimed at racial subordination in general and racist gun control laws in particular...” (Kopel and Cramer 2010: 1138), including the pre-existing Black Codes, was to forbid racial classifications.

As should be clear from the pattern identified in this thesis project, however, the presence of colorblindness did not lead to the end of racism in the law, but merely an institutionalization of racism, the construction of laws in race-implicit language that achieves racialized ends. This trend is exactly the crux of the thesis—at times of racial progress and increased egalitarianism, in this case the ratification of the Fourteenth Amendment, mechanisms of racial control, in this

case, arms-control, which has been shown to have been a historically consistent method of racial control over Black individuals, are implemented through the criminal justice system in colorblind ways. If the pattern holds in this instance, then we will see the passage of the colorblind arms-control measures that seem to target Black individuals soon after the passage of the Fourteenth Amendment.

This, unsurprisingly, is exactly what occurred: “In effect, the South abandoned explicitly racial laws and replaced them facially neutral laws designed to disarm freedmen.” (Koppel and Cramer 2010: 1138). These restrictions took a few different forms, two of which were economic restrictions, which “...prohibited inexpensive firearms, while protecting more expensive military guns owned by the ex-Confederate soldiers...” and licensing restrictions, which “...imposed licensing systems or carry restrictions.” (Koppel and Cramer 2010: 1138).

In June of 1870, the Tennessee state legislature passed an act titled “An Act to Preserve the Peace and Prevent Homicide” (“Public Statutes of the State of Tennessee...” 1872: 96). Again, it should be noted from the title both *whose* peace is being preserved, and whether that peace is merely a preservation of the status quo, an “absence of conflict”, or whether it is a more racially egalitarian social order, a “presence of justice”. Section 1 of the statute describes the offense and punishment:

That it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol, or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment, and, on conviction, shall pay a fine of not less than ten nor more than fifty dollars, and be imprisoned, at the discretion of the court, for a period of not less than thirty days not more than six months, and shall give bond in a sum not exceeding one thousand dollars to keep the peace for the next six months after such conviction. (“Public Statutes of the State of Tennessee...” 1872: 96)

The subject of the law, the individuals to whom the law is to be applied, is any “person”—in this way, the law appears to be colorblind and thus apply to all citizens equally in regards to race, as



the newly ratified Fourteenth Amendment demands. If anything, the law functions by economic discrimination, which of course is acceptable according to the Constitution.

The link between discriminating economically and discriminating racially, however, is closer than it may seem. Recall from early that the Black Codes subjected newly freed Black individuals to sociopolitical control through economic contracts and other coercive and dominative economic practices. Under the Black Codes, "...you were required to sign an annual labor contract—by mid-January of a given year—that effectively made you a slave again. You had to work six days a week, from sunrise to sunset. If you tried to leave your job, you would be arrested and returned to your employer..." (Winkler 2013: 135). The Black Codes thus established an intimate link between poverty/economic domination and racial control.

At the same time, guns started becoming rapidly available and more economically accessible after Civil War surpluses were introduced to the public: "The handgun did not become financially accessible to most Americans until the end of the Civil War brought the sale of large stocks of military surplus weapons." (Kates 1979: 11). By outlawing the carry of the cheapest and most economically affordable weapons, Tennessee's law was merely using this pre-established link, which had kept Black individuals trapped in poverty, to disarm those Black individuals who had been subject economic control for years.

If Section 1 of An Act to Preserve the Peace and Prevent Homicide is unconvincing in its suspect timing and its employment of economic stratifications that largely substituted racial stratifications, perhaps Section 4 will point to a more sinister and suspect purpose. After describing the violation in Section 1, enforcement in Section 2, and an exception for law enforcement in Section 3, the law provides a revealing tell that, to today's readers, seems more like an all-knowing wink than a legal clause: "Sec 4. That it shall be the duty of the several

courts in this State to give this act a liberal construction, so as to carry out its true intent and meaning.” (“Public Statutes of the State of Tennessee...” 1872: 96).

Later, in *Andrews v. State*, a state Supreme Court ruled that the prohibition against carrying revolvers was unacceptable. The court cited that it may be interpreted in ways that hindered the efficacy of soldiers who carried weapons that could be construed as “revolvers” (“If such is the character of the weapon here designated, than the prohibition of the statute is too broad to be allowed to stand, consistently with the views herein expressed.” (*Andrews v. State* 1871: 187)) and also that it did not account for circumstantial exception: “Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute.” (*Andrews v. State* 1871: 187).

The state legislature, in 1879, responded by changing the text of the law to add an exception to the absolute prohibition of revolvers: “except army or navy pistols” (Kopel and Cramer 2010: 1141). The justification for the modification was contrived and questionable, and did not even conform to the Tennessee Supreme Court’s demands (Kopel and Cramer 2010: 1141) and it is largely accepted that the purpose of the exception was to serve as a facially-neutral racial restriction: the guns outlawed by the law were “...among the most expensive, and largest, handguns of the day...The law thus prohibited small two-shot derringers and low-caliber rimfire revolvers, the handguns that most Blacks could afford.” (Hoffman 2009). Again, this law used the logic of parallel economic and racial stratifications to target and control Black individuals in a facially race-neutral way.

Other states followed Tennessee's example in implementing colorblind, though effectively racially restrictive, arms-control measures. In 1881, the General Assembly of Arkansas legislated An Act to Preserve the Public Peace and Prevent Crime, a law nearly identical to Tennessee's passed a few years early. ("Acts and Resolutions of the General Assembly of the State of Arkansas" 1881) This law, too, is an example of economic classifications substituting racial classifications in the language of the law in order to retain a colorblind front acceptable under the Fourteenth Amendment's colorblind standard. Section 1, describing the offense, reads:

That any person who shall wear or carry, in any manner whatever, as a weapon, any dirk or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor or any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor. (Acts and Resolutions of the General Assembly of the State of Arkansas" 1881: 191)

As will be made clear, "...the reactions of Southern legislatures to the threats of [armed] racial and economic change different in detail, they evinced a common purpose..." (Kates 1979: 14) – to maintain white supremacy. Other Southern states passed similar statutes meant to restrict gun ownership along racial lines without explicitly defining themselves as such. "In 1893 and 1907, respectively, Alabama and Texas attempted to put handguns out of the reach of blacks and poor whites through 'extremely heavy business and/or transactional taxes' on the sale of such weapons. (Tonso 1985: 2) (Kates 1979: 15). Mississippi joined the Black disarmament trend "...by enacting the first registration law for retailers in 1906...", a law which was understood to "require [arms dealers] to maintain record of all pistol and pistol ammunition sales [and] make these available for inspection on demand." (Kates 1979: 14). South Carolina passed a law in 1902 "...banning all pistol sales except to sheriffs and their special deputies – i.e., company goons and the KKK." (Kates 1979: 15).

Other Southern states used the criminal justice system in less formal, less legally legitimate ways. “Instead of formal legislation, Mississippi, Florida, and [other states in the Deep South] simply continued in effect) to enforce the pre-emancipation statutes forbidding blacks to possess arms, the Fourteenth Amendment notwithstanding,” (Kates 1979: 14). Suspect arms sales, namely sales made to Black individuals, were “...report[ed] to local authorities.” (Kates 1979: 14). This strikingly sketchy and questionable use of the criminal justice system, as seen in uneven enforcement of vagrancy statutes at roughly the same time, will reappear in other manifestations that enable racialized disarmament.

Decades later, in 1941, the case of *Watson v. Stone* came before the Florida Supreme Court. The law at hand was a suspicious law passed in Florida in 1893 that declared it “...unlawful for persons without first obtaining a license therefor: (a) To carry around with him a pistol, Winchester rifle or other repeating rifle; (b) or to have a pistol, Winchester rifle or other repeating rifle in his manual possession” (Chapman 1941: 701). In many ways, the law before the court was an antiquated relic from Reconstruction whose awkward enforcement had raised questions of its legitimacy. In a special concurring opinion, Justice Buford articulated his own perspective, enlightened by half a century of hindsight and his own legal expertise:

I know something of the history of this legislation. The original Act of 1893 was passed... for the purpose of disarming the negro laborers and to thereby ... give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. (Buford 1941: 703)

#### **IV. Pattern Explanation: Gun Control as a Response to a New Racialized Threat**

It may be suggested that rather than or in addition to across states, it should be unambiguously apparent that within individual states there had been a recurring and consistent

effort to disarm Black individuals and maintain racial control through gun control. One would expect this to appear, given the three distinct windows of time described, as first a slave disarmament provision prior to the abolition of slavery; then, a Black disarmament provision prior to the passage of the Fourteenth Amendment; and finally, a colorblind disarmament provision after the passage of the Fourteenth Amendment; all, importantly, within the same state. Presumably, this would show a concentrated and concerted effort at racialized arms-control within individual political bodies, states, or legislatures, an effort that culminated in the type of suspect colorblind restrictions shown above.

It should be noted that the prediction of that pattern assumes a continuous history of racial threat and subsequent continuous demand for racial control. Perhaps, one would argue, this assumption is supported by the history I show of systematic gun control used as racial control historically, prior to the abolition of slavery or the passage of the Fourteenth Amendment. But the history provided here shows that gun control has historically been used as a reactionary weapon of racial control—in short, that it has been a tactic *in times of threat*. There is a distinction to be made here—my argument is not that gun control had always been in place as a form of racialized control, but rather that it had been always or often been used, when needed, as a tool of racialized control.

And as for the prediction of the pattern, it should not be forgotten that according to the central idea of the project, the episodes of superficial colorblindness in the criminal justice system are, at their core, reactionary and not continuously present throughout history. At the crux of the project's argument lies the idea that colorblindness occurs as a backlash to discrete moments of racial progress to respond to and address a specific threat. That is, it is not merely that previous racially explicit methods of racial control have continued and been allowed to

proliferate via colorblindness, but rather that new colorblind measures have been put in place to respond to a *new*, burgeoning threat.

The passage of the Fourteenth Amendment may be one such threat. Just as the convict lease system, discussed in a prior chapter, was designed to respond to a new threat of a freed Black class and a vacuum in cheap labor, so too might colorblind gun laws have been passed to respond to an increasingly autonomous and powerful class of individuals. We may see variations across states, rather than within states, then, because new perceived threats give rise to inherently reactionary legislation. Tennessee may not have had a prolific history of iterated and reiterated racialized gun laws prior to 1870 because there had not been a real perceived threat, and thus sufficient motivation for restrictive legislation, until the Fourteenth Amendment demanded equal protection and increased freedom and equality for those individuals. Only at that point, at which Black individuals were increasingly integrated into the previously exclusively white political society, was the perceived racial threat present enough to motivate a restriction, which at that point had to be colorblind in text.

Though the absence of the pattern is not dispositive and may in fact strengthen the argument, the presence of this reiterative pattern still matters, as it reveals a racialized intent and nature of supposedly colorblind laws. It holds true for some states that held explicit arms-control measures for slaves, and then reiterated and modified those measures to apply to freed Blacks following the abolition of slavery. In Louisiana, for example, as mentioned earlier, there existed legislation to first deny gun ownership to slaves passed in 1806, and then further legislation forbidding arms sales to slaves in 1811 (Cottrol and Diamond 1991: 337). When the slaves were freed, however, these pieces of legislation became obsolete. To adopt to changing times, times that welcomed increasing egalitarianism into racial politics, Louisiana, also mentioned earlier,

passed what was essentially a newer version of the 1865 law, effectively “...prohibiting blacks from carrying firearms without licenses, a requirement to which whites were not subject.” (Cottrol and Diamond 1991: 344-5). In this case, Louisiana implemented (and then reinforced) a racialized gun ban in one window of time, and then updated and reasserted that gun ban in another later period of time. This reveals a continued history of arms-control as racial-control, and thus that arms-control is historically linked to racial control.

This pattern is the exception rather than rule. A number of states that had racialized or slave-based arms-control measures in place prior to abolition, including Virginia, Georgia, Texas, and South Carolina did not seem to update or otherwise reiterate those laws after the abolition of slavery, when the Black Codes replaced slave codes. This may be because a number of states’ arms-control measures, including those of Maryland, Virginia, and Georgia, were racialized rather than slave-based from the start (Cottrol and Diamond 1991: 338), and thus continued to hold post-Abolition—even after the slaves were freed, they remained Black, and thus vulnerable and targeted by those racialized laws.

## **V. A Puzzle: Invisibility of Colorblind Racialized Control**

Similarly, a number of states that implemented racialized gun bans in the second window of time, between the passage of the Thirteenth and Fourteenth Amendments, did not update their statutes and gun control regimes to appear race-neutral in the language of the law after the passage of the Fourteenth Amendment. Although Alabama, Louisiana, and Mississippi are all identified in the earlier section as implementing racially-explicit gun bans between 1865 and 1870, there is no clear trajectory in these states of passing suspect colorblind gun-control statutes immediately following the passage of the Fourteenth Amendment, as one might reasonably

expect. Instead, as mentioned early, Alabama placed a prohibitively high transactional tax on handguns, but not until 1893 (Tonso 1985: 2) (Kates 1979: 15). Mississippi enacted a suspect mandatory-registration law, but not until even later – 1907 (Kates 1979: 14).

But contrary to how one might be initially inclined to read this gap, it does not suggest a lack of gun control used as racial control following the passage of the Fourteenth Amendment. Indeed, there are examples indicated above of extremely suspect passages of laws, suspect both in content and in time passed, even if this is not necessarily the case for the same individual states across larger periods of time. The detailed analysis and example of Tennessee holds true, regardless of whether or not Tennessee implemented similar but unclad statutes prior to its colorblind statutes.

It seems that the passage of new laws in states without long histories of institutionalized racialized gun control can be explained by reactionary forces; however, the opposite remains unexplained—namely, the absence, in a number of states, of colorblind, updated gun laws following the passage of the Fourteenth Amendment. An explanation for this is that gun control was made, instead of colorblind, legally invisible and forced underground. In states in which racialized gun control, long embedded in the state’s history, was made invisible following the Fourteenth Amendment, the state legislatures, my data sources, simply did not need to pass new colorblind statutes to maintain the racialized gun-control status quo. Where racialized gun control was forced underground, the duty of controlling Black access to guns shifted from the government to the realm of private individuals. In both cases, there will be no present record nor data of institutionalized arms-control.

**Puzzle Solution 1: Invisibility Due to Legal Contempt and Disregard for Colorblindness**



First, I hypothesize, states made racialized gun control invisible by exercising a Constitutionally unfounded authority to enforce statutes on the ground that would be deemed unacceptable, and thus presumed to be “erased”, in the realm of the Constitutional and political legitimacy. As mentioned earlier, Mississippi and other states invoked the Southern tradition of nullification by largely ignoring the colorblindness mandate, keeping with their explicitly racialized business-as-usual (Kates 1979: 14). In this case, the Mississippi legislature would not have passed any new colorblind law because they simply did not feel the need to change the law. Newer, modified instances of racialized gun control in this case, the kind exhibited by the Tennessee legislature, would be impossible to find, and thus invisible, because that kind of formalized, institutional legislation was deemed unnecessary by Southern legislatures that displayed no compulsion to follow the Fourteenth Amendment. Rather than a sign of *progress*, this is a sign of severe *intransigence*. The lack of colorblindness statutes, the kind of racialized control visible to the modern researcher, thus suggests a profound disrespect for the Fourteenth Amendment, an unwillingness to recognize federal authority or even make the superficial effort it demands, rather than a sudden and new-found respect for Black gun rights. It is also easy to imagine that in the chaotic and largely lawless post-bellum South, where the deeply-held tradition of white supremacy that permeated all aspects of life was deemed illegitimate by an elite government thousands of miles away, police and law enforcement did not rapidly embrace racial egalitarianism and suddenly carry out the law in a fair, just way that guarantees all citizens equal protection regardless of race.

### **Puzzle Solution 2: Invisibility Due to Court’s Empowerment of Private Actor**

In addition to racialized gun control used as racial control and being made invisible through sheer disregard to institutional legitimacy and rule-of-law, there was a parallel dynamic occurring in which gun control as racial control was forced, though really thriving, *underground*. By underground, I mean relegated to the private sphere and left to the hands of private actors, including the Ku Klux Klan, actors who carried out agendas of racial violence and disarmament not as arms of the state, but rather as private individuals empowered in some by the government.

This occurred through the neutralization of the federal government's ability to intervene in this private racial violence and disarmament. If the Fourteenth Amendment ushered in an era of legal and political "*colorblindness*", in which states could not make racially-explicit nor racially-conscious statutes, this new dynamic can be understood as a largely Supreme Court-imposed *blindness*, in which the federal government was rendered as powerless to intervene in Southern state affairs as Southern states were unwilling to intervene in racial affairs. The result, then, was a Court-imposed blindspot on the federal government's ability to intervene in the rampant racial violence, privatized racial control, that was occurring "underground", outside of the realm of government and public affairs, which, of course, had to be colorblind and was thus weakened in its ability to carry out the white supremacy agenda of racial disarmament on its own.

To illustrate this disabling trend of Supreme Court jurisprudence during Reconstruction, it is useful to consider an earlier landmark holding by the United States Supreme Court that signaled an early commitment to crippling federal, or public, interventions into privatized racial control.

Though it chronologically followed the most specifically pertinent United States Supreme Court Case, which will be discussed after, the Civil Rights Cases of 1883 most clearly articulate

the principle that the Supreme Court established that empowered private actors to establish a reign of racial terror, effectively privatizing racial control. The law under consideration was the Civil Rights Act of 1875, a major piece of early civil rights legislation in which "...Congress had attempted to use its enforcement power under the Fourteenth Amendment to prohibit racial discrimination in certain major forms of public accommodations..." (Horan 1972: 71). Congress, a decade after the end of the Civil War, seven years after the passage of the Fourteenth Amendment, and in the heat of Reconstruction, sought to further realize the core Equal Protection principles of anti-discrimination and anti-subordination on the ground by forbidding discrimination and legal subordination not just on behalf of the state, but also on behalf of private individuals. The law meant that not only could states not treat individuals differently on account of race, but neither could private establishments that ostensibly have nothing to do with the government, including "...innkeepers, theater owners, and a railroad." (Horan 1972: 72). This principle, it would seem, would give federal authorities the jurisdiction and legitimacy to intervene in private systems of racial violence and control, as it was able to intervene in public systems.

However, the Supreme Court struck down the law at hand, invoking and strengthening a concept known as the "State Action" doctrine: "The essential principle of this doctrine was...that the Equal Protection and Due Process clauses of the Fourteenth Amendment were warranties of freedom only at the hands of the states, and no other source." (Horan 1972: 72). Congress' attempt to realize the Fourteenth Amendment's principles of anti-discrimination and anti-subordination to intervene in privatized racial violence, discrimination, and control, it held, "...represented an attempt...to forbid racial discrimination by persons or businesses which were not connected with the state, but *private* in nature. Since the Fourteenth Amendment gave

Congress no power to reach this far, the provisions were unconstitutional...and hence void.” (Horan 1972: 72-73).

The ruling “cut back drastically the kind of protection the federal government might afford to Negro rights and heightened the respectability of states’ rights.” (Horan 1973: 77). Regulation and control of private racial discrimination, subjugation and control was left to the states, who, it should not be forgotten, were as unwilling to intervene as the federal government was now unable. The practical effect of the Court’s holding, of “heightened respectability for states rights”, was “...an implicit admission that Reconstruction, with its social, political, and economic dislocations, was a thing of the past.” (Horan 1972: 73.) Or, in other words, the end of Reconstruction and the abandonment of the vulnerable Black population by the federal government to private actors and private systems of control, especially the Ku Klux Klan.

With the State Action doctrine in mind, the most specifically relevant development in shaping this dynamic in the realm of gun law was the 1873 Colfax massacre and subsequent Supreme Court case that followed. In the years following the conclusion of the Civil War and the passage of the Fourteenth Amendment, racial violence, especially extra-legal lynchings of Blacks, reigned supreme (Winkler 2013: 143). Though racial violence, championed by the white supremacist terror group known as the Ku Klux Klan, was largely indiscriminate against Blacks during this era of increased egalitarianism, there was a specific goal, probably one of many – disarmament. “The Klan used mob violence to reassert white supremacy and dissuade blacks from exercising their constitutional freedoms, like the right to vote and the right to bear arms...” (Winkler 2013: 143), rights at this point supposedly guaranteed and protected. It is unsurprising that among a horrifyingly violent terror group’s priorities would be the disarmament, and thus elimination of self-defense capabilities, of their primary target.

Black individuals at times organized for resistance, though such organized resistance generally met Klan, or otherwise violent, opposition. When Northern or pro-Union governments “...purchased two thousand muskets and forty thousand round of ammunition to distribute to the black militias, Klansmen...seized the shipment en route.” (Winkler 2013: 143). Similar episodes of Klan interference with Black armament occurred in Arkansas (Winkler 2013: 143). It should be noted at this point that as organized and entrenched as the Ku Klux Klan was, and as much influence and power as it held, it was not an arm of the government. As such, it was unclear how explicitly race-based disarmament by the Ku Klux Klan would interact with the, now supposedly equally applied, Constitutional protection of arms for all citizens.

The most influential clash of armed Black resistance with violent white terror mobs occurred in Colfax, Louisiana in 1873. There occurred a disputed election, “...marked by widespread fraud and intimidation of black voters...” (Winkler 2013: 143), which resulted in white officials claiming a majority, and thus political power and legitimacy, in a majority Black district, an event that hardly seems believable with even the most limited understanding of the sociopolitical context (Winkler 2013: 144). The Black citizens organized and resistance, armed with guns: “They occupied the courthouse and dug a large trench around the building.” (Winkler 2013). However, they, unsurprisingly, were outmatched when “...more than 300 whites armed with rifles arrived and ordered the blacks to turn over their guns and evacuate the courthouse.” (Winkler 2013: 144). A battle ensued, with a tragically predictable ending: “The militiamen inside the courthouse waved a white flag in surrender, but the whites set the building afire. Blacks able to escape the blaze were hunted down by the mob and executed. In all, 150 blacks and 3 whites were killed.” (Winkler 2013: 144). Aside from being a momentous episode of racial violence and repression of organized Black resistance by organized and far more powerful white

supremacists, this event should be understood as an episode of brutally successful disarmament of Black individuals, carried through not by the law, but rather by angry, private white citizens, the type of people empowered by ruling in the Civil Rights Cases of 1883.

Predictably, state and local officials refused to press charges. The federal government thus intervened, charging a local white man involved, Bill Cruikshank, with murder and conspiracy to violate the Black citizens' civil rights, including their Second Amendment rights to "keep and bear arms for a lawful purpose." (Winkler 2013: 144). Cruikshank, however, was not satisfied and appealed to the United States Supreme Court, "...arguing that the federal government lacked the authority to prosecute them." (Winkler 2013: 144). At question, here, was largely the federalism that was so disputed in the Civil War years. With Southern states demanding and claiming autonomy (recall the early enforcement of unconstitutional statutes) and the federal government demanding acknowledgement of and conformation to the Fourteenth Amendment, it was largely unclear who would emerge victorious, and thus the fight went to the Supreme Court. At hand here, however, was a narrower question—can the federal government intervene to protect armament rights for Blacks when either states or private individuals in those states were denying them?

The primary holding of the Court was that "...private action cannot constitute a violation of the rights guaranteed by the Constitution." (Halbrook 1998: 172). Compare this to the State Action doctrine as applied in the Civil Rights Cases of 1883, in which the Court ruled that the Fourteenth Amendment cannot be read to regulate private action, and thus that private action cannot constitute a violation of the Fourteenth Amendment. The majority opinion wrote:

"This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no

other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to [local authorities]...” (Waite 1875: 141)

In other words, “...the responsibility for punishing crimes by individuals rested where it always had—with local and state authorities...In the name of federalism, the decision rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law.” (Foner 1988: 531). The Cruikshank case was a phenomenal victory for white supremacy and private Black disarmament in the South, for it marked “...the death knell of prosecutions of private persons for violation of the Bill of Rights guarantees...” (Halbrook 1998: 175).

It is in this way, then, that Black disarmament was forced underground and relegated to the private sphere, but allowed to flourish, along with all types of discrimination a few years later. 1870 marked the end of racialized gun bans, ending race-explicit arms-control measures from the era of slavery and from the era of the Black Codes. However, that does not mean, as one might assume, that only colorblind laws prevented Black armament from being realized. Indeed, as a result of the Civil Rights Cases of 1883 and the Cruikshank case, there were other extremely potent factors, especially private individuals who now were granted effective immunity from prosecution for committing race-based civil rights violations. There were still prominent and significant actors preventing Black citizens from owning their own weapons—however, the actors doing so were not only part of the government operating under supposedly colorblind rules, but also private individuals who could now reign free to disarm Blacks without fear of prosecution from sympathetic local and state governments.

The prosecutorial blindspot imposed onto the federal government by the State Action doctrine as established by the Civil Rights Cases of 1883 and Cruikshank case did not replace

nor undermine the parallel colorblindness dynamic—rather, it complemented and supplemented it. The pattern identified in this project, occurring in this time period as identified earlier, is that at times of significant legal and political racial progress, there occurs a backlash effect, realized through the criminal justice system, that utilizes and is disguised under a colorblind standard set forth by the Fourteenth Amendment. This parallel dynamic, though more subtle and perhaps more clever, does just that—at the time of the passage of the Fourteenth Amendment, when Black citizens claimed civil rights including gun ownership, the criminal justice system, as per the Supreme Court’s demand, *allowed* the disarmament to continue. And of course, this passive act of allowing racism to occur appears colorblind, as it takes no explicit action to classify individuals along racial lines nor to impose differential treatment. This parallel dynamic of prosecutorial blindness that allowed Black disarmament to occur in the private realm through criminal justice restraint is just as much an act of superficial colorblindness in the criminal justice system as is the colorblind laws passed in the wake of the Fourteenth Amendment and as such complements, as well as adds nuance, to the initial and more straightforward dynamic of colorblindness identified earlier.

## **Conclusion**

In this chapter, I first discussed and analyzed three periods, each of which was characterized by unique sociopolitical contexts and thus produced arms-control measures that differed in content and approach. Close consideration of the sociopolitical context, as well as analysis of the legislation of each era, revealed a sustained intent and effect of arms-control measures, manifest through varying degrees of “colorblindness”. The end result was the presence of “colorblindness” in arms-control measures of the criminal justice system, passed after the



Fourteenth Amendment threatened to usher in a significant moment of sociopolitical racial progress.

The first period was antebellum United States. The defining characteristics of this era, for the sake of this project, were the presence of slavery and the lack of Equal Protection colorblindness mandates. The defining arms-control products, for the sake of this project, were racially explicit bans on slaves and freed individuals of color from owning or carrying arms. I showed that these racially-explicit arms-control measures were largely a response to historical patterns of armed resistance among slaves and freed Black individuals. Thus, before the end of the Civil War and the beginning of the era of so-called “colorblindness”, there was already an established history and tendency of individuals of color using arms to resist racial control, and the subsequent passage of arms-control to enforce racial control.

The second period, a brief window of time situated directly after the Civil War between the passage of the Thirteenth and Fourteenth Amendments, lasted from roughly 1865-1870 and held defining contextual characteristics, for the sake of this project, of the abolition of slavery and the lack of an Equal Protection “colorblindness” mandate. Its defining products, for the sake of the project, were the passage of racially-explicit arms-control measures and racially-restrictive Black Codes more generally. The passage of these racially-explicit arms-control measures, often as part of restrictive Black Codes, reiterated the pattern of using arms-control as racialized control, and did so to control a newly freed and threatening population.

The final period I discussed began after the passage of the Fourteenth Amendment in 1870. Its defining contextual characteristics, for the sake of this project, were the abolition of slavery and ratification of the Fourteenth Amendment/codification of a “colorblindness” mandate. The defining products of this era, as my project is concerned, were the passage of

“colorblind” arms-control measures, the manifestations of the larger pattern that my project identifies. This instance of the pattern included a body of state-passed legislative measures that I argued followed in the pattern of using arms-control measure as a means of racial control, and did so at the beginning of Southern Reconstruction.

After discussing the three eras, and tracking the appearance and characteristics of arms-control across them, I analyzed a puzzle that emerges from the narrative I presented. The puzzle is that if the true nature of gun control was to control the Black population, iterations and reiterations of racialized gun control measures should be more apparent within individual states over time.

I responded to this puzzle first by challenging its premise—that a lack of racialized gun control necessarily means a lack of racialized control. I reiterate that the thesis argues that gun control is used as a response to a new racialized threat, and perhaps the passage of the Fourteenth Amendment characterized a new racial threat that did not exist before. If that is the case, then racialized measures would only be visible after the appearance of such a threat, rather than historically reiterated across a longer time horizon.

I then responded to the puzzle by challenging its conclusion. Granting that there may not be reiterations of racialized gun control within individual states, I put forth two hypotheses to explain why that does not necessarily mean that there was no racialized control.

I first argued that racialized control via gun control was made *invisible* through primarily extra-legal means. In this explanation, racialized gun control was still the reality on the ground and the everyday practice, but a Southern contempt for federal law and the principle of Equal Protection established a set of conditions in which local Southern governments felt no need to pass formal statutes to restrict access to guns.

I then, as a response to the puzzle, identified a concurrent mechanism that, though structurally different from colorblindness, allowed racialized control via gun control to flourish *underground*, largely out of the scope of today's researcher, through empowerment of the private actor. Rather than actively restricting Black access to arms through the criminal justice system, this mechanism, activated by the Supreme Court and in particular the *Cruikshank* case and *Civil Rights Cases of 1883*, limited the ability of the federal government to prevent local, extra-legal arms-confiscation raids conducted by the Ku Klux Klan and other violent white supremacist terror groups that shared the aim of disarmament of the Black population. The functional result was the strengthening and enabling of extra-legal, racialized arms-control, without leaving traces of iterations and reiterations within individual state legislative bodies.

Recall from Chapter 2 the four takeaway points from the convict leasing system model of control through institutionalized racism within the criminal justice system. Each takeaway point contains a unique piece of insight that strengthens analysis of the pattern at all of its appearances. Consideration of the points both deepens analysis of the pattern as seen in this chapter and explains the connection with, as well as anticipates the appearance of, the pattern in the next chapter.

The first takeaway point is that the identified instance of racialized control responded to a sudden increased demand for racialized control, as a response to a *threat*. This chapter detailed a number of such threats that resulted in increased demand for racialized control, including slave rebellions, the abolition of slavery, and the passage of the Fourteenth Amendment. Importantly, the substance of this takeaway point was at the heart of the challenge to the premise of the puzzle—this takeaway point reminds the reader that racialized gun control

occurs in response to a threat, not just continuously in a racially unequal society. The next chapter will provide similarly nuanced analysis to an increase in demand for racialized control that occurred a century later. It will focus on the liberal Civil Rights and the liberationist Black Nationalist movement, considering the different threats they posed, and why those different threats elicited different responses from systems of racialized control. In both cases, the thesis shows that racialized control through gun control has occurred as a response to specific threats that emerged at specific moments of racial progress, and has also provided significant analysis and insight into that moment and its racial progress.

The second takeaway point is that the identified instance of racialized control was made manifest through a principle of *colorblindness* in its language and prima facie intent. This chapter detailed the origin of the principle of colorblindness in the passage of the Fourteenth Amendment and tracked the appearance and manifestations of racialized gun control measures before and after the colorblindness mandate. The result was an argument that the racialized gun control that existed following the passage of the Fourteenth Amendment was still racialized in nature, and thus that racialized control through gun control existed while superficially adhering to the Amendment's colorblindness mandate. The next chapter will show that this trend was sustained and continued to hold for at least a century, when a measure that similarly sought to control a Black population to subdue a racial threat adhered to the colorblindness mandate put forth by the Fourteenth Amendment while still grounded in a clearly racialized purpose. It will present another manifestation of an ostensibly colorblind law that has a specific and controlling effect on a Black population.

The third takeaway was that a parallel dynamic of *empowerment of the private actor* occurs along side colorblindness in the law to reinforce the racialized control. This chapter

showed that the existence of this dynamic may be one reason that the anticipated reiterations of gun control as racialized control within one state may not be so simple nor apparent. It detailed and analyzed 19<sup>th</sup> century Supreme Court jurisprudence that, through bolstering the State Action doctrine, limited the federal government's ability to intervene into private discrimination, in effect bolstering the private actor's ability to maintain concurrent systems of racialized control. The next chapter will provide analysis of an instance a century later in which the Supreme Court *undermined* the contemporary, colorblind system of racialized control, and was supported by the two other branches of federal government in a unique moment of federal political-ideological alignment. The result was a federal government that had no interest in empowering the private citizen to maintain systems of racialized control, but state and local governments whose interests are more unclear.

The final takeaway point is that the identified system of racialized control occurred through, and under the auspices of, the criminal justice system. This chapter provided an example of a number of laws that sought to control a Black population and that were passed and enforced through the criminal justice system. Similarly, the Supreme Court empowered private actors to maintain racialized control by allowing the Southern criminal justice system to exercise extreme restraint in punishing private actors who sought racialized control through violence. The next chapter will discuss and analyze another instance in which racialized control via gun control was realized through an arm of the criminal justice system. It will provide detailed analysis into the deliberate shift from racialized control through Jim Crow and legal segregation, to racialized control through law-and-order rhetoric that defined and strengthened the role of the criminal justice system in American politics.

## **Chapter IV: Colorblindness, Racialized Control, and Gun Policy in the Mid-Twentieth Century**

### **Introduction**

This chapter takes as its moment of racial progress a shift in America's racial paradigm that occurred in the mid-Twentieth century and argues that at this moment, the criminal justice system, through colorblind means, was used to stifle and retaliate against that progress and re-exert control over the Black population enjoying an increasingly egalitarian racial order.

I first discuss the highlighted historical moment of racial progress occurring in the mid-Twentieth Century, presenting key actors, achievements, events, and core philosophies of the two most visible and formative movements, the Civil Rights Movement and the Black Nationalist movement. I present the liberal and institutional triumphs of the former, and the revolutionary and liberationist nature of the latter. By illustrating the Black Nationalist critique of the Civil Rights Movement, I argue that Black Nationalism posed a unique and particularly dangerous threat to the white supremacist order, anticipating that it may have received a unique response from the white supremacist order.

Next, I describe the Black Panther Party, known as the foot-soldiers of Black Nationalism. I present their core philosophies and argue that they were more economic, social, and psychological in nature than was the largely politically-focused Civil Rights Movement. This culminates in a discussion of historical circumstances and the Black Panther Party's signature and most notorious practice—self-defense and protection from police brutality—which I argue was essential to the unique threat that Black Nationalism posed to white supremacy. I

additionally describe the presence and importance of guns within the Black Panther movement, and argue that guns were of utmost importance to their liberationist threat.

I then discuss the role of colorblindness in shaping the contemporary sociopolitical context. I argue that colorblindness was likely to emerge as a vehicle through which the criminal justice system could exert control because a certain form of it, law-and-order politics, had already been gaining traction for years and was already present in the political and legislative ethos. In particular, I discuss Vesla Weaver's "frontlash" hypothesis, the suggestion that a racialized rhetoric and politics of law-and-order came to replace the Jim Crow system of racialized control. I use her hypothesis to argue that this identified law was part of that change in systems of control, from a race-explicit system to a race-implicit system, from Jim Crow to law-and-order.

Next, I describe a historical incident that brought the Black Panther's philosophy and tactics to the consciousness of many Americans, and more importantly, many American lawmakers. On May 2, 1967, a group of Black armed members of the Black Panther party walked into the California State Capitol displaying their guns for the predominantly white lawmakers to see. The show of force, which brought the Black Panthers' more radical and indicting philosophy to the forefront of California politics, represented a confrontation of the Black Panthers' gun-centering ideology with California politics, and more importantly, a protest of a specific disarmament policy item.

Following the description of the incident involving the confrontation between the Black Panther Party and the California state legislature, I argue that a specific piece of ostensibly colorblind legislation, the Mulford Act, was a response to that incident, and was a clear instance of the pattern identified in this project. Pointing to a number of pieces of evidence, including

suspicious social contexts, actors, and speeches, I argue that this piece of legislation meaningfully resembles the gun control legislation passed during Reconstruction both in content and purpose. The description and analysis of the gun-restricting law at hand is largely the culmination of the description of the unique egalitarian threat posed by the Black Nationalist movement and the Black Panthers, the importance of guns to the Black Panthers' ideology and platform, and the robust discussion of colorblindness as a trend in racialized lawmaking. This section argues clearly and explicitly that this legislative development is an example of the pattern identified in the greater thesis project.

Lastly, following the description and analysis of the law, I present a parallel and familiar dynamic that I argue emerged alongside the development of ostensibly colorblind legislation—the enabling of private action by the state to enforce and maintain white supremacy when it is under attack from increasingly egalitarian moments in American political culture. I argue that government empowerment of the private actor was not particularly visible at mid-century at the federal level mainly because all three branches of American government adopted a racially liberal ideology. At the state and local level, I argue, however, racially inegalitarian ideologies still held strong, and thus in this area there is more evidence of empowerment of the private actor. I describe an episode in which Bull Connor explicitly enabled the Ku Klux Klan to enforce such white supremacy where state actors could not, as well as other incidences of the state and police cooperating with or enabling private white supremacist actors. This is compared to the prior instances of state-enabled private action following the end of the Civil War, and shown to be a parallel, if less visible, dynamic paired with the passage of colorblind measures with racialized effects.



## **I. The Civil Rights Movement: A Liberal-Institutional Movement**

The Civil Rights Movement of the mid-Twentieth Century is often held to be a crowning jewel of racial progress in America (Alexander 2010: 38). The traditional narrative holds that during the 1950s and 1960s, America made a stride toward racial justice, perhaps comparable even/only to that of the era of Reconstruction (Valelly 2004). During the “...*heroic* period between the May 17, 1954 *Brown* Supreme Court decision and the August 6, 1965, passage of the Voting Rights Act...”, we imagine “...iconic images of activist [who] have become enshrine in American memory, such as those who persevered through a long-shot bus boycott in Montgomery, Alabama, braved snarling German Shepherds and fire hoses in Birmingham, Alabama, and endured mob violence in Little Rock, Arkansas, and Oxford, Mississippi, all before reaching a symbolic mountain top at the August 28, 1963, March on Washington.” (Joseph 2010: 2). This is, of course, neither unjustifiable nor unfounded; all of these events, as well as the larger movement that birthed them, were remarkable, and the political products, including but not limited to the *Brown* Supreme Court Case, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, all had very real impacts that surely ushered an increasingly egalitarian racial order into American politics.

At the risk of stating the obvious, the Civil Rights Movement, or least its legacy as felt and remembered, was ultimately political and institutional. Despite what its end goals may have been, whether institutional change was to be an instrument in bringing about a truer and more holistic equality, its tactics appealed to institutionalized political forces—Congress, the President, and courts—to expand political rights and citizenship for Blacks. The Movement focused on “...galvaniz[ing] public opinion and plac[ing] pressure on the national government...[to] provide the necessary incentives for the Democratic-controlled government to

finally pass a number of significant pieces of legislation in the mid-1960s... (Frymer 1999: 99). In this way, as it was interested in working within the system to expand rights and citizenship, it was ultimately a liberal movement (Taylor 2011: 114).

Importantly, the Movement's signature tactic to achieve that institutional and political change was to exploit public police brutality and violence against nonviolence, establishing a strategic and sympathetic juxtaposition. "In the spring of 1963, civil rights leaders came to the realization that, tactically and strategically, the deranged police response provided a critical political lever that the professional response did not." (Valelly 2004: 195). It evoked sympathy from those who shape political institutions and, through positions of power, define rights and citizenships. The logic of nonviolent direct action was thus rooted in liberalism and institutionalism. It held that the violence against nonviolent protestors would evoke a dormant political will among those who witnessed the violence, a will that held the potential to shape and redefine political institutions and decisions. The tactic underlying King's famous march on Selma, for example, the end-purpose of which was to expand voting rights for southern Blacks, was to "...generate a crisis that was impossible for the president and Congress to ignore..." and ultimately to reset and reprioritize the "national agenda". (Valelly 2004: 164-1775).

The nonviolent Movement was largely successful in winning public opinion and thus gaining political-institutional clout: "...the non-violent protest strategies of civil rights activists had captured the hearts of many Americans, millions of whom watched on television Martin Luther King's famous "I Have a Dream" Speech"...Between 1961 and 1965, the "Negro question" was consistently identified in public opinion polls as the most important issue on the national agenda...". (Frymer 1999: 98). This was both the success and genius of King and the Movement's nonviolent approach: the uncontroversial but powerful protest tactic created a

political will where they had not been one, and thus, as King hoped the Selma march would do, forced institutional politicians to confront their agenda of expanded and more egalitarian rights claims.

The result of the Movement's political efforts was an institutional alliance between the Democratic Party and the Civil Rights Movement that resulted in the passage of keystone Civil Rights legislations—in many ways, a political and liberal success. These, of course, include that Kennedy, the head of the institutional Democratic Party and "...seeking to land a harness on the direct action movements..." for political gain (Valelly 2004: 184), made concessions, including "...[proposing] a mass voter registration drive..." (Valelly 2004: 184). "Lyndon Johnson... with his eye increasingly on winning the presidency, changed from a supporter of southern segregation to a civil rights advocate." (Frymer 1999: 98). And the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 changed the laws in America to fight segregations and racial separation (Alexander 2010: 38). In other words, King and the non-violent Civil Rights Movement had strategically and deliberately made support for the Civil Rights Movement a political asset and opposition a liability, and thus found success within liberal expansions of rights and citizenships for Black Americans.

## **II. Black Nationalism—A Revolutionary-Liberationist Movement**

Though the definitively liberal and rights-based Civil Rights Movement, which fought for institutional and political change, enjoys the dominant narrative in the story of racial egalitarianism in the mid-20<sup>th</sup> century, it was not the *only* force fighting the white supremacist status quo. A parallel movement challenging white supremacy was Black Nationalism, championed and largely represented by The Black Panther Party and Malcolm X. If the Civil

Rights Movement was primarily liberal in its methods and demands, peacefully calling for institutional reform, Black Nationalism was primarily liberationist and separatist in its methods and demands, aggressively demanding more revolutionary measures (Taylor 2011: 114).

The core philosophy of Black Nationalism demanded a more far-reaching reorganization of society, one that transcended political institutions and individual laws (Taylor 2011: 114). Rather than demanding integration into the United States of America, as Martin Luther King and the Civil Rights Movement did, Black Nationalism rejected "...the reality of being led, governed, and incorporated into a national polity with a Euro-American ruling elite and majority...[a polity that by its very name] is exclusionary, overtly racist, and proudly nationalist." (Taylor 2004: 114). Rather than accepting integration, which they equated with "assimilation" to mean "...the end of a process of acculturation and social mobility...", Black Nationalists "...rejected the idea of becoming part of white society by positing the idea that becoming part of American society meant losing one's cultural and racial identity." (Robinson 2001: 43).

Given the liberationist nature of Black Nationalism, it is not surprising that its followers largely found the lived effects of the liberal, rights-based Civil Rights Movement insufficient in many regards. They held that "...integration as a goal [and the Civil Rights Movement as a movement] was problematic, partly because the civil rights leadership had not formulated strategies that confronted the dire conditions of black life, especially in urban centers, and also because they linked integration to undesirable cultural assimilation." (Robinson 2001: 52). They found the economic consequences of the Civil Rights Movements on Black life unsatisfying—"...for unemployed backs living in the ghetto[,] they hadn't made much of a difference." (Winkler 2011: 232), as the economic plight of Black Americans remained largely untouched,

and unemployment double, and average wage half of, their white counterparts (Winkler 2011: 232). They found the cultural end goal of integration and harmony to be nothing more than assimilation and a loss of identity (Robinson 2001: 43). They found the social end goal of integration and interracial harmony to be a myth, brutalized abroad by disproportionate draft selection for the war in Vietnam, and, importantly for this project, widespread epidemics of police violence at home (Winkler 2011: 232).

Malcolm X was largely the face of the Black Nationalist movement, and spoke in much more threatening, indicting terms than did Martin Luther King or any leader within the Civil Rights Movement. Whereas, as discussed earlier, the Civil Rights Movement was fighting for integration, the rights to be included within mainstream America, Malcolm X's demands were considerably more revolutionary, and much more threatening to that white social order:

The black nationalists, those whose philosophy is black nationalism, in bringing about this new interpretation of the entire meaning of civil rights, look upon it as meaning ...equality of opportunity. Well, we're justified in seeking civil rights, if it means equality of opportunity, because all we're doing there is trying to collect for our investment. Whenever you're going after something that belongs to you, anyone who's depriving you of the right to have it is a criminal...I'm nonviolent with those who are nonviolent with me. But when you drop that violence on me, then you've made me go insane, and I'm not responsible for what I do...Any time you know you're within the law, within your...moral rights, in accord with justice, then die for what you believe in. (Malcolm X, "Ballot or the Bullet")

Rather than demanding, or as he would likely suggest, asking for, rights from whom he deemed the oppressor or the enemy, Malcolm X called for a broader, more comprehensive equality of lived opportunity rather than a weaker and more superficial equality under the law. And he demanded not because it is the right thing to do morally, as King and the Civil Rights Movement did, but because the white supremacist racial order *owes* it to them, because that equality of opportunity is rightfully *theirs* after centuries of unpaid labour on behalf of that white

supremacist racial order. His philosophy was much more indicting of, and thus threatening to, the white supremacist racial order than was King's and that of the mainstream Civil Rights Movement.

In addition to being more prosecutorial and hostile in style toward the white supremacist racial order, he also advocated a sort of economic and social pride and solidarity that he held that the Civil Rights Movement largely lacked. The indictment, recalling the grievance discussed earlier that the Civil Rights Movement did not improve the economic status of Black life, may or not have been fair, given Martin Luther King's, as well as other Movement leaders' focus on the creation of jobs and economic opportunity for Black Americans (Alexander 2010: 38).

Regardless, whether King and the Civil Rights Movement advocated economic growth and improved quality of Black life, their achievements were primarily in political integration, not targeted economic growth (Alexander 2010). In other words, regardless of what the Civil Rights Movement set out to do, Malcolm X's searing indictment of the poor state of Black life was not entirely inaccurate nor out-of-touch with his targeted audience of mostly poor, often unemployed, urban Blacks, and it largely supported his image as "...an 'authentic' voice of the black urban community, in contrast to a seemingly more detached middle-class leadership."

(Robinson 2001: 40). It is in this way that he spoke to those who the Civil Rights Movement left behind, those for whom political integration was not the panacea it was sold as. For Malcolm X,

..the economic philosophy of black nationalism means in every church, in every civic organization, in every fraternal order, it's time now for [Black] people to be come conscious of the importance of controlling the economy of our community. If we own the stores, if we operate the businesses, if we try and establish some industry in our own community, then we're developing to the position where we are creating employment for our own kind. Once you gain control of the economy of your own community, then you don't have to picket and boycott and beg some cracker downtown for a job in his business. (Malcolm X, "Ballot or the Bullet")

His philosophy included a social dimension as well, again which the equality-as-political-integration goal of the Civil Rights Movement lacked:

“The social philosophy of black nationalism only means that we have to get together and remove the evils, the vices, alcoholism, drug addiction, and other evils that are destroying the moral fiber of our community. We our selves have to lift the level of our community, the standard of our community to a higher level, make our own society beautiful so that we will be satisfied in our own social circles and won't be running around here trying to knock our way into a social circle where we're not wanted. So I say, in spreading a gospel such as black nationalism, it is not designed to make the black man re-evaluate the white man -- you know him already -- but to make the black man re-evaluate himself. Don't change the white man's mind -- you can't change his mind, and that whole thing about appealing to the moral conscience of America -- America's conscience is bankrupt.”  
(Malcolm X, “Ballot or the Bullet”)

These, Malcolm X’s social and economic philosophies of Black Nationalism, importantly differed in their promises for Black Americans and thus in the threats they posed to white America. While Dr. King and The Civil Rights Movement promised an expansion, if opening up, of American political and perhaps social relations to Black Americans, Malcolm X and Black Nationalism demanded a fundamental restructuring of those relations. His social philosophy would fundamentally re-alter whiteness and the racial hierarchy of America, and his economic philosophy would fundamentally restructure the distribution of resources and thus allocation of economic power.

Black Nationalism thus posed a unique threat to white supremacy. As mentioned earlier, the Civil Rights Movement was certainly a threat, but it was a liberal threat. It held that the current system had the right idea, but not to be fixed. Inherently optimistic, it sought to incorporate and expand the system that was in place through expansions of rights and political opportunities to the disenfranchised. King appealed to American ideals and argued that civil rights expansions strengthened the system in place. Black Nationalism, however, was a liberationist threat, which is much more dangerous philosophically than is a liberal one. Black

Nationalism did not seek to expand nor incorporate anyone into the existing system, but sought to fight it and to establish a Nation within a nation. Black Nationalism argued that the system is, at its core, rotten, and must be replaced, rather than merely fixed. And in addition to the movement being more threatening in its philosophical message, its leaders were far more threatening in their rhetorical messages. Whereas King and the Civil Rights Movement promised to sit and protest nonviolently, Black Nationalists and Malcolm X were not afraid to advocate armed self-defense. Black Nationalism as a philosophy and practice thus posed a unique and heightened threat to white supremacy that the Civil Rights Movement did not, and would thus demand a different type of reciprocal defensive response.

### **III. The Black Panthers—Black Nationalism on the Ground**

If Malcolm X was the voice and preacher of Black Nationalism, then the Black Panther Party was his army on the ground. Formed ultimately as a group of self-defense and community activism, the Black Panther Party "...sought to address the powerlessness that characterized and circumscribed black ghetto residents." (Austin 2006: xvi). It was, in many ways, a direct challenge to white supremacist racial control. "Its leaders understood that, more than anything else, black Americans needed to define and determine the destinies of their lives. Insisting they take over and maintain the 'cultural and political autonomy of black communities'...the Black Panther Party...demonstrated to blacks that the first step toward this all-important goal was self-preservation. The idea that blacks needed to be alive, healthy, and unmolested guided the party's philosophy from its earliest days, through its many transitions, and to the end of its life." (Austin 2006: xvi-xvii).



To carry out this central philosophy of self-determination and autonomy, certainly closely tied to Malcolm X's Black Nationalism, The Black Panther Party carried out an agenda similar to what Malcolm X demanded, and detailed this agenda in a document titled "The Ten Point Plan". Included in this set of demands were "...the power to determine the destiny of the back community", "full employment for [Black] people", "decent housing", an authentic education, exemption from military service, an "immediate end to police brutality and murder", a fairer criminal justice system for Black Americans", and "land, bread, housing, education, clothing justice, and peace." (Austin 2006: 355). This Ten-Point plan, essentially a declaration of independence from white supremacy, was realized through a number of programs meant to invest economically in local Black communities, develop and strengthen social relations, and foster an autonomy that precluded reliance on white institutions and power structures. Such programs included ambulance services, health clinics, free breakfast programs, and programs to monitor police violence and activity (Austin 2006). Motivated and inspired by Malcolm X's philosophy of Black independence, liberation, and nationalism, the Black Panthers existed as an organized effort to challenge and resist the ruling white supremacist racial social, economic, and cultural order, and in doing so, posed a particularly potentially devastating threat to white supremacist rule, a threat that Dr. King and the more mainstream Civil Rights Movement did not touch.

An essential activity of the Black Panther Party', one that deserves unique consideration for this project, was its commitment to combatting police brutality, especially in Oakland, California. In Oakland during this period of racial turmoil, the violent context of the identified moment of racial progress, there grew an epidemic of police brutality and violence, especially in poor and predominantly Black communities: "[t]he almost exclusively white Oakland police

force had recently increased its presence in minority neighborhoods to combat juvenile delinquency, angering residents...Only months before the Black Panther Party was started, Bay Area police killed three black men engaged in petty crimes; one was shot seven times in the back by Oakland police officers for trespassing.” (Winkler 2011: 232) (Austin 2006). The police no longer held institutional legitimacy nor moral authority. They were not perceived as a public service or public good, but rather as an occupying army meant to protect and serve the interests and needs of white supremacy rule (Austin 2006: 43). As is the case with police and state-sanctioned violence, the evil was double—not only were residents regularly and systematically subjected to fear, control, and violence, but there was no external recourse through which they could seek protection. What good, then, was King’s promise of liberal integration if the very agents of the state into which integration was being sold were harassing and brutalizing Black residents? “In [the eyes of the Black Panther Party leadership], the only tangible outcome of the civil-rights movement had been more violence and oppression, much of it committed by the very entity meant to protect and serve the public: the police.” (Winkler 2011: 1).

#### **IV. Self-Defense, Guns, and Necessary Violence in the Black Panther Party**

If there existed such rampant police violence in poorer communities of color, which was certainly at least the *perception* (Winkler 2011: 43), and there existed no path for recourse through the government, Malcolm X’s Black Nationalism philosophy, founded on self-reliance, independence, and autonomy, left only one option: self-defense. While Malcolm X preached pride, dignity, and self-defense, it became abundantly clear to Black residents of Oakland that “self-help [was] the only available option.” (Winkler 2011: 233). Malcolm X famously preached that an increasingly egalitarian racial order must be demanded and obtained “by whatever means

necessary”, and thus that “. . . blacks were justified in doing whatever they had to in order to bring about racial justice.” (Winkler 2011: 233). This tenet of Malcolm X’s racial philosophy presented a clear challenge to Dr. King and the Civil Rights Movement’s unwavering and unconditional commitment to nonviolence, and was a philosophy that certainly resonated with those who felt that they were left with only one ”means” for survival.

However, neither Malcolm X nor the Black Panthers favored violence for its own sake. For both, violence was to be used not merely as a *sufficient* condition to racial equality, but rather only when it existed as a *necessary* condition. Violence was to be the last resort and used only in self-defense, as a response to violence. In articulating his fundamental philosophical departure from Dr. King and the mainstream, unconditionally nonviolent Civil Rights Movement, Malcolm X spoke: “If you don't take an uncompromising stand, I don't mean go out and get violent; but at the same time you should never be nonviolent unless you run into some nonviolence. I'm nonviolent with those who are nonviolent with me. But when you drop that violence on me, then you've made me go insane, and I'm not responsible for what I do.” (Malcolm X, “Ballot or the Bullet”). Similarly, Huey Newton, a hugely prominent figure in the Black Panther Party’s police-monitoring activity, explained that the organization got its name because “[t]he panther is a fierce animal, but he will not attack until he backed in to a corner; then he will strike out.” (Austin 2006: 34).

This violence-as-self-defense and violence-as-a-last-resort message is often confused as advocating violence *first*, probably either as a result of deliberate efforts by Malcolm X and the Black Panther Party to use incendiary rhetoric to gain visibility, or as a result of a reactionary racial order seeking to dismiss and paint as extreme those who have historically have posed the greatest threat. Malcolm X’s words “you should never be nonviolent unless you run into some

nonviolence” can be rephrased, less inflammatorily though logically identically, as “(only) if you run into nonviolence, you should be nonviolent”, from which we can infer, much less inflammatorily, that “you should only be *violent* when you encounter *violence*.” Similarly, perhaps we should read “by any means necessary” as meaning not that violence is just one of many available means, but rather that violence as an option will always exist as a last resort, and ought always be available when necessary.

Essential to the Black Nationalist philosophy of self-defense, of violence as a necessary and essential means to the end of true racial equality, was the presence and use of guns. Guns were uniquely suited to serve the philosophy of Malcolm X and the Black Panthers in that they represented the possibility of violent resistance against oppression. They thus commanded respect and recognition from those proven least likely to give it and most likely to initiate violence. Thus, predictably, the image of guns, as a manifestation of social, political, and economic power, became inextricably linked with Malcolm X and the Black Panthers.

“Malcolm X illustrated the idea for *Ebony* magazine by posing for photographs in suit and tie, peering out a window with an M-1 carbine semiautomatic in hand.” (Winkler 2011). Guns became essential to the identity and image of the Black Panther Party (Winkler 2011: 234). Motivated in part by Mao Zedong’s statement that “Political power grows out of the barrel of a gun”, guns symbolized everything that the Black Panther Party stood for—demanding and commanding respect, recognition, and ultimately, to be left alone. “Every member of the Black Panthers was expected to know how to use a firearm. . . . Newton made sure recruits were taught how to clean, handle, and shoot guns.” (Winkler 2011).

Beyond just the possession of guns, the public display of guns was valued above all by the Black Panther Party. After all, the ultimate end of commanding respect and autonomy was

achieved merely by the oppressor *seeing* the gun and backing off, which required public visibility. “Guns became part of the official uniform of the Black Panthers: black beret, black leather jacket, powder blue shirt, black pants, and a firearm.” (Winkler 2011: 235). “They carried their guns in public, openly displaying them for everyone...to see.” (Winkler 2011: 235). It can be said, then, that the Black Panther Party’s philosophy was characterized by the display of and pride in two things: Blackness and guns.

The Black Panther Party’s use of guns served one of its stated activities particularly well—policing, and providing self-defense from, the police. Recalling both Malcolm X’s declaration that violence is justifiable in the face of unprovoked violence, and Huey Newton’s declaration that violence may be used when backed into a corner, guns served as a tremendous weapon of self-defense and self-preservation against the police. One encounter, according to anecdotal evidence, involved Newton responding to a police officer asking him what he plans to do with his visibly displayed weapon with the reciprocal question: “what are *you* going to do with *your* gun?” (Winkler 2011: 236), followed by “If you shoot at me swine, I’m shooting back.” (Austin 2006: 51). Notably, the encounter ended peacefully with Newton achieving some street notoriety and fame, undoubtedly due to his public display of his willingness and ability to use his visibly-displayed gun. This encounter evolved into a tradition of “patrolling the police”, as discussed briefly earlier, where “...groups of armed Panthers would drive around following the police cars...” (Winkler 2011), undoubtedly empowered to fight racialized police brutality and violence by their public possession of guns. It should be noted that guns were thus an essential tool for the Black Panther Party to carry out their uniquely threatening challenge to a well-established white supremacist racial order.

## **V. A Trend of Colorblindness: Law-and-Order as a Response to Racial Egalitarianism**

The Black Nationalist's use of radical, liberationist rhetoric and visible display of guns, paired with the Civil Rights Movement's political and legislative victories, established a political climate in which conservative whites, those who had held control under the pre-Civil Rights Movement systems of racialized control, sought new and innovative ways to re-establish control. However, the sociopolitical context demanded colorblindness in lawmaking. Their subsequent actions to reclaim that control, in an environment that requires colorblindness, can be explained by Vesla Weaver's "frontlash" hypothesis. Weaver's "frontlash" hypothesis suggests that "...the process by which losers in a conflict become the architects of a new program, manipulating the issue space and altering the dimension of the conflict in an effort to regain their command of the agenda. (Weaver 2007: 236). According to Weaver, opponents of civil rights expansions, who ultimately lost and could no longer seek to control Blacks on explicitly racialized grounds, "...open[ed] the possibility of reversing its fortunes without violating established norms..." by "maneuvering into a new issue space and carving a new niche to mobilize around..." (Weaver 2007: 236). In reacting to the liberationist threat to white supremacy, as well as to new civil rights gains, "...[c]onservative whites began, once again, to search for a new racial order that would conform to the needs and constraints of the time. This process took place with the understanding that whatever the new order would be, it would have to be formally race-neutral—it could not involve explicit or clearly intentional race discrimination." (Alexander 2010: 40).

This task, of replacing one system of racialized control with another given a set of constraints mandating some degree of colorblindness, is powerfully reminiscent of earlier chapters of the thesis. The second chapter discussed one such change in systems of control: the change from slavery to the convict leasing system, the latter of which was formally colorblind

but had clearly racialized effects. The third chapter discussed another such change in systems of control: the change from formally racialized arms-restrictions to more colorblind, though racialized, restrictions on gun possession. This chapter now identifies merely another such change: the change from race-explicit Jim Crow laws, to a new, supposedly colorblind system that followed.

The ostensibly colorblind system that emerged following the formal collapse of Jim Crow can, at its origins, be understood as a “law-and-order” control system. Law-and-order politics had a history of being linked with racial politics, with a constant theme of “...national leaders explicitly and routinely address[ing] black civil rights in criminological terms.” (Murakawa 2008: 235). In the 1940s, when President Truman had advocated civil rights for Black veterans returning from World War II, “...Southern Democrats protested...by forming the States’ Rights Party...”, a tenet of which was that “...segregation maintains law and order, while integrations breeds crime.” (Murakawa 2008: 237). A decade later, Southern Democrats, while debating the Civil Rights Act of 1957, “...contended...that [it] would empower black organizations to defend black criminals under the guise of civil rights.” (Murakawa 2008: 240).

The rhetoric and politics of law-and-order, already with a deeply racialized history, was utilized to re-assert the control that Jim Crow could no longer, though this time it was colorblind. It was used to critically respond to the political developments of the Civil Rights Movement, and to reinstate some degree of racialized control immune to the charges of the Civil Rights Movement: “The same actors who had fought vociferously against civil rights legislation, defeated, shifted the “locus of attack” by injecting crime onto the agenda. Fusing crime to anxiety about ghetto revolts, racial disorder...was redefined as a crime problem, which helped shift debate from social reform to punishment... As Crow had loosened its clutch, leaders of the

old paradigm remained and sought to enlarge and shift the conflict strategically.”(Weaver 2007: 230, 236).

The new rhetoric that motivated the racialized system of control caught on: “For more than a decade—from the mid-1950s until the late 1960s—conservatives systematically and strategically linked opposition to civil rights legislation to calls for law and order...” (Alexander 2010: 41) (Murakawa 2009). Advancements in racial egalitarianism became cognitively linked with simultaneous, though irrelevant, increases in national crime, which together were seen as accelerating a “...breakdown in lawfulness, morality, and social stability.” (Alexander 2010: 41). The result was that in the years following the political victories of the Civil Rights Movement, “...political leaders declared victory over Jim Crow while simultaneously passing [law-and-order measures] with a disproportionate impact on black Americans.” (Murakawa 2008: 234).

This new ostensibly colorblind system of law-and-order, which had clearly racialized intent and effects, had a unique political appeal. It resonated particularly strongly with “...working class whites” in the Southern states, those who likely held “...intense resentment of racial reforms...” (Alexander 2010: 43), and were eager to re-establish a system of control. The “Southern Strategy” was the political tactic to capitalize on, and thus institutionalize, this demand for racialized control by “...appealing to racial fears and antagonisms...” to build a Republican coalition of “the white South, and half the Catholic, blue-collar vote of the big cities.” (Alexander 2010: 43) (Murakawa 2008).

The institutionalization of a superficially colorblind system of racial control was largely successful. Law-and-order soon gained sufficient traction to exist as a strong and independent racial control mechanism. “Barry Goldwater...aggressively exploited the riots and fears of black crime...” for political gains (Alexander 2010: 41). Ardent, and infamously racist segregationists



who held political office and significant political clout, including Governor George Wallace and Strom Thurman, espoused the importance of political measures to implement law-and-order (Alexander 2010: 42). A clear reactive transformation had occurred—“After the passage of [Civil Rights legislation], the public debate shifted from segregation to crime.” (Alexander 2010: 42). A new manifestation of America’s demand for racialized control was born, and, similar to prior systems, it rested on a foundation of a familiar resurfacing fad in establishing racialized systems of control— formal colorblindness.

## **VI. May 2, 1967 – A Clash of Law-and-Order Colorblindness and Black Nationalism**

The Black Panther Party’s tactic of publicly displaying, and threatening to use, guns to challenge racialized police violence and thus the greater white supremacist racial order, culminated on May 2, 1967, amidst a public zeitgeist of ostensibly colorblind rhetoric of law-and-order. On that day, twenty-four men and six women, all associated with the Black Panther Party, approached the California State Capitol Building bearing the described Black Panther uniform, including loaded guns, with a specific and deliberate policy agenda. Following all of the intricacies and details of California’s gun-carrying laws so as not to violate any, “...the Panthers holstered their loaded pistols, grabbed their loaded shotguns, and looked up at the majestic statehouse. Huey Newton decided that the Panthers should take their guns to the state Capitol and declare that blacks were no longer subjects. They had a say in politics too.” (Winkler 2011: 238). In a surreal series of events, a group of armed Black men and women, complete with a sort of paramilitary outfit and donning pistols and shotguns, roamed the halls of the State Capitol building, passing by then-governor Ronald Reagan speaking to a group of young school

children, seeking to generate visibility and recruit members for their revolutionary cause (Austin 2006).

That group of heavily armed individuals, however, did not merely have lofty goals nor were they merely seeking attention and headlines; they had a singular clear and detailed policy goal. On the steps of the California State Capitol building, armed with loaded shotguns and pistols, Bobby Seale read a message from the Black Panther Party articulating this goal and their greater purpose in boldly and provocatively entering the Capitol armed so visibly and so heavily:

The Black Panther Party for Self-Defense calls upon the American people in general and the black people in particular to take careful note of the racist California Legislature which is now considering legislation aimed at keeping the black people disarmed and powerless at the very same time that racist police agencies throughout the country are intensifying the terror, brutality, murder, and repression of black people.

The Black Panther Party for Self-defense believes that the time has come for black people to arm themselves against this terror before it is too late. The pending Mulford Act brings the hour of doom one step nearer. A people who have suffered so much for so long at the hands of a racist society, must draw the line somewhere. We believe that the black communities of America must rise up as one man to halt the progression of a trend that leads inevitably to their total destruction. (Seale 1968: 161- 162)

## **VII. The Mulford Act – Institutionalized Racism Through Gun Control**

The pending legislation that Seale identified in the statement he read, the same piece of legislation that the armed individuals were protesting, was the Mulford Act, proposed by Oakland Republican, and noted conservative reactionary, Don Mulford. Mulford had developed a reputation among his constituents in Alameda County, part of which includes Oakland, for “fighting radicals”; he had previously supported a bill that, during free speech protests at the public University of California at Berkeley, sought to “..forcibly remove people who came onto school grounds only to protest.” and additionally had a unique penchant for “law-and-order” in his district (Winkler 2011: 239). It was additionally supported by then-governor Ronald Regan,

who espoused the virtues of sensible gun control measures that would not impose an undue burden on the “honest citizen” (Winkler 2011: 245). It would not be unreasonable to conclude or infer that two individuals who were largely the faces of the white establishment, the entrenched racial, social, political, and economic order so profoundly threatened by the Black Panthers Party, would do whatever they could as Congressman and governor to neutralize that threat.

The act, ostensibly colorblind and sold as a sensible law-and-order measure, would “...outlaw the open carrying of loaded firearms within city limits.” (Winkler 2011: 239). Prior to the existence of this bill, such open and visible carrying of firearms was legal as long as the weapon was visible to the public (Winkler 2011: 244). Huey Newton and those in leadership positions in the Black Panther Party were well-versed in law and knew this—that is precisely why they were able to make the public display of firearms the lynchpin of their tactics. The passage of this law, by criminalizing the signature tactic of the Black Panther Party and undermining the Party’s ability to carry out their perfectly legal armed police patrols, would thus pull the rug out from under their feet and, by outlawing their signature and essential activity, functionally criminalize the revolutionary organization itself.

It is this at this moment that the iteration of the pattern identified in this larger project resurfaced. At this time, in 1967, there was occurring a huge moment of racial progress—namely the upheaval and demands of the Civil Rights Movement, but additionally, and more radically, the more far-reaching demands of Malcolm X, the Black Panther Party, and other voices of Black Nationalism. To resist that movement toward a more egalitarian racial order, to maintain the white supremacist control that Black Nationalists so vocally challenged, Don Mulford, California Republicans, and Ronald Reagan crafted and implemented an ostensibly colorblind measure that would have the sure effect of collapsing the racially revolutionary threat. Mulford

defended his legislation, denying that it was tailored specifically to address the threat of the Black Panthers, and claiming that it "...applied to everyone regardless of skin color." (Winkler 2011: 245), but surely equal application is not a sufficient standard for *true* egalitarianism.

It is thus worth briefly situating the 1967 Mulford Act within a historical context to draw undeniable parallels. Recall, from the previous chapter, the iterations and reiterations of gun laws designed and re-designed to disarm Black Americans and enslaved Americans at the end of the Civil War and beginning of Reconstruction. Through slave disarmament provisions, explicit race-based disarmament provisions, and then ostensibly colorblind economic disarmament provisions following the passage of the Fourteenth Amendment, new and threatening challenges to the established white supremacist racial order were constantly neutralized through mechanisms of institutionalized racism that resulted in the confiscations of weaponry. This is merely another instance. Don Mulford's attempt to disarm "...was not much different from the nineteenth century Black Codes passed during Reconstruction that forbade blacks' possessions of weapons. Blacks had been disarmed by fearful whites after the Civil War in an effort to maintain a cheap labor force and to ensure that they could not defend themselves against the myriad violent attacks that were sure to come." (Austin 2006: 117), and the disarmament of the Black Panther Party by the California legislature bore a strikingly similar purpose and effect.

The law passed the California state legislature, which should not be surprising given prior iterations of the pattern, and it largely served its purpose—the police finally had a legal way to subordinate, subdue, and ultimately control the revolutionary Black Panther Party. The organization "...had stopped patrolling the police ever since the Mulford Act outlawed the public display of weapons except by law enforcement officers." (Austin 2006: 166). In an attempt to disturb the Party elite and arrest leader Bobby Seale, Oakland police confronted a group of Black

Panther Party leaders and “...discovered they were all armed and in violation of the new, Panther-inspired Mulford Act. The police arrested the three and placed them in police cars to await their comrades, whom they captured next.” (Austin 2006: 119). Eventually, Newton was arrested after a gun fight with a police officer and “...shootouts between the Panthers and police would become commonplace...” (Winkler 2011: 246). Recall that prior to the passage and implementation of the Mulford Act, as described in an earlier anecdote, armed encounters with police were predominantly peaceful, as all parties were cognizant of the then-legality of the Black Panther Party’s open-carry tactics. Mulford’s colorblind response to the Black Panther threat, utilizing the criminal justice system to maintain and bolster a white supremacist racial order, ultimately succeeded in dismantling that threat.

### **VIII. Empowerment of the Private Actor to Enforce Racialized Control**

A parallel dynamic occurring over time is also emphasized in this project, one that complements the identified instances of the passage of ostensibly colorblind legislation. This second dynamic entails the empowerment of private actors to maintain white supremacy rule when that racial order is threatened by racial progress. This pattern, as it appears in my project, is intrinsically linked to the actions and jurisprudence of the national legislature, and specifically the Supreme Court. Earlier, this pattern was made manifest in Supreme Court rulings that disempowered the federal government from prosecuting and disrupting racial violence perpetrated by private actors, namely the Ku Klux Klan. During the mid Twentieth-century, the dynamic, when it appeared, occurred largely *despite* Supreme Court rulings, rather than because of them.

### **No Empowerment at Federal Level – A Moment of United Institutional Racial Liberalism**

This instance of American political history is unique in its ideological alignment of the three branches of federal government, an alignment grounded largely in the Democratic Party's racial liberalism—the executive office, Congress, and the Supreme Court were all occupied by Democrats and racial liberals. This held significant implications for the federal government's likelihood to empower racialized control in the private realm.

With Democrats in power both in the executive office and the national legislature following “Lyndon Johnson’s landslide victory” (Perry and Poe 2004: 649), it was unlikely that law-and-order politics, and an empowerment of the private actor from it, would define the national legislative agenda. This racially liberal legislative ideology was perhaps in tension with a lesser-known institutional legacy of the bureaucratic federal government, namely its service “...as an active participant in the process of fostering and maintaining a ‘segregationalist order’...” (Francis 2014: 14) (King 2007). Democrats knew that Black Americans were “...disproportionately involved with the criminal justice system, and [so they] would not consider appearing hostile.” The 1968 platform of the Democratic Party, “...which firmly established the party’s positions for at least two decades, stated that the ‘entire nation is united in its concern over crime’ and then proceeded to treat the issue as if it were political poison.” (Perry and Poe 2004: 657). When they did focus on crime, when the national ethos forced them to, they “...placed organized crime and white collar crime first.”, (Perry and Poe 2004: 658), afraid to touch the racialized law-and-order rhetoric that had drawn party lines.

Rather, it was the Republicans, including Goldwater, Ford, and Nixon, who had “...fused race and crime for political gain.” (Perry and Poe 2004: 655). At this point, by the late 1960s, “[c]rime had become a Republican issue. Republican platforms robustly emphasized the problem

of violence in society and the need for public safety...Republicans worked to solve the crime problem, Democrats contributed to it.” (Perry and Poe 2004: 657). Recall from the prior discussion of law-and-order politics that it had largely been born out of a deliberate strategy to build a Republican coalition of “the white South, and half the Catholic, blue-collar vote of the big cities.” (Alexander 2010: 43), and that the California legislature and governor’s office that passed the Mulford Act were both Republican-led. On the national level, between 1960 and 1968, Republicans were in the minority in Congress and did not hold the presidency, and thus so too was their racialized law-and-order agenda. The federal legislative climate was thus unlikely to take legislative action to empower the private actor to maintain racialized control.

Similarly, the Supreme Court in the 1960s, known as the Warren Court, supported a racial ideology similar to that of Democratic Party, namely racial liberalism. The perception at the time was that Lyndon Johnson and his Democratic Congress’ “...Great Society need[ed] a Great Supreme Court and the United States already had one headed by Chief Justice Earl Warren.” (Perry and Poe 2004: 651).

This Democratic appreciation of, as well as Republican antipathy toward, the Warren Court came partially from its liberal rulings on procedural criminal justice, and thus the subterranean issue of race, relations, and racialized control. While Republicans sought to strengthen and make more restrictive the criminal justice system, in order to support a racialized agenda of law-and-order, as evident in the passage of the Mulford Act, the Warren Court stood ideologically opposed. The Warren Court’s general criminal justice jurisprudence was defined by “the promotion of expansive interpretations of the Bill of Rights provisions protecting the accused” (Israel 1977: 1340) and a “...general premise...that an expansive interpretation of individual rights should be taken unless adoption of such an interpretation presented exceptional

difficulties.” (Israel 1966: 1340). It liberalized the criminal justice system, contrary to the racially restricting law-and-order ethos, in a number of areas, including Constitutional questions of search seizure, prosecutorial conduct, and self-incrimination (Israel 1977). A number of landmark cases and rulings handed down by the Warren Court fundamentally expanded the rights of the accused, developments that of course ran contrary to the spirit of maintaining strict law-and-order (Perry and Poe 2004). While the Court alienated Republicans and proponents of maintaining racialized control through law-and-order, it captured support from “...African-Americans [who] had been major beneficiaries of the [its] revolution...” (Perry and Poe 2004: 657).

Institutional Democrats “applauded the Warren Court’s criminal procedure decisions”, knowing fully well that, with the potent ethos of law-and-order, “[n]o elected branch of government could have taken the antiquated justice system and transformed it, especially against skeptical or hostile public opinion.” (Perry and Poe 2004: 657). Opposed to the Democratic Party and its agenda, “Republicans ran against the Warren Court in both 1964 and 1968...” (Perry and Poe 2004: 652). As a Republican presidential candidate, Nixon, in 1968, explicitly criticized the Warren Court for “...nearly rul[ing] out confessions as a law enforcement tool...” and used a similar criticism as a “punch line during the 1968 [presidential] campaign”.

From the ideological tendencies of the Warren Court’s rulings, as well as Democratic support of and Republican opposition to it’s rulings, it is evident that the Supreme Court was at least as unlikely, if not more so, than the elected branches of government to take actions to empower the private actor or in some way enforce or maintain systems of racialized control. This rare and unique moment of clear and distinct ideological agreement between the three branches of federal government established a set of political conditions that differed remarkably from the



conditions a century earlier, when the Supreme Court, with its rulings in the Civil Rights Cases of 1883 and *Cruikshank*, took deliberate and egregious measures to empower the private actor. It should be noted, however, that the ideological alignment under analysis, here, was occurring at only the national level.

From a theoretical perspective, this rare moment of ideological alignment between the Court and the elected branches of government can be explained, or at least conceptualized, by the “multiple traditions” thesis within American Political Development. This thesis, as argued by Rogers Smith, challenges and adds nuances to the accepted Tocquevillian thesis that defines American political culture as having been “...shaped by the unusually free and egalitarian ideas and material conditions that prevailed at its founding...” (Smith 1993: 549). Rather, the “multiple traditions” thesis suggests that in addition to the “unusually free and egalitarian ideas” that have shaped America’s political culture, a sort of American exceptionalism, American politics have historically also been shaped by uglier “...inegalitarian ideologies and conditions that have shaped the participants and the substance of American politics just as deeply...” (Smith 1993: 549). According to the thesis, inegalitarianism, or what are called “ascriptive hierarchies”, have not merely been exceptions to or nuances of triumphant traditions of liberalism and republicanism, not merely what Smith calls “emotional prejudices or ‘attitudes’”, but actually constitute their own, parallel, influential political tradition (Smith 1993).

Smith remains vague, however, as to when the multiple traditions surface. Under what set or sets conditions is American political culture characterized by inegalitarian ascriptive hierarchies, and under what set or sets of conditions do the Tocquevillian, uniquely American, egalitarian ideals triumph? Smith largely leaves this question unanswered, though he makes clear that the traditions do not move in one direction, that egalitarianism does not always triumph over

inegalitarianism over time. That, given a limited time horizon, “the arc of the moral universe” does *not*, in fact, always “bend toward justice” (King 1965). He describes “volcanic peaks” and “...seismic pressures with outbursts that harden into substantial [inegalitarian] peaks once again...” (Smith 1993: 550), and explicitly suggests that “...novel intellectual, political, and legal systems reinforcing racial, ethnic, and gender inequalities might be rebuilt in America in the years ahead (Smith 1993: 550).

This moment of unusual racial liberalism, of apparent egalitarian ideology within national political institutions, may be an emergence and triumph of the more egalitarian ideals that Tocqueville described. Recall that the Civil Rights Movement was characterized by racial liberalism, while Black Nationalism was characterized by racial liberationism, and that the Civil Rights Movement was ultimately triumphant in its political and legislative aspirations and institutionalization. It is reasonable to infer, then, that the Movement’s political success is the reason that racial liberalism triumphed over both racial liberationism and racial inegalitarianism, at least in national politics. Its institutionalization and political victory over its more conservative and radical counterparts established a set of conditions in which more the more egalitarian, Tocquevillian traditions emerged and came to define American political culture, as shown by the Democratic holdings of the executive and legislative branches and the Warren Court’s racially liberal character.

However, and it is essential to reiterate, the emergence of the egalitarian Tocqueville tradition at the federal level, in all three branches of government, does not translate into egalitarian racial orders on the ground. Racial egalitarianism is a necessary, though not sufficient condition for true racial egalitarianism—true racial egalitarianism also demands racial liberalism at the state and local levels. Unsurprisingly, these more concentrated government bodies were

more resistant to the emergence of egalitarian traditions. As such, through largely anecdotal evidence, the dynamic of empowerment of the private actor to enforce racialized control can be seen at the local and state level where possible, often through more unofficial and informal channels.

### **Empowerment at Local and State Level—Klan-Police Cooperation**

In the early 1960s, there were a series of campaigns by mainly white Northerners, known as “The Freedom Rides”, which had the goal of registering disenfranchised Black Americans to vote. These campaigns, however, were perceived by some as violating the sovereignty and way-of-life of the deeply racialized American South. The response to these freedom rides included horrific racial violence, often perpetrated by private actors with assistance from, and often largely coordinated by, state and public officials.

One particular incident details the anticipated appearance of freedom riders, living representations of a progressive threat to the white supremacist racial order, in Alabama. In defending against the threat to politically empower Black Alabamans, the local Alabama police department coordinated closely with the local chapter of the Klan to form a public-private partnership in using violence to maintain white supremacist control: “The Klansmen had known about the Freedom Ride since mid-April, thanks to a series of FBI memos forwarded to the Birmingham Police Department...Police Sergeant Tom Cook—an avid Klan supporter...who worked closely with Eugene “Bull” Connor... -- provided the organization with detailed information on the Ride, including a city-by-city itinerary.” (Arsenault 2006: 136). Additionally, Police Sergeant Cook, an official of the state, is said to have made an explicit promise to Gary Thomas Rowe, a leader of a particularly violent chapter of the Ku Klux Klan in Alabama: “You

will work with me and I will work with you on the Freedom Riders... We're going to allow you fifteen minutes.... You can beat 'em, bomb 'em, maim 'em, kill 'em. I don't give a shit. There will be absolutely no arrests. You can assure every Klansman in the country that no one will be arrested in Alabama for that fifteen minutes." (Arsenault 2006: 136).

Though the image conjured by this incident, of an official of the state explicitly sanctioning racial violence by organized private actors, is perhaps the perfect illustration of the dynamic identified, it was not, by any means unusual. "Throughout much of the South, police departments were heavily populated by Klansmen. In some counties, Klan dues were even paid and collected right at the local police station." (Winkler 2011: 232). Indeed, cooperation between police and the Ku Klux Klan, the enablement and empowerment of private racial violence by public actors, was not just a rare occurrence while Dr. Martin Luther King was preaching nonviolence and Malcolm X was preaching Black Nationalism and self-defense—rather, it was often the norm. This public-private coalition was grounded in the disturbing logic that "[p]rotecting the sanctity of white supremacy required vigilante justice dispensed by red-blooded Klansmen willing to give the do-gooders from the North an old-fashioned Alabama-style welcome." (Arsenault 2006: 137), at least as much as it required colorblind legislation to disarm those who threatened the well-established racial order.

Such cooperation between the public sector and private sector, a cooperation enabled and empowered by deliberate government action, echoes the effects of the Supreme Court rulings discussed in the preceding chapter. Court cases such as *Cruikshank*, and *Civil Rights Cases of 1883*, all occurring in the post-Reconstruction South, had the general effects of empowering the private citizen to enforce a similarly vigilante and reactionary racial violence onto the newly empowered Black population. There certainly are distinctions that exist, not the least of which is

the differing mechanisms through which the empowerment of the private citizen occurred. Whereas the earlier, twentieth century mechanisms were legal interpretations of the law that weakened forces that restricted private action, the latter mechanism was a sort of extra-legal, if not illegal, abandonment of public duty and obligation, an explicit cooperation among low-level actors, resulting in a re-delegation of the duties of violently enforcing white supremacy to the private sphere. Despite the mechanical differences, both are iterations of the recurring trend of empowerment of the private actor to maintain white supremacy, when the public actors involved cannot.

## **Conclusion**

In this chapter, I first identified and discussed the moment of racial progress during which the events of the chapter are set. This entailed a description and analysis of the mid-Twentieth Century liberal Civil Rights Movement and liberationist Black Nationalist Movement. I first presented the dominant narrative of the triumphant nonviolent Civil Rights Movement, highlighting some key actors, achievements, events, and philosophies and analyzing the effective racial progress they institutionalized. I then discussed the Black Nationalist liberationist movement and its core philosophy, which led to highlighting its contrast with, and critique of, the liberal Civil Rights Movement. I subsequently discussed the parallel, though perhaps lesser known, Black Nationalism movement, again describing some key actors, achievements, events, and philosophies. I highlighted how it was uniquely situated to fight the white supremacist social power structures that remained following the triumphs and successes of the Civil Rights Movement.

I then described the Black Panther Party, the footsoldiers of Black Nationalism. I outlined their core philosophy, which was different from the Civil Rights Movement in that it sought change not just in society, but also in social, economic, and cultural relations. I outlined the Party's Ten-Point Plan, and spoke of its organized activities to realize those goals. This led to a discussion of the Party's involvement in self-defense protection from police brutality. This supported my argument that the Black Nationalism posed a unique and more all-compassing threat to the predominant white supremacist social order than the threat that the more liberal Civil Rights Movement may have posed.

This led to a discussion of the role of guns and violence within the Black Nationalist Movement and the Black Panther Party. I described historical circumstances surrounding police brutality and racial violence. I analyzed the importance of guns to the ideological platform and public image of the Black Panther Party, arguing that guns were integral to maintaining self-defense at the heart of both. I thus argued that guns were essential to the unique liberationist threat that Black Nationalism and the Black Panther Party posed to the established and entrenched racial order.

I discussed the role of colorblindness in shaping the contemporary sociopolitical context. I discussed Vesla Weaver's "frontlash" hypothesis, and the suggestion that a racialized rhetoric and politics of law-and-order came to replace the Jim Crow system of racialized control, and served as a subsequent iteration of systemic racialized control with the purpose to fulfill a constant demand. I then discussed the institutionalization of colorblind law-and-order rhetoric, suggesting that this body of colorblind racialized control was the natural origin of racially controlling legislation.

I then described a historical protest tactic by the Black Panther Party that resulted in widespread controversy and panic. On May 2, 1967, a number of Black armed members of the Black Panther party walked into the California State Capitol, with their guns publicly displayed for all of the predominantly white lawmakers to see. The show of force, which brought the Black Panthers' more radical and indicting philosophy to the forefront of California politics, was both a confrontation of the Black Panthers' gun-centering ideology with California law-and-order politics, and more concretely, a protest of specific disarmament policy item.

Following the description of the incident involving the confrontation between the Black Panther Party and the California state legislature, I described the supposedly colorblind response from the criminal justice system—a specific and identifiable measure passed by that same California state legislature only a few days later. Pointing to a number of pieces of evidence, including suspicious social contexts, actors, and speeches, I illustrated, through analysis, how this piece of legislation, born from racialized law-and-order politics and rhetoric, resembled the gun control legislation passed during Reconstruction both in content and purpose. The description and analysis of the gun-restricting law at hand was essentially the culmination of the description of the unique egalitarian threat posed by the Black Nationalist movement and the Black Panthers, the importance of guns to the Black Panthers' ideology and platform, and the sociopolitical context of using law-and-order and crime control rhetoric to maintain some system of racialized control. The section thus articulated clearly and explicitly how this incident was an example of the pattern identified in the greater thesis project.

Lastly, following the description and analysis of the law, I identified the presence of a parallel and familiar dynamic—the enabling of private action by the state to enforce and maintain white supremacy when it is under attack from increasingly egalitarian moments in

American political culture. I argued that empowerment of the private actor was not particularly visible at the federal level mainly because all three branches of American government were characterized by a predominance of a “Tocquevillian”, racially liberal ideology. However, at the state and local level, I argued, racially inegalitarian ideologies still held strong, and thus in this area there was more evidence of empowerment of the private actor. I described an episode in which Bull Connor explicitly enabled the Ku Klux Klan to enforce such white supremacy where state actors could not, as well as other incidences of the state and police cooperating with or enabling private white supremacist actors. This was compared to the prior instances of state-enabled private action following the end of the Civil War, and was shown to be a parallel, if less visible, dynamic paired with the passage of colorblind measures with racialized effects.

Recall from Chapter 2 and the conclusion of Chapter 3 the discussions of the four takeaway points from the convict leasing system’s model of racialized control. Each takeaway point contains a unique piece of insight that, as a lens, strengthens analysis of the pattern at all of its appearances. At this point, after the discussion and analysis of the occurrence of the pattern at two instances a century apart, it is worth briefly reviewing those instances through the lens of those takeaway points, with special consideration given to the instance identified in this chapter.

The first takeaway point is that the instance of racialized control responds to a sudden increased demand for racialized control, as a response to a *threat*. Chapter 2 detailed a number of such threats that occurred prior to, and at the beginning of Reconstruction, and showed racially controlling legislation to have occurred specifically as a response to threats that triggered increased demand at certain points in mid-Nineteenth Century American history. This chapter detailed the continued demand and identified the racial threat that emerged when the Jim Crow



system of racialized control formally collapsed. When Jim Crow collapsed, there was a sudden glimpse of racial egalitarianism. This glimpse of racial egalitarianism was institutionalized through the legislative successes of the Civil Rights Movement, and reinforced through the unique threat presented by Black Nationalism. However, demand among a white supremacist reactionary class for control did not collapse, and as such, there was sufficient demand to respond to the burgeoning egalitarian threat with the creation of a new, colorblind system of control to replace it—law-and-order rhetoric, specifically the Mulford Act. This is essentially Vesla Weaver’s “frontlash” hypothesis.

The second takeaway point is that the identified instance of racialized control was made manifest through a principle of *colorblindness* in its language and prima facie intent. Chapter 2 detailed the origin of the principle of colorblindness in Constitutional politics, as well as the presence of colorblindness in gun control legislation. Colorblindness increasingly replaced race-explicit control when the Fourteenth Amendment was passed. In this chapter, colorblindness replaced race-explicit control when Jim Crow collapsed. The system that replaced it, that re-established racialized control, was, prima facie, colorblind, and used ostensibly neutral law-and-order rhetoric to impose racialized control. This, the racialized intent of ostensibly colorblind law-and-order politics, was particularly evident in the context and passage of the Mulford Act, as discussed, in California.

The third takeaway was that a parallel dynamic of *empowerment of the private actor* occurs alongside colorblindness in the law to reinforce the racialized control. Chapter 2 showed that the existence of this dynamic may be one reason that the anticipated reiterations of gun control as racialized control within one state may not be so simple nor apparent. The empowerment of private actors through the Supreme Court’s State Action doctrine may have

done the work of racialized control for the state. This Chapter argued that this dynamic may have been more apparent at the state level than at the federal level because of the makeup of political institutions. Federal political institutions, the legislative, executive, and judicial branches of government, were shaped by what Rogers Smith would consider a Tocquevillian, more liberal-egalitarian tradition, which made them unlikely and unwilling to take action to empower the private actor. State and local governments, however, were still defined by more racially inegalitarian traditions. In state and local governments, we see explicit cooperation between the Ku Klux Klan and instigators of racial violence with the police.

The final takeaway point is that the identified system of racialized control occurs through, and under the auspices of, the criminal justice system. Chapter 2 provided an example of a number of laws that sought to control a Black population and that were passed and enforced through the criminal justice system. In this chapter, the criminal justice system similarly makes a number of key appearances. It was through the criminal justice system, more specifically the police force, that Black individuals, mainly in Oakland and poorer urban areas, were humiliated, brutalized, and subjected to systematic racial violence on behalf of the state. It was with the blessing and cooperation of the criminal justice system, again the police, that Black individuals in the rural South were murdered and brutalized by private actors, including the Ku Klux Klan. And it was through the criminal justice system that the threat of armed self-defense from the criminal justice system's systematic violence, the threat of Black liberation from the oppressive white supremacist racial order, was subdued through the passage of colorblind law-and-order policies.

## **Conclusion: Review, Application, and Implication of the Identified Pattern**

### **I. Summary and Review**

Methodologically, this project was born out of the logic and methodology of American Political Development, namely the value that it places on pattern identification. It was grounded in the idea that distinct events and occurrences in the development of American politics, separated by both time and space, are not as distinct as their temporal and geographic distance suggests. Rather, it claims, they are iterations and reiterations of one singular pattern or dynamic that reemerges time and time again, under sets of similar or comparable conditions. This pattern, shown to have fundamentally shaped the development of some aspect or area of American politics, reveals a fundamental truth, or otherwise meaningful conclusion, about the nature and development of that aspect or area of American politics.

Substantively, the pattern identified in this project is that in times of racial liberation and expanded racial freedoms in the United States, the criminal justice system (in the cases studies to which this project is limited, the criminal justice system as limited to restrictive gun laws), has been used as a reactionary mechanism of racial control to respond to an increasingly egalitarian racial order, and it has done so through the use of “colorblind” statutes that have racial effects. It has been revealed to emerge across long horizons of time, in the mid-nineteenth century and then again in the mid-twentieth century, and across wide geographic horizons, in the rural Deep South and then in urban Oakland, CA. It has been shown to emerge under similar sets of conditions, namely the transition into a more racially egalitarian sociopolitical order, whether that order is defined by the fall of slavery or the fall of Jim Crow. And it has appeared similarly at each

emergence, as a restrictive policy, or set of policies, that is facially colorblind but has a profoundly racialized impact. According to the logic and methodology of American Political Development, then, we can draw a meaningful, if limited, conclusion regarding the historical significance and importance of the pattern to the development of the criminal justice system—that race, race relations, and America’s history of institutionalized racial control somehow, at some level, matters.

The project has repeatedly highlighted four “take-away points”, four insights into the nature of the pattern that speak to its meaning and importance. First, the pattern’s distinct manifestations are motivated by demands for racial control that emerge to fill voids left by racially egalitarian developments in American politics or society. From a larger perspective, viewing the pattern as a whole rather than its distinct parts separately, we can conclude that there is a distinct and lasting American demand for racial control, one that surfaces at different historical moments. Second, the pattern’s distinct iterations appear facially colorblind, to not mention race explicitly in their language. From a larger perspective, seeing that colorblindness has served a racialized purpose at eras hundreds of years and thousands of miles apart, we can conclude that colorblindness has served as a potent disguise for racial control, and is thus essential to fully understanding racial control in American politics and society. Third, in addition to ostensibly colorblind legislation, a complementary dynamic emerges in which the newly neutered public sector empowers the private sector to reinstitute racial control over Black bodies. We can thus conclude that when thinking of racial control, the distinct lines between the public and private sector are often blurred, that both public and private actors can act to maintain racial control, often in strategic cooperation. Lastly, the pattern’s manifestations, episodes and institutionalizations of racial control occur as developments of and actions by the criminal justice

system. From this, we can conclude that the criminal justice system is particularly suspect as an American institution involved in the enforcement and maintenance of racial control—that the American criminal justice system, a product of its disturbing historical legacy, has been a particularly invidious agent of the American ideological tradition of white supremacy.

The first chapter of the project was a literature review. It discussed the subfield, methodology, and aims of American Political Development, namely pattern identification, and situated this project within the subfield. It described and justified the critical-race perspective that this project adopts, and, in doing so, detailed literature relevant to institutionalized racism in three policy areas—disenfranchisement law, mass criminalization, and colorblindness.

The second chapter provided a model for what manifestations of the pattern may look like. It did this by providing description and analysis of one particularly obvious and insidious example of ostensibly colorblind institutionalized racism occurring through the criminal justice system. This was the convict leasing system that emerged in the wake of the Civil War. The chapter described the instance of racial progressivism in which slavery was abolished, as well as the criminal justice system's response, the convict leasing system. The convict leasing system, it claimed, was as an ostensibly colorblind form of institutionalized racism, resulting from white supremacy's racialized anxieties, designed to re-exert control over the Black population.

The third chapter described the first iteration of the pattern, a number of restrictive gun laws passed in the wake of the Civil War. It showed that these laws occurred in the midst of a significant moment of racial progress and increased egalitarianism, remarkably soon after Constitutional Amendments demanded facial colorblindness. The restrictive gun laws appeared facially colorblind, but I show that they had clearly racially differential effects, meant to re-exert white supremacist racial control.

The fourth, and final, chapter described the second iteration of the pattern, a restrictive law passed in the wake of the Civil Rights Movement. The manifestation of the pattern emerged amidst the success of a few ideologically diverse challenges to white supremacy, one of which relied heavily on guns to embody and realize its philosophy. An ostensibly colorblind law soon passed amidst that group's activity and rise to prominence, and I showed that this law was motivated by purposes of racialized control. I thus argued that it fit into the identified pattern, given that it bore such substantial resemblance to the earlier instance of restrictive gun laws, as well as to the convict leasing system, in that racialized control was institutionalized to re-exert control over a Black population whose new racial freedoms threatened white supremacy's grip on American politics, culture, and society.

## **II. Extending the pattern vertically (temporally): Application to gun law today**

The pattern identified by this project highlights how racial control has been institutionalized and systematized, in ostensibly colorblind language, in the policy area of gun law. It is a historical pattern, but that is not to say it is a historical relic nor in any way dead. Rather, the pattern and its implication still inform the state of gun law today. This application of the pattern to a modern context, recall from the discussion of the American Political Development subfield, is the purpose of using a historical approach to perform political analysis—to explain what is happening *today*. For that reason, this section will extend the pattern and its implications *vertically* (temporally), to a contemporary sociopolitical context.

It is unclear whether there exists today a singular movement toward racial egalitarianism comparable to those identified earlier, Reconstruction and the development of Black civil rights. Perhaps it would be the election of the nation's first Black president. However, it would be naïve

to accept that Barack Obama’s election in 2008 brought much more than a superficial change to American politics and society. Indeed, the change it did bring has been more symbolic and representational than meaningful and substantial—his presidency has been characterized more by compromise and triangulation (Smith 2013) than radical egalitarianism, more by the bolstering of mass incarceration and continued racialized control (Lurie 2014) than any expansion of or commitment to fundamental civil rights expansions.

However, even if the sociopolitical conditions that have contextualized iterations of the pattern are not necessarily apparent today, the fundamental truth, that the development of the criminal justice system and gun law has been profoundly racialized, remains. The implications of the pattern, the fundamental, and morally disturbing, meaning we can draw from its repeated manifestation holds. Two episodes in particular, the epidemic of so-called “stand-your-ground laws”, and the inaction of the criminal justice system in the face of white supremacist armed insurrection, speak to the pattern’s fundamental truth in a modern context, and do so by conversing with instances discussed in prior chapters.

### **Stand-Your-Ground Laws**

In recent years, increasing numbers of states have adopted laws known as “stand-your-ground laws”, related pieces of gun legislation that make explicit “a person's right to use deadly force for self-defense.” (Currier 2012). First passed in Florida in 2005, such laws drastically expand self-defense justifications in killings and violent encounters. The legal standard, in most states, has been characterized by the so-called “Castle Doctrine”, that outside of an individual’s home, that person “...generally [has] a ‘duty to retreat’ from an attacker, if possible, to avoid confrontation” (Currier 2012). However, stand-your-ground laws release that obligation by

allowing individuals to “stand their ground” outside the confines of their home, as well (Currier 2012). Whereas states without stand-your-ground laws mandate that an individual *retreat first* in the face of a potentially violent or lethal encounter, states with stand-your-ground laws allow for *shoot first*, even if retreat is an option. Stand-your-ground laws have since been passed in more than 23 states (Currier 2012) and have become a sort of gratuitous legal fad.

Before discussing the racial implications of such laws, their profoundly *radical* nature should be considered. Earlier in this project, in the fourth chapter, the self-defense philosophy of Black Nationalists, including Malcolm X and the Black Panthers, was discussed. These leaders, marginalized and dismissed as violent radicals, actually held a philosophy that is fundamentally less violent and radical than the stand-your-ground philosophy. The Black Panther Party, as discussed earlier, took their name from the self-defense behavior of the black panther animal. This was because the animal, *when it had no other choice*, would resort to violence. But, importantly, it only resorted to violence when backed into a corner and retreat was not an option. Similarly, Malcolm X espoused self-defense “by any means necessary”. This, however, endorses violence *only when violence is necessary*, presumably because retreat is not an option. Neither the Black Panther Party nor Malcolm X, both typically viewed as marginal and violent figures, espoused violence *before* retreat—for them, it was always *retreat first*, but keep violence as a last-resort option, used only as necessary. But endorsing violence before retreat, what not even Malcolm X or the Black Panther Party would favor, is *exactly* what stand-your-ground laws do. In fact, that is *all* that they do.

Perhaps the reason the philosophies of stand-your-ground and the Black Panther Party are afforded different legitimacies is because of who espouses them and who benefits from them. Stand-your-ground laws are replete with white supremacist racial bias on many levels—on who



is killed, on who invokes a stand-your-ground defense, and on who is acquitted on a stand-your-ground defense. One study, performed on behalf of PBS, found first that, unsurprisingly, more murders occur in states with stand-your-ground laws. They contribute to, and really promote, violence. Second, it found that “[w]hites who kill blacks in Stand Your Ground states are far more likely to be found justified in their killings.” (Childress 2012). The murder of Black Americans, again, is justified on the grounds that they likely posed a lethal threat. Those Black murder victims are thus *criminalized*. Stand-your-ground is thus an institutionalization, through the criminal justice system, of racially discriminatory murder rates. And those differential murder rates are not insignificant: “In non-Stand Your Ground states, whites are 250 percent more likely to be found justified in killing a black person than a white person who kills another white person; in Stand Your Ground states, that number jumps to 354 percent.” (Childress 2012). There is thus a systemic and institutionalized devaluation of the already hugely undervalued Black life under stand-your-ground laws—they disproportionately justify the murders of Black individuals by white individuals. Beyond who is found justified using a stand-your-ground defense, the study found, the laws “...offer substantial discretion to authorities at every level, which is much more difficult to monitor and evaluate — and much more vulnerable to creeping bias.” (Childress 2012).

This is a near perfect resurgence of the complementary dynamic highlighted throughout this project—the empowerment of the private actor to enforce and maintain racialized control. In the case of stand-your-ground laws, the state, through the criminal justice system, pre-prepares excuses for murders that would otherwise not occur, and then disproportionately accepts those excuses when it is white individuals using that defense to justify their murder of Black individuals. Fifty years prior, there was local cooperation between private actors, such as the

Klan, and public actors, such as the police, to enforce and institutionalize violent racial control with the government's blessing. A hundred years prior to that, the Supreme Court neutralized the federal government's ability to intervene in cases of private disarmament and discrimination, effectively granting the Klan and other private actors free reign over the South. In all such cases, the state, through some action or restraint of the criminal justice system, empowered the private actor to enforce a violent and institutionalized regime of racial control when the state itself cannot do so on its own.

### **Armed insurrection**

As stand-your-ground laws have grown in popularity in the past half-decade or so, there has been another disturbing in the context of gun legislation and race relations—the fetishization of guns and threats of armed rebellion by white armed insurrectionist groups. Such groups, the most well known of which is the Tea Party, have grown in number and popularity since the election of the Black Obama—but of course, correlation does not equal causation. The movement, “named after the original tax revolt in 1773...”, sees itself as a guardian of America's founding legacy (Zernike 2010). The profound and disturbing irony, of course, is that they may well be right—if that founding legacy is white supremacy. The Tea Party movement is, as it must be, facially colorblind. Today's sociopolitical context demands as much—its membership is a primarily white “...rambunctious and Internet-connected network of groups” and its agenda “...powered by grass-roots anxiety about the economy, bailouts and increasing government involvement in health care.” (Zernike 2010). The group has been most united around a general animus toward government, a vague anti-establishment sentiment (Zernike 2010).

Compounding the disturbing nature of an almost exclusively white anti-establishment group that was born and has grown in social and political influence almost immediately after the executive branch was headed by a Black individual for the first time, however, is one of their signature tactic—the fetishization of guns. Perhaps to draw attention, perhaps to make a statement, so-called “militia members...have shown up at meetings wearing guns and suggesting that institutions like the Federal Reserve be eliminated.” (Zernike 2010). “In Nevada, Sharron Angle [, a politician supported primarily by the Tea Party,] gave voice to the militia movement’s views in January when, in a radio interview, she warned if elections don’t force [Democratic] officials ... out of office, the people may be forced to turn to “Second Amendment remedies.” (Winkler 2010). In Montana, “About two dozen gun-toting Tea Party activists staged a rally at the Montana statehouse on Friday to support the Second Amendment right to bear arms and limiting the reach of the federal government.” (Ritter 2011). The protesters were armed with “handguns and a semiautomatic rifle” and demanded familiar “‘nullification’ measures”, Confederate-style laws that “seek to void various federal laws on grounds that the 10th Amendment of the Constitution reserves for states any powers not delegated to the federal government nor prohibited to the states.” (Ritter 2011).

Similarly, in Nevada, a rancher named Cliven Bundy made a name for himself and became a Tea Party hero when he staged an armed standoff with federal troops, complete with “50 supporters, some armed with handguns and rifles, standing in a semicircle before him” (Nagourney 2014) over what he saw as federal intrusion into states’ rights. He also said, about Black Americans: “They abort their young children, they put their young men in jail, because they never learned how to pick cotton. And I’ve often wondered, are they better off as slaves,

picking cotton and having a family life and doing things, or are they better off under government subsidy? They didn't get no more freedom. They got less freedom." (Nagourney 2014).

When these events occurred, when white Tea Party reactionaries staged an armed anti-establishment rally at the Montana statehouse and when Cliven Bundy fended off federal troops with heavy artillery, nothing happened. There was no federal, state, or even local response. This should be compared with what happened to Malcolm X and the Black Panthers made guns central to their own anti-establishment philosophy— a crippling backlash from the criminal justice system. When Tea Party activists marched onto their statehouse to demand political change, there was no subsequent Mulford Act passed, no ostensibly colorblind measures to neutralize the obvious and violent threats they posed. Rather, “[t]he demonstrators had received special permission in advance to bring their weapons, unloaded and secured, to the state Capitol grounds for the rally.” (Ritter 2011). When Cliven Bundy, waxing nostalgic over the era of slavery and motivated by an incoherent anti-establishment ideology, threatened federal troops with a literal militia, an armed group of insurrectionist volunteers, he was made a *hero*. When Huey Newton and the Black Panther Party carried weapons for self-defense, to protect their community members from rampant police brutality, they were vilified and literally criminalized. It is clear that the criminal justice system has treated armed insurrections, and their use of guns, quite differently, depending on whose finger it is on the trigger. Stephen Colbert captured this double standard when he asked protestors in Ferguson, Missouri, grieving over police violence not dissimilar to the violence that the Black Panther Party protested against fifty years prior in Oakland, California: "Black people, why can't you be more like ['Cliven Bundy and his buddies']? They were armed and they dared the cops to shoot them and nothing happened. Just figure out whatever was different about them and you'll be fine." (Colbert 2014).

### **III. Extending the pattern horizontally (substantively): Broader implications for the criminal justice system**

To reiterate, the pattern identified by this project highlights how at times of increasing racial egalitarianism, racial control has been institutionalized and systematized, in ostensibly colorblind language, *in the policy area of gun law*. So far, its data and conclusions have been limited to that one, singular policy area. However, that is not because gun law is unique or in any way distinct from other policy areas, but rather because a more narrow and limited scope of study allows for deeper and more insightful analysis and exploration. More than an outlier, gun law is a case study. And given the affirmative findings of that one case study, it is likely that the conclusions are, to some extent, generalizable to the larger criminal justice system and hold wider implications across policy areas.

#### **Drug Law**

Perhaps the most obvious, and egregious, area of policy where the identified pattern likely holds is in drug law. Drug law has historically exhibited a pattern disturbingly similar to the pattern this project found in gun law. If the pattern, of the passage of ostensibly colorblind laws within the criminal justice system in times of increasing racial egalitarianism, can be found in the development of drug law, or any other policy area, it strengthens the likelihood that the pattern is more fundamental to the criminal justice system itself as a whole, endemic to the system rather than merely one of its parts.

One possible iteration of the pattern as seen in drug law occurred in the early Twentieth century, taking as its moment of racial egalitarian a moment of racial change that threatened

white supremacy's demographic stronghold. "Political upheaval in Mexico that culminated in the Revolution of 1910 led to a wave of Mexican immigration to states throughout the American Southwest...". (Schlosser 1994). Further North, jazz music and other experimental, predominantly Black, art forms, were gaining popular traction (Bonnie and Whitebread 1970). Linked to both of the culture and practices of both of these groups was the use of drugs, marijuana in particular. Mexican immigrants brought with them "their traditional means of intoxication" and, "[i]n New Orleans newspaper articles associated the drug with African-Americans [and] jazz musicians..." (Schlosser 1994).

Amidst this demographic and sociopolitical shift, American white supremacy grew anxious that it might lose its stronghold on society, politics, and demographics. As such, it exhibited the same behavior it has historically with gun control: passing ostensibly colorblind legislation with the effect to control those threatening populations.

In 1914 El Paso, Texas, enacted perhaps the first U.S. ordinance banning the sale or possession of marijuana; by 1931 twenty-nine states had outlawed marijuana, usually with little fanfare or debate. Amid the rise of anti-immigrant sentiment fueled by the Great Depression, public officials from the Southwest and from Louisiana petitioned the Treasury Department to outlaw marijuana (Schlosser 1994)

The pattern of drug, and especially marijuana, criminalization continued, and in 1937, Congress passed the Marihuana Tax Act, officially criminalizing the drug disproportionately associate with certain non-white populations (Bonnie and Whitebread 1970) (Schlosser 1994).

Later, after decades of marijuana criminalization and targeted control of the new racial demographics, marijuana use caught on among white middle-class college students. The public response this time, however, to a new class of users was quite different from the criminalization-and-control-based approach against Black Americans and Mexican immigrants decades earlier. This time around, when it was white students smoking marijuana, the public response was

“...motivated by interests of public health, with more emphasis on treatment than on punishment.” (Schlosser 1994). It was social assistance, rather than social control. Perhaps those Black Americans and Mexican immigrants, who spent years in prison for engaging in the same exact activity that elicited health worries and substance treatment programs when engaged in by white college students, ought to have heeded Stephen Colbert’s tongue-in-cheek advice and “Just figure out whatever was different about them and you’ll be fine.” (Colbert 2014)

A second iteration of the pattern as occurring in drug law takes as its moment of racial egalitarianism the same moment this project identified in the fourth chapter, namely the expansion of Black civil rights in the mid-twentieth century. Recall the development of ostensibly colorblind law-and-order rhetoric and legislation that followed those racialized rights expansions, as well as Vesla Weaver’s hypothesis that dominant groups open up a new strategic front after losing a sociopolitical battle, hoping to cut their losses or win by other means. The War on Drugs was a development of law-and-order politics and became a battlefield that white supremacy opened after having to cede Black civil rights.

In 1982, after law-and-order politics had gained traction, then-President Ronald Reagan, who, a handful of years earlier as governor of California had announced his support for the reactionary Mulford Act, declared a War on Drugs (Alexander 2010). Just as there had been no real law-and-order crisis when law-and-order became a political darling of conservative and white supremacist America, neither was there a real drug problem when Ronald Reagan, the face of conservative and white supremacist America, declared a War on Drugs. Indeed, there came to *be* a drug problem, including widespread crack cocaine use, but that did not begin until *after* the War on Drugs was declared (Alexander 2010). That, among other factors, suggests that the War

on Drugs was merely an attempt at superficially colorblind racial control, one that, in search of legitimacy, scrambled to find an acceptable ex-post facto justification for its existence.

The War on Drugs has enjoyed unprecedented success in controlling and restricting Americans. In less than three decades, the U.S. penal population exploded, leaping from about 300,000 to over two *million*. Drug convictions, products of the War on Drugs, have been primarily responsible. “From a figure of about 40,000 people incarcerated in prison or jail for a drug offense in 1980, there has since been an 1100% increase to a total of 500,000 today... [T]he number of people incarcerated for a drug offense [today] is now greater than the number incarcerated for *all* offenses in 1980.” (Mauer 1). The United States’ incarceration rate, at about 750 people per 10,000, is by far the highest in the world. (Alexander 2010).

However, most striking are the racial effects, arguably the truest successes, of the War on Drugs. Those controlled and incarcerated as a result of the War on Drugs are overwhelmingly Black or Latino: “Overall, two-thirds of persons incarcerated for a drug offense in state prison are African American or Latino.” (Mauer 2009: 1). However, this is not merely because Black and Latino Americans use drugs at much higher rates than do white Americans: “As of 2005, African Americans represented 12% of the total population of drug users, but 34% of those arrested for drug offenses, and 45% of those in state prison for a drug offense.” (Mauer 2009: 4).

A number of ostensibly colorblind structural and essential features of the War on Drugs were designed to maintain its racialized impact. There was put in place an enormous sentencing discrepancy between the use of crack cocaine, associated with urban Black youth, and powder cocaine, associated with white wealthy elite, that punished possession of the former exponentially more harshly than of the latter, even though the two substances are chemically identical (Alexander 2010) (Mauer 2009). Structural features, such as prosecutorial discretion,



handed over enormous discretion to criminal justice officials, allowing for implicit racial biases to creep into sentencing and the broader criminal justice system (Alexander 2010). Differential policing of urban Black communities and suburban white communities, despite comparable rates of drug use, ensured that Black youth would be punished disproportionately more than their equally guilty white counterparts, who have enjoyed legal safe-havens in the suburbs and on college campuses (Alexander 2010).

Both of the instances described, of the criminalization of marijuana in the early twentieth century and then the wider War on Drugs declared in the 1980s, followed moments of racial change and progress. The first criminalization of marijuana followed an influx of foreign immigrants and birth of Black jazz culture, both of which threatened white supremacy's tight sociopolitical grip on America. The wider criminalization of drugs under the War on Drugs followed Black civil rights expansions, and were a direct product of the law-and-order politics that more immediately followed those expansions. Importantly, both episodes in the development of drug law in America were ostensibly colorblind but had enormously and obviously racialized effects. In the first case, the criminalization of marijuana was a way to criminalize Mexican immigrants and Black jazz musicians without naming their race or ethnicity. In the second case, the War on Drugs was a way to criminalize Black urban youth in America, again without naming them as such—one need only take a cursory glance at statistics showing who is incarcerated for what in America to recognize its racialized effects.

### **Other policy areas**

But why stop at drug law? Drug law is, again, neither distinct nor an outlier—rather, it is merely another case study. The findings of this project call for further research of pattern identification, seeking out the same pattern in other policy areas. If it has emerged so distinctly in

the historical case of gun law, and quite likely in the development of drug law, as I have suggested in this conclusion to the project, I see no reason why it would not emerge in other policy areas as well. If gun law and drug law have been used to restrict and control Black Americans after moments of increased egalitarianism, what other policy areas may have exhibited, and continue to exhibit, similar tendencies? Presumably ones that criminalize “petty” crimes, the criminalization of which may ebb and flow based on sociopolitical trends. And presumably policy areas that have historically targeted Black Americans disproportionately. One can imagine, then, the pattern may exist in such areas as truancy law, or so-called “dead-beat dad” laws, for example. Again, further research should be done to confirm my own speculations.

#### **Same Story Every Time / Being Black Is Not a Crime**

If, as I suggest, the pattern does hold across policy areas within the criminal justice system, we would be confronted with a disturbing truth about the nature of the American criminal justice system and racialized control in America, one that my project reveals, but only in the more limited realm of gun law: In America, time and time again, after our greatest moral triumphs and celebrated efforts to bend the proverbial arc of the universe toward justice, we regress and criminalize Blackness. After we finally abolish the abhorrent system of slavery in hopes of moving toward a more perfect union, we use our American institutions to criminalize Blackness. After we root out the morally repugnant segregation and discrimination that plagued the Deep South in hopes of realizing Dr. King’s dream of interracial equality and harmony, we use our American institutions to criminalize Blackness. Indeed, it would suggest that the criminal justice system has been, and likely will continue to be, absolutely instrumental in enforcing racial control, in acting as a faithful servant to white supremacy. It would suggest that it is, in fact, the

same story every time, that being Black is a crime. The question that remains, then, for scholars and activists alike, is how to break the pattern.

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