Mackenzie Rutherford

Civil Liberties and Fundamental Rights

Mark Golub

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The Failure of Anti-discrimination Legislation: Special Protections for Law Enforcement

The United States showed a number of unprecedented strides towards racial equality in the 1960s and 1970s through laws such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and through court cases like Loving vs. Virginia, which legalized interracial marriage, and Regents of University of California vs. Bakke, which laid a foundation for affirmative action. These laws and court cases are often seen as the underpinnings of a legally "postracial" and "colorblind" America, an America that is at least lawfully free from racial discrimination.

Undoubtedly, this era of advancement towards legal equality shifted the racial dynamics of the United States of America - today there are no explicitly specific race-based laws in the US as there were only 60 years ago. Unfortunately, racial inequality has nonetheless been sustained. While the common understanding of the legal trends during and since the civil rights era is of progression towards racial equality and increased protections against racial discrimination, supreme court cases such as Ricci v. DeStefano show that there has been a wave of conservative judicial activism that has used the protections that have been created to expand the rights of white people. This era of white rights has been bolstered by the frontlash that occurred during the War on Crime, which created the image of the Black criminal and the endangered cop to further perpetuate and enforce white supremacy. In this essay, I intend to draw from the history of equal protection law on the basis of race since the 1960s to prove the current priority of equal protection law as not only an expansion white rights but also the creation of police officers as a

class that needs special protections, only in order to more effectively and lawfully enforce white supremacist ideals to continue white control and domination over the Black race.

A "Colorblind" Constitution and the False Equivalency of Racial Discrimination

Prior to the Civil Rights era, almost all laws and policies were based on race: marriage, access to schooling, access to housing, etc. However, after a few legal advances in Civil Rights legislation, both the white conservative and white liberal interpretation of racial law changed. In *Is Race Equality Unconstitutional?*, Political Theorist Mark Golub introduces the modern liberal and conservative understandings of what a colorblind constitution ought to look like. As conservative Clarence Thomas explains it, "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all" (Golub 7). This statement reveals a common ideology among conservatives, that mention of race is inherently discriminatory, and that "Because they [classifications] 'make race relevant', racial classifications are said to violate this basic principle [individual being treated as an individual] and are therefore unconstitutional." (Golub 8). On the other hand, liberals tend to understand the occasional utility of racial classification in antidiscrimination but also accept the notion that it has negative effects, and consequently seek to minimize the need/use of this classification.

An application of these sentiments was embodied in the 1988 *Richmond vs. Croson* case that declared Richmond, Virginia's "race-based measure" of awarding contracts for construction unconstitutional. Justice Sandra Day O'Connor's majority opinion states "The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of

past wrongs." (O'Connor). While the expressed intent of this decision is to make race irrelevant to existence in society, the effect of this decision works in a different way. In Reel Time/Real Justice, Kimberlé Crenshaw and Gary Peller interpret this ruling as a declaration "that the problem of racism is a symmetrical one - both Blacks and whites can suffer when racial classifications are utilized, and therefore the same level of scrutiny is warranted whether a racial classification benefits Blacks or whites" (Crenshaw and Peller 60). While the push for a society where "race is irrelevant" may seem like a positive vision for the future where racial inequalities do not exist, this is a blatant erasure of the immensely racialized experiences of people living in the United States and the racial asymmetry that exists today. In his book *Normal Life*, Dean Spade states that this trend of practicing colorblindness "undermines the possibility of remedying the severe racial disparities in the United States that are rooted in slavery, genocide, land theft, internment, and immigration exclusion, as well as racially explicit policies that historically and presently exclude people of color from the benefits of wealth-building programs for US citizens like Social Security, land grants, and credit and other homeownership support." (Spade 43) Spade stresses that colorblindness cannot suddenly be legitimate immediately following the accepted color consciousness in law. The protection of colorblindness by conservatives demonstrates a shift from the wide endorsement of explicit race-based law - when it benefits the white elite - to the fear of explicit race-based law - when it could potentially work towards genuine equality. For proponents of racial equality, colorblindness also shows a lazy solution to racial inequality with room for the preservation of white privilege. After adopting strict racialized laws and policies for centuries, legislators and judges claimed a de-racialized and colorblind mantle following slight policy and legal equality changes, revealing largely unnoticed subsequent effect of anti-discrimination law: an expansion of white rights.

White Rights and White Legal Entitlement

As previously noted, civil rights laws lead to various types of widespread conservative backlash. Through reworking anti-discrimination law in order to be able to work around protections for Black people, conservatives were effective at doing what they believed to be re-equalizing the playing field that was threatened by Black equality. This trend of establishing *white rights* can be found clearly in several court cases. The first in succession was *Regents of the University of Califonia v. Bakke (1978),* which declared racial quotas unconstitutional but declared affirmative action constitutional. While setting a clear limit on how affirmative action can function - mostly qualitatively rather than quantitatively - Regents is still an important case in allowing for racially conscious admittance to schooling and employment. Its legacy and intent were, however, quickly flipped on their head.

The actual practice of affirmative quickly empowered innumerable white people who claimed to be experiencing racial discrimination to sue, causing a slew of anti-discrimination court cases to arise. These court cases include *Gratz v. Bollinger (1997)* and *Grutter v. Bollinger (1997),* which both accused the University of Michigan of disadvantaging high achieving white students while admitting minorities with lower grades and test scores. The judge of the original Gratz case found the University of Michigan's admissions policies aligned with the standards of the Supreme court, while the judge in Grutter declared the policies were unconstitutional. This discrepancy led to unrest regarding the results of both cases. After a series of appeals and overturns, the Supreme Court ruled that race can factor into admissions decisions but cannot be an "overriding factor", weakening the scope of affirmative action (CNN Library). There are several other court cases that follow the pattern of the Bollinger cases: a white student suing for

'racial discrimination', a series back and forth between courts, and a gradual weakening of affirmative action's functions.

Ricci v. DeStefano (2009), a court case involving an "objective" examination to identify which firefighters best qualified for a promotion in the department also exhibits this gradual and consistent contestation of affirmative action by white people. The case resulted in nineteen white and one Hispanic firefighters scoring the best on the exam and the City's subsequent decision to discard the test as discriminatory, promoting the firefighters who succeeded on the test to sue. The test was discarded as discriminatory not because white people did well on the test, but rather because the obvious disparity in the results clearly revealed the test was designed to benefit white people. Despite this rational understanding, the Supreme Court ruled that the actions of the City were unconstitutional. (Kennedy) This case essentially won white people the right to benefit from racist examinations and vetting processes. Rather than seeing the examination for what it was - biased and discriminatory - the court attributed the test to a lower level of achievement of minorities and could only see (chose only to see) the discrimination in the action of the examination being thrown out. The surface level 'discrimination' was the primary focus, and the harmful, deeper discrimination of the test was left beneath the surface, untouched. Kennedy's majority opinion exclaims, "Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory…" (Kennedy). This claim proves that the court believed the acts of discrimination equally affect different racial groups while abstracting discussion of power dynamics and the higher ground that white people have always occupied in the United States from the conversation. This specific erosion of

affirmative action worked to weaken disparate impact analysis, which previously allowed for a judicial analysis of seemingly neutral or unintentional discrimination in its impacts rather than its intent. This case further neutralized discrimination by ruling intent as more important than impact even when racial intent is impossible to trace in an era of colorblindness and formal legal equality. These court cases and others that followed them also helped create and sustain a narrative that affirmative action laws and other anti-discrimination laws that were intended to legally equalize an unequal system are oppressive to white people. The relatively short historical moment in which white students and employees have felt a sense of inequality or disadvantage (in order to preserve equality for others) resulted in massive conservative judicial activism in equalizing or neutralizing racial inequality, in order to position racial inequality as something that can be equally felt despite the history of racism in America. The demand for special rights for white people shown by these cases was effective in constructing an illusion of the equality of racial discrimination.

This push towards white rights revealed a legal entitlement of its proponents. These people clearly see black equality as a violation of white rights or in other words, their perception of equality is the necessary maintenance of white privilege/rights. Dean Spade addresses this bias well in his claim that, "the conditions that created and continue to reproduce such immense disparities are made invisible by the perpetrator perspective's [the perspective that sees only specific acts of intentional discrimination as worth outlawing[1]] insistence that any consideration of the prohibited category is equally damaging. This model pretends the playing field is equal, and thus any loss or gain in opportunity based on the category is harmful and creates inequality, again serving to declare the racial status quo neutral. This justification for systemic racism

[1] Freeman, Alan David. *Legitimizing Discrimination Through Anti-Discrimination Law*.

masquerading as a logic of equal opportunity gives rise to the myth of 'reverse racism,' a concept that misunderstands racism to suggest parallel meanings when white people lose opportunities or access through programs aiming to ameliorate impacts of racism and when people of color lose opportunities due to racism." (Spade 43) In this sense, it is evident that the fight for white rights is not about actual equality, but rather a preservation of white privilege and power as white supremacy. It seeks to situate white individuals as separate from racism and preserve their innocence, while allowing for furthering perceived neutrality of whiteness and white existence in society, rather than adopting an accurate narrative of how preservation of white innocence works to protect white supremacy's existence and legacy.

Law and Order and Black Criminality

It is a common belief that with formal legal equality, the law is fair and works to protect everyone equally. Crenshaw and Peller describe formal legal equality through the statement, "rather than leave protection to the whim of politics or the discretion of power, the imagery of the 'rule of law' suggests that the prohibition against racial discrimination [formal legal equality] is clear and determinate. It doesn't depend on 'subjective' evaluation" and that "A belief in formal legal equality, in the objectivity of 'the rule of law', can help obscure the everyday trait of racial power." (Crenshaw and Peller 62). Trust in the objectivity of law and order coupled with a fear of crime allowed for the rise of a calculated approach to working against the advances of civil rights legislation: crime policy. In "The origins of the carceral crisis: Racial order as 'law and order' in postwar American Politics", African American Studies scholar Naomi Murakawa traces this history back to a post World War II era where "Southern Democrats in Congress, as well as many whites in the South and the urban North, defended Jim Crow by suggesting that segregation maintains law and order while integration breeds crime", despite low and stable

crime rates (Murakawa 237). This pitting of neutral "law and order" and integration against each other was proven most effective in its ability to create a clear connection between Black people and crime among white people of all political affiliations. This thought process even worked to claim the necessity of protection of Blacks, in the neutral stance that violence against Black people would also increase in integration.

The criminality imposed upon certain groups is furthered by tying crime to political dissent and political dissent primarily to civil rights practice, and by extension, to Black bodies. Southern Democrats who opposed civil rights bills used the argument that "civil rights protest is lawbreaking… and therefore federal civil rights legislation rewards black lawlessness." (Murakawa 243) Since it was believed that black people create crime and that law and order are fair, neutral, and colorblind, it was easy to rationalize black criminalization to conservative and liberal white people alike, and this trend has not yet come to a halt.

The Conservative War on Crime: Frontlash

The 1960s and 70s in the United States were marked by a number of pivotal civil rights 'victories'. At the same time, however, conservatives were working hard on the Second Reconstruction which included reifying the death penalty, reinstating felon disenfranchisements, and the creation of the Law Enforcement Assistance Act of 1965 (LEAA) and the Crime Control and Safe Streets Act of 1968. Because of the ways in which Black existence was tied to crime even before civil rights law implementation, it is obvious that these policies were an attempt to roll back the potential progress of the new civil rights legislation. Vesla M. Weaver, scholar of Political Science, describes the conservative response to civil rights advances as a "frontlash", the "process by which losers in a conflict become the architects of a new program, manipulating the issue space and altering the dimension of conflict in an effort to regain command of the

agenda." (Weaver 236). In this case, the 'conflict' is civil rights, the 'losers' are opponents of civil rights legislation, primarily conservatives, and the new program is the war on crime. The application of frontlash to the war on crime highlights the way "strategic entrepreneurs... used the crime issue as a vehicle to advance a racial agenda without violating norms." (Weaver 237). The constructors of the war on crime used language and rhetoric that did not clearly appear to be anti-civil rights nor upset the norms of racial equality that the majority of people in the US believed in at that time and thus expanding its support.

The fear of crime engendered by new crime legislation spread rapidly, and several states were increasing funding to law enforcement and crime evaluation. While crime did increase during the war on crime, the reasons behind the increase wasn't merely more crime. Crime levels were increased by the factors such as a large percentage of the population (the baby boomers) being the prime crime age, urbanization, voluntary crime reporting and heightened attention to crime, the LEAA's professionalization of law enforcement, pressure from the FBI to report, incentivization of reporting through increased law enforcement funding, the likelihood of reporting certain crimes, criminalization of more nonviolent charges, and outdated census data. These are just a few of the reasons that crime increased, but at the time there was still panic - a fearmongering of this panic - on why crime was so rapidly increasing. Conservatives worked hard to continue to connect the increase in crime to Black criminals. For example, LA Police Chief William Parker claimed that police brutality allegations were "'a terribly vicious canard which is used to conceal Negro criminality… to try to find someone else to blame for their crimes.'" and the highest ranked law enforcement official at the time, J Edgar Hoover, "'dismissed police brutality as part of a communist campaign stating that the net effect of the charge of "police brutality" is to provoke and encourage mob action and violence by devloping

contempt for constituted authority.'" (Weaver 248) These public statements by law officials convey the power of speaking out about specifically Black criminality without being deemed racist.

Without an understanding of the racialized investments of the war on crime exposed by Weaver's analysis of frontlash, "we would mistakenly attribute the rise in incarceration to the much later war on drugs and fail to see how it developed out of the strugglles of the 1960s. By sidestepping consideration of elite incentives, the backlash framework cannot explain the sudden mobilization of the crime issue and its connection to the rights revolution." (Weaver 239)

The Liberal War on Crime: Backlash

While the conservative construction of the war on crime is apparent, Naomi Murakawa reframes the conversation to highlight the liberal responsibility in the war on crime. Murakawa's analysis works to put liberals at the forefront of the blame for creating a racialized war on crime. While some democrats explicitly agree with the conservatives, such as West Virginia Senator Robert Byrd who in a statement declared "We can take the people out of the slums, but we cannot take the slums out of the people. Wherever some people go the ratholes will follow." (Weaver 248), many liberals upheld critical consciousness of race biases in the war on crime on the surface. When faced with the war on crime, liberals attempted to perfect the criminal 'justice' system to ensure equality within it. In practice, this attempt was done by creating mandatory minimums to limit the power of too much discretion from potentially racist officers, equalize applications and encourage more officers of color to join. In essence, liberals built the war on crime by trying to fix the prison industrial complex; the reforms liberals constituted in this era strengthened the prison system and largely led to its prevalence in modern society.

Another liberal failure in the war on crime was a failure to recognize the false criminalization of Black people. Murakawa explains this by stating, "Civil rights proponents and many northern Democrats responded that street crime was evidence that black civil rights had not gone far enough: unfulfilled civil rights agendas breed crime, they claimed, because racial inequality sustains and engenders black distrust of laws. While seemingly opposite interpretations, both explanations attribute crime to black civil rights, and both interpretations identify blacks as default suspects in the crime problem" (Murakawa 236). This analysis reveals the success of Black criminalization: while the reasoning behind why Black crime was happening differs greatly, both parties accepted and normalized the imagery of the Black criminal.

By discussing the liberal's role in the war on crime, Murakawa proves the pervasiveness of the Black criminal trope and proves the point that there was no true neutrality or innocence in the war on crime. Murakawa's research "suggests [that]… the U.S. did not confront a crime problem that was then racialized; it confronted a race problem that was then criminalized. The battle to preserve Jim Crow in the 1940s and 1950s segued into the battle against crime in the mid-1960s." (Murakawa 236). Following this analysis, it is undeniable that all of white America was responsible for the racialization of crime and the continuity of legal white supremacy, reframed in the more palatable package of crime prevention.

Regardless of the motive, mass criminalization of Black people functions as a legally sanctioned preservation of Jim Crow era of white supremacy. The enforcers of white supremacy are now the heavily militarized police force, but despite endless accounts of racist police brutality and corruption, the criminalization of the Black body always prevails. Black criminalization effectively established an image of the violent Black person versus the innocent

(often white) officer who is simply attempting to protect the community and is in perpetual danger of falling victim to Black violence. This image is replicated time and time again, but most notably through the acquittal of the undoubtedly guilty officers in the Rodney King brutality case. To briefly analyze the outcome and the legacy of the lawyers' manipulation of evidence, Crenshaw and Peller state, "Here the power that's manifest in the inability of black people in L.A. to get redress when the police beat them unless they have what will satisfy others as proof" (Crenshaw and Peller 66) Black people, at the hands of police, are violent and guilty unless given the opportunity to be proven completely innocent without loopholes. A trust in law and order preserves the possibility of this. While the police provide a tangible threat to marginalized groups and especially Black people, the trend of police victimhood is consistently reifyed.

Special Protections for Police Officers

Due to the perceived neutrality of law following anti-discrimination law, the preservation of inequality through the bipartisan war on crime, and the creation of the Black criminal, the most modern extension of anti-discrimination law is the creation of special protections for those who enforce racial inequality and white supremacy: police officers. In 2004, the Law Enforcement Officers Safety Act (LEOSA) was enacted as a United States federal law "that allows two classes of persons - the 'qualified Law Enforcement officer' and the 'qualified retired or separated Law Enforcement officer' - to carry a concealed firearm in any jurisdiction in the United States or United States Territories, regardless of state or local laws, with certain exceptions." (LEOSA Online). While amended several times, it still works to allow for the omnipotence of the police force and add an additional layer of special protection for self-defense

or offense. This law also literally created new classes of people, implying that being a cop is a lasting identity - similar to that of a racial identifier.

Harming a police officer is and has been a federal crime, and all fifty states have additional laws that will intensify punishment for crimes against police officers. But in 2018, the Protect and Serve Act passed the house. The Protect and Serve Act states "Whoever, in any circumstance described in subsection (b), knowingly assaults a law enforcement officer causing serious bodily injury, or attempts to do so— (1) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and (2) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if— (A) death results from the offense; or (B) the offense includes kidnapping or an attempt to kidnap, or an attempt to kill.". This act, which has not yet passed the Senate, seeks to enforce special protections for police officers through establishing mandatory additional punishments for crimes against officers. The additional layer of punishment solidifies police officers' ability to exist above the law and increase the power and control that officers can enforce.

Crenshaw and Peller assert, "The sharp differences between issues of 'formal equality' as opposed to 'special protections' fades as the identification of each is seen to depend ultimately on which pictures of the world are believed and which are disbelieved". These special protections created for officers are commonly viewed as acceptable as cops are often perceived vulnerable and endangered. However, many special protections for minority groups face extreme backlash/frontlash/declared unconstiutionality because the black individual is often seen as protected enough, lawless, and criminal.

Conclusion

While it may have value in certain applications, this essay has proven that the overall impact of anti-discrimination law has been to legitimize actual racial inequality by minimizing inequalty to a perpetrator perspective, and to create an overly-simplistic solution to the complex problem of racial discrimination that allows for white supremacy to exist. This combination is incredibly dangerous, as it simplifies racism to only explicit and intentional discrimination and therefore simplifies the realm of discourse around racism overall. Simplification of racism limits productive conversation on the nuance and complexity of racism and in turn, racism is more difficult to identify, understand, and discuss. Though the United States only exists in its current form because of slavery and systemic racism, the erasure of formal racism situates racism as singular and often past tense, rather than acknowledging racism's overarching, omnipotent legacy as a dominant system that seeps into every aspect of life in the US. In *Normal Life*, Dean Spade introduces the harmful legacy of anti-discrimination law on the trans community. While his analysis is specific to transphobia and trans rights, it is largely applicable to anti-discrimination law for all marginalized groups. "Much of the thinking behind the need for… anti-discrimination legislation… [is] the significance of having our experiences of discrimination and violence named in the law. The belief that being named in this way has a benefit for the well-being of trans people has to be reexamined with an understanding that the alleged benefits of such naming provides even greater opportunity for harmful systems to claim fairness and equality while continuing to kill us. Hate crime and anti-discrimination laws declare that punishment systems and economic arrangements are now nontransphobic, yet these laws not only fail to eradicate transphobia but also strengthen systems that perpetrate it." (Spade 47). In his analysis, he explains how systems within the US continue to kill trans people while claiming to protect them through certain laws, and thus enables their most violent effects without explicit

blame on the law that enables it. This analysis can be extended to the way in which the war on crime, which held the same motives as anti-civil rights conservative activism, penetrated deeply into US culture without responsibility placed on racial inequality, white supremacy, or anti-discrimination law itself.

In this essay, I have outlined how the war on crime from both a liberal and conservative perspective created the image of the Black criminal, and how this history is central to understanding special rights for cops as an extension of white rights, racialized violence against black people, and white supremacy. Though law enforcement is often positioned as neutral in society, this essay has shown how police are the very enforcement of the goals of the white supremacists who fueled the war on crime, and therefore, the police's current role in society is still to enforce white supremacy. The police will occupy this space of unchecked, legal, and state sanctioned white supremacy until its legacy, legitimacy, and power is dismantled.

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