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FREEDOM AND PRISON: PUTTING STRUCTURALISM BACK INTO STRUCTURAL INEQUALITY

*Anders Walker**

ABSTRACT

Critics of structural racism frequently miss structuralism as a field of historical inquiry. This essay reviews the rise of structuralism as a mode of historical analysis and applies it to the mass incarceration debate in the United States, arguing that it enriches the work of prevailing scholars in the field.

I. INTRODUCTION

Structuralism has become a prominent frame for discussions of race and inequality in the United States, part of a larger trend that began in the wake of Barack Obama's presidential victory in 2008. This victory was a moment that inspired some to herald a "post-racial" America and others to insist that persistent disparities continued to plague the United States, particularly in the context of criminal justice.¹ No one made this point more forcefully than legal scholar Michelle Alexander, who argued in 2010 that not only had America failed to move beyond race, but the United States had spawned a new mode of racial control—a New Jim Crow, as she put it—that relied on prisons and police to put "blacks back in their place."²

Alexander drew from the language of structuralism to counter conservative claims about incarceration as a logical outgrowth of poor moral choices, noting that "racism manifests itself not only in individual attitudes and stereotypes, but also in the basic structure of

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¹ Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7 (2011).

² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40 (2012).

society.”³ To illustrate, she invoked the metaphor of a birdcage, positing that “any given wire of the cage may or may not be specifically developed for the purpose of trapping the bird,” yet when “arranged in a specific way, and connected to [other wires],” still “serve to enclose the bird and to ensure that it cannot escape.”⁴ Mass incarceration was precisely such an arrangement, she argued, featuring “a wide variety of laws, institutions, and practices—ranging from racial profiling to biased sentencing policies, political disenfranchisement, and legalized employment discrimination [to] trap African Americans in a virtual (and literal) cage.”⁵

Despite her intriguing allegory of a multi-intentioned cage, Alexander spent little time considering whether policies that lacked racial animus may have contributed to mass incarceration, preferring instead to focus on the survival of invidious intent—both explicit and implicit—in the post-Jim Crow era. As she described it, “conservative whites” retained a deep commitment to white supremacy, and simply shifted from overt to covert racism following the end of formal Jim Crow, developing “a race-neutral language” to maintain a “racial caste system.”⁶

While many found Alexander’s argument compelling, the question of racial animus remained a prominent, if unexplained, aspect of her work. If whites did in fact want to resubordinate African Americans post-Jim Crow, where did this desire come from? Was it learned? Was it the product of a defect of the white mind? Or was it the product of lived experience, i.e. observations of the natural world that were then interpreted in a way that reinforced racial stereotypes? Alexander did not say for certain, preferring to focus on how invidious intent lurked behind ostensibly neutral policies. However, she did hint at a structural source, one that she located in “human nature.”⁷ “It’s not that white people are more unjust than others,” she observed, “[r]ather it seems that an aspect of human nature is the tendency to cling tightly to one’s advantage and privileges and to rationalize the suffering and exclusion of others.”⁸

The question of human nature remains, at its core, a structural one: a case for locating the origins of human behavior, including

³ *Id.* at 184.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 40.

⁷ *Id.* at 257–58.

⁸ *Id.*

racist behavior, in the biological structures of the mind.⁹ However, Alexander's jump to biological causes proved an odd turn in her otherwise detailed account of a birdcage of ostensibly race-neutral laws and policies, a story that would seem to lend itself to contingency and complexity. Further, much of Alexander's book dedicated itself to unveiling hidden racial animus, not explaining the origins of that animus.¹⁰

Despite her invocation of structuralism, in other words, Alexander's study of mass incarceration is in fact something quite different. She tells us not where racial animus comes from, but how it masquerades itself, a process more akin to the post-structuralist practice of deconstruction, not the structuralist project of locating underlying causes of particular worldviews, or "*mentalités*."¹¹ To illustrate, this essay will provide a brief review of structuralism, locate Alexander's argument in the field, and then demonstrate how critiques of her argument might point us to a more genuinely structuralist—rather than post-structuralist—account of mass incarceration in the United States.

II. STRUCTURALISM

Notions of structuralism owe their origins to the building trades which, as early as the fifteenth century in Europe, invoked the term "structure" to refer to "the action of building," or what we today would term "construction."¹² During the course of the seventeenth century, this terminology evolved in two directions, towards the "product of building," as in a wooden or stone "structure," but also the "manner of building," meaning the way in which "constituent parts" of a building made up a "whole."¹³ This latter iteration became popular in other fields, including biology and anatomy, in the seventeenth century, to explain the internal workings, or "internal structure[s]" of human parts, like for example, hands.¹⁴ That which was structural, in other words, explained the component parts necessary to make things work—bone, muscle, ligaments, and so

⁹ See Gordon H. Orians, *Nature & Human Nature*, 137 DAEDALUS 39, 44 (2008).

¹⁰ See generally ALEXANDER, *supra* note 2.

¹¹ Lawrence J. Chase, *Teaching All There Is to Know: The Annales 'Paradigm' and the World History Survey Course*, 18 THE HIST. TEACHER 409, 414 (1985).

¹² RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOC'Y* 253 (1976).

¹³ *Id.*

¹⁴ *Id.*

on—while that which was not structural could simply be written off as superfluous, or “decorative.”¹⁵

By the turn of the twentieth century, structuralist ideas crept into fields as disparate as botany, geology, chemistry, and engineering – but remained largely a matter of the natural—not human—sciences.¹⁶ Students of the human sciences tended to explain their subjects in terms of personal agency and historical contingency, not the predetermined results of “deep permanent structures” but the consequence of individual moral choice.¹⁷

However, an early form of structuralism did find inroads in the study of one topic: race. As early as the sixteenth century, for example, Europeans traveling to Africa reported on startling physical differences between themselves and Africans, most notably in terms of skin color.¹⁸ Such differences then became the basis for widespread, rambling theories of intelligence, culture, and identity, what historian Winthrop Jordan has termed “an irresistible playground for awakening scientific curiosity,” that later became linked to particular types of legal control, like slavery.¹⁹ For example, scientists at the turn of the nineteenth century began to argue that racial difference could be measured by examining physical attributes, including cranial structure.²⁰ This idea, termed phrenology, became widely popular in the United States during the antebellum period, and was wheeled out by southerners interested in rationalizing human bondage.²¹ As early as 1837, for example, a physician named Charles Caldwell concluded that African skulls were shaped in such a way as to suggest that they were more “tamable” than whites, and therefore better suited to be slaves.²²

By the 1840s, such notions declined in prominence, only to be replaced by an updated variant known as craniometry, which surged in the 1880s and 1890s and held that detailed measurements of skull capacity could explain intellectual prowess, not just for individuals

¹⁵ *Id.* at 253–54.

¹⁶ *Id.* at 255.

¹⁷ *Id.* at 256.

¹⁸ WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO* 4–5 (1968).

¹⁹ *Id.* at 12.

²⁰ See BRUCE R. DAIN, *A HIDEOUS MONSTER OF THE MIND: AMERICAN RACE THEORY IN THE EARLY REPUBLIC* 200 (2002).

²¹ See *id.* at 72.

²² See *id.* 72–73.

but entire groups.²³ Such ideas took hold in a rising discipline dedicated to the study of human civilization, anthropology, and contributed to a surge of scientific theories about race in the 1880s and 1890s that became central to the rise of Jim Crow in the American South.²⁴

Meanwhile, another branch of anthropology emerged that focused not on skull size, but the physical process of perception. Claude Levi-Strauss argued that human beings shared a common mode of perception due to the structure of their minds, and that this structure then influenced cultural development, a view that came to be identified as “structuralist,” and that was inspired by earlier theories of human language.²⁵

French historian Fernand Braudel joined Levi-Strauss’s efforts to find structural causes of human behavior, looking beyond human perception to the natural environment, including geography and climate.²⁶ Braudel maintained that human perception (and human action) depended heavily on the physical interaction of humans and their environments, particularly over long periods of time, or what he termed the “*longue durée*.”²⁷ To explain why, Braudel penned a path-breaking history of the Mediterranean world, arguing that proximity to water, climate, and other physical factors explained the history of the region better than individual leaders, ideas, or events.²⁸ Rather than read history as a procession of great men doing great things, in other words, Braudel focused on the “interaction between natural and cultural milieus” that gave rise to such men, including the work of historically marginalized populations dependent on the land, like serfs and slaves, as well as the importance of collective thinking over individual ideas, or what Braudel called *mentalités*.²⁹

Braudel’s approach to history came to be associated with an entire school of thought focused on a particular journal, the *Annales d’Histoire Economique et Sociale*, or simply *Annales*, that focused on the lives of average people, not elites, and captured European

²³ See *id.* at 211–15.

²⁴ See Gregory P. Downs, *University Men, Social Science, and White Supremacy in North Carolina*, 75 J. OF SOUTHERN HIST. 267, 270 (2009) (discussing how white supremacy became an idea discussed at southern universities).

²⁵ See Peter Schottler, *Historians and Discourse Analysis*, 27 HIST. WORKSHOP 37, 39–41 (1989).

²⁶ See Chase, *supra* note 11, at 416.

²⁷ See *id.*

²⁸ *Id.*

²⁹ *Id.* at 418–19; Schottler, *supra* note 25, at 38–39.

attention from the 1940s through the 1970s.³⁰ *Annales* historians took Braudel's basic methodology and applied it to a variety of contexts, often using it to downplay political, intellectual, and military history, arguing instead that the continuities in the daily lives of forgotten people were more significant to understanding the past than dramatic moments, heroic leaders, or "the instant drama and distortions of the 'media event.'"³¹

The *Annales* school's resistance to grand narrative brought it into conflict with scholars from other fields, some of whom rejected structuralism outright, and others who posited a variety of "post-structuralist" theories of history that included bits and pieces of the *Annales* approach.³² For example, French philosopher Louis Althusser applied structuralism to Marxist theory, using it to explain how capitalist systems relied on public and private platforms to influence popular culture, thereby winning the support of the working class.³³ Structural Marxists joined *Annales* historians in downplaying personal agency and private moral choice, preferring instead to view human action—including popular thought and private dissent, such as crime—as a byproduct of the situations that individuals found themselves in.³⁴ However, they did believe in the possibility of dramatic events, foremost among them revolution (against the capitalist order) that could be accelerated through Marxist teaching.³⁵

Others, like Jacques Derrida and Michel Foucault, borrowed from structuralism to challenge conventional notions of historical change generally, arguing instead for the "de-construction" of historical categories, a notion that questioned the permanence of deep-Braudellian structures, and emphasized instead the hidden power relations beneath even the most objectively neutral categories.³⁶ Crime, madness, mythology, and language all struck Derrida and Foucault as malleable, politically fraught areas of inquiry that obscured deeper contests.³⁷

³⁰ Chase, *supra* note 11, at 415.

³¹ *Id.* at 418.

³² See Lynn Hunt, *French History in the Last Twenty Years: The Rise and Fall of the Annales Paradigm*, 21 J. OF CONTEMP. HIST. 209, 217–19, 221 (1986).

³³ *See id.* at 221.

³⁴ *See id.*

³⁵ *See id.*

³⁶ Gertrude Himmelfarb, *Some Reflections on the New History*, 94 AM. HIST. REV. 661, 665–68 (1989); Schottler, *supra* note 25, at 41–42.

³⁷ Schottler, *supra* note 25, at 42.

By the 1980s, aspects of post-structuralist thinking began to capture the attention of legal scholars in the United States, prompting them to question the neutrality of legal rules, an inquiry that led to the rise of critical legal studies in the 1980s and critical race theory in the 1990s.³⁸ Critical race theory maintained that objectively neutral legal rules could be deconstructed to find hidden racial animus in a variety of legal fields, including criminal law, a project that Michelle Alexander undertook in her widely acclaimed book, *The New Jim Crow*, published in 2010.³⁹

As Alexander told it, the story of mass incarceration appeared on its face to be the byproduct of a racially-neutral campaign to control crime but was in fact a veiled effort to subordinate blacks.⁴⁰ To demonstrate, she cited statistics suggesting that suburban whites used drugs more extensively than did urban blacks but were policed—and punished—less.⁴¹ The rationale for this, she argued, was racial bias, particularly bias on the part of “white conservatives” who did not really care about preventing drug abuse, but were in fact more interested in rebuilding a system of racial control that might replace the one extant in the American South during the era of Jim Crow.⁴²

On its face, the argument had a heavy deconstructionist bent, exposing white animus in places that made no overt mention of race, a classic post-structuralist move. To the extent the argument was structuralist, it relied heavily on the permanence of racial animus—and by extension racialized thinking generally—as a feature of American society, a *mentalité* of sorts that was also part of its *longue durée*. Alexander hinted that this may have stemmed from basic human nature, a biological proclivity by elites to rationalize their privilege; this, however, did not explain precisely why race was the chosen rubric for elite rule, nor why mass incarceration was greater in the United States than in other countries with similar racially-polarized demographics.⁴³

To answer that question, more would need to be known about the transmission of racist ideas, and also any factors that might make those ideas more persuasive than their alternative, non-racist variants.

³⁸ See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893 (1995).

³⁹ See generally ALEXANDER, *supra* note 2.

⁴⁰ *Id.* at 40.

⁴¹ *Id.* at 98–99.

⁴² *Id.* at 43.

⁴³ See generally ALEXANDER, *supra* note 2.

Such questions lend themselves to a structuralist, rather than post-structuralist, account, as the next section shall demonstrate.

III. ANIMUS

That racial animus explains mass incarceration is a reasonable claim, particularly if one takes into account the long history of racial thinking, and racial science, in America. For example, one could locate the persistence of white animus not in human nature per se, but rather in scientific claims about black biological inferiority rooted—ironically—in structuralist arguments about race and physical appearance that first emerged during the colonial period.⁴⁴ Though Alexander does not get into this story, she could have used it to support her structuralist argument about the birdcage of criminal justice, arguing, for example, that racialist thinking was a type of *mentalité*, i.e. not simply a single theory or idea, but a whole realm of thought that captured the nation both before and after the Civil War—even into the post-Civil Rights Era. To establish this point, Alexander could simply have canvassed the long history of racist science in the United States, beginning with phrenology and continuing on through the rise of anthropology, biology, genetics, and a variety of other disciplines that openly endorsed notions of black inferiority as late as the 1930s.⁴⁵

Only by the close of World War II did such science lose formal credibility, but even then many Americans continued to believe it precisely because it had become part of the mental furniture of the United States, a view expressed in myriad ways and on myriad platforms, not just in scientific journals, for example, but in public media and popular culture as well.⁴⁶ Americans who graduated college in the 1930s, for example, may simply have adhered to the racist ideas that they had absorbed growing up, carrying them well into the 1960s and beyond. The structuralist frame of a *mentalité* captures this problem, explaining how certain ideas might continue to survive even though they have been formally discredited as a matter of science—bedeviling policy for decades to come.⁴⁷ This would

⁴⁴ JORDAN, *supra* note 18 at 96–97.

⁴⁵ See generally DAIN, *supra* note 20.

⁴⁶ *Id.* at 197–204.

⁴⁷ See generally IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE ACCOUNT OF RACIST IDEAS IN AMERICA (2016).

explain, for example, why elites might have worked to reinscribe racial hierarchy in neutral terms during the 1980s, as Alexander claims, a move that stemmed from a heartfelt—if deluded—belief about human difference that stemmed from a much larger *mentalité*.⁴⁸

However, racial animus may not have been the only cause of mass incarceration. In *Locking Up Our Own: Crime and Punishment in Black America*, James Forman Jr. challenges Alexander's singular focus on white animus, focusing instead on the rise of violent crime in America in the 1970s, and then on the African American response.⁴⁹ Using Washington, D.C. as an example, Forman makes the startling claim that African American voters themselves lobbied for longer prison sentences and more police, along with conservative whites.⁵⁰ Forman concedes Alexander's point about white animus and drugs, in other words, but goes further, demonstrating that in Washington, D.C. the problem of black drug use may not have been as serious as white use in the suburbs, but differed in that it coincided with a proliferation of firearms, and that guns became the weapon of choice for drug distributors, who used extreme violence to eliminate competitors and terrorize the city.⁵¹

Drug-related violence, maintains Forman, became so intolerable that African American majorities themselves voted for higher prison sentences and more police, effectively joining white conservatives in what Alexander has termed mass incarceration.⁵² Rather than a product of some outdated racialist *mentalité*, in other words, Forman suggests that the story in Washington was a tale of rational choices that had unanticipated effects.

But this too may be a structuralist tale. Forman's story presses us to look more closely, for example, at the structural causes of crime in the United States in the 1960s and 1970s—a topic that Alexander ignores. Further, Forman's nuanced description of debates within Washington, D.C.'s African American community suggests that both cultural and structural forces contributed to mass incarceration's rise, perhaps even its inevitability.⁵³

⁴⁸ ALEXANDER, *supra* note 2, at 40.

⁴⁹ See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 9–14 (2017).

⁵⁰ See *id.* at 43–46, 51, 60–61, 107–11, 115.

⁵¹ *Id.* at 17, 39, 51, 126, 136, 145.

⁵² *Id.* at 43–46, 60–61; See ALEXANDER, *supra* note 2.

⁵³ See FORMAN, *supra* note 49, at 17–46.

According to criminologist Barry Latzer, for example, the “late-1960s” witnessed the “biggest sustained escalation in criminal violence in the United States since the 1870s,” a development that affected African Americans “to a much greater degree” than whites.⁵⁴ From 1960 to 1970, argues Latzer, “urban homicide rates” doubled in the United States, part of a trend that could only be partially explained by increased birth rates following World War II’s “baby boom.”⁵⁵ “[N]onwhite males were responsible for 77 percent” of the increase, argues Latzer, yet only “[t]wenty-seven percent of the nonwhite male homicide spike was attributable to a rise in the size of that population.”⁵⁶

That police focused more heavily on urban blacks than suburban whites, a core aspect of Alexander’s argument, did not—in Latzer’s analysis—explain the spike in black violence, which was reflected not only in arrest records, written by police, but also victimization reports.⁵⁷ According to the National Crime Victim Survey, for example, “67 percent of the robbery suspects” in the United States in 1973 were African American, a number generated by victims, not police.⁵⁸ According to police records, only 63% of all individuals arrested for robbery during that period were black, a slightly lower number than victims reported, suggesting that police were actually falling short in their apprehension of black offenders.⁵⁹

Not only did blacks disproportionately commit more crime than whites, argues Latzer, but African Americans were also much more likely to be the victims of crime than whites. From 1965 to 1973, for example, “the average homicide mortality rates for nonwhite males were more than ten times those of whites.”⁶⁰ Part of this was due to proximity. “Having migrated to big cities with a high degree of residential segregation,” argued Latzer, “black people living in poor communities became easy targets for their more violent neighbors.”⁶¹

Behind such numbers, argues Latzer, lurked three structural causes: (1) a surge in birth rates following World War II, yielding a disproportionately large population of young men; (2) a mass

⁵⁴ BARRY LATZER, *THE RISE AND FALL OF VIOLENT CRIME IN AMERICA* 114, 128 (2016).

⁵⁵ *See id.* at 110-11, 114-15, 152-53, 245.

⁵⁶ *Id.* at 131.

⁵⁷ *See id.*

⁵⁸ *Id.* at 132.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.* at 128.

migration of southern blacks to the urban North, part of the “Great Migration”; and (3) an underdeveloped criminal justice system that actually emboldened crime by failing to maintain order.⁶²

Black crime rates did not stem from biological factors, Latzer is careful to note, but environmental ones.⁶³ Among these were the proximity of rich and poor in big cities, where “potential victims” were plentiful, and the odds of detection slight, due in part to the “anonymity” of urban areas.⁶⁴ Also important were economic issues, including a shrinking job market due to deindustrialization, a segregated housing market due to discriminatory real estate practices, and a flight of white tax dollars from urban cores, all factors that historian Tom Sugrue has coined “the urban crisis.”⁶⁵ According to Sugrue, the conditions that led to the urban crisis in Washington, D.C.—and other American cities in the 1970s and 1980s—resulted from major demographic and economic shifts in the United States, including some of the very same phenomena that Latzer mentions.⁶⁶ For example, Sugrue joins Latzer in emphasizing the Great Migration, which intensified in the 1950s and 1960s due to the mechanization of agriculture, a Braudellian development that drove thousands of black sharecroppers from the rural South to the urban North.⁶⁷ While some of these sharecroppers found adequate housing and jobs, many did not—a problem compounded by the fact that the jobs the migrants had hoped to obtain, i.e. high paying positions on assembly lines, disappeared due to automation and outsourcing.⁶⁸

Meanwhile, little money remained to fill in the gaps. In fact, public resources evaporated as middle- and upper-middle-class whites abandoned urban cores for remote suburbs, taking their tax dollars with them.⁶⁹ While the reasons for their departure were myriad, the consequences for urban blacks were dire.⁷⁰ Those able to

⁶² *Id.* at 152–53.

⁶³ *See, e.g., id.* (Latzer cites the three principal reasons for the surge in violent crime to be: the “coming of age” of male baby boomers; an underdeveloped criminal justice system that resulted in increased crime; and the migration of African Americans from the South to the urban North. All of these factors are environmental, not biological.)

⁶⁴ *Id.* at 77.

⁶⁵ THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2005).

⁶⁶ *See id.*

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 130–35.

⁶⁹ *Id.* at xxii.

⁷⁰ *See id.*

find work and housing found themselves pitted against those who did not, a problem exacerbated by isolation, exclusion, and—according to both Latzer and Forman—cultural baggage from the South.⁷¹

As Latzer tells it, southern migrants brought with them “distinctive norms that support[ed] and encourage[ed] violence,” including a culture of honor that descended from nineteenth century whites but was adopted by twentieth century blacks, to catastrophic effect.⁷² Suddenly trapped in crowded but crumbling urban cores, blacks came into more frequent conflict with one another as they struggled for resources, and turned to violence as a result.⁷³ Drugs factored in here, providing some with an outlet for depression, and others an illicit means of earning a living, though not without risk.⁷⁴ Guns provided security, violence resolved disputes between rival dealers, and crime spiked.⁷⁵

But most blacks did not commit crime. As Forman explains it, most African Americans brought with them not a culture of criminal violence from the South, but criminal punishment.⁷⁶ Black ministers, argues Forman, along with their congregations, viewed the rise in urban crime in Washington, D.C. and cities like it through a rural, Old Testament lens.⁷⁷ As white liberals lobbied for treatment to lessen a heroin epidemic, for example, black ministers balked, opting instead for punishment.⁷⁸ And, as white liberals lobbied for decriminalization of substances like marijuana, black ministers balked again, arguing for prohibition.⁷⁹ Both stances were classic evangelical positions, positions that actually united Protestants, white and black, across the South and Midwest.⁸⁰

IV. CONCLUSION

As Forman suggests, the origins of mass incarceration in the United States lie not simply in reconfigurations of racial animus, as

⁷¹ LATZER, *supra* note 54, at 50–57, 164.

⁷² *Id.* at 169.

⁷³ *Id.* at 50–57, 164.

⁷⁴ *See id.* at 175–82.

⁷⁵ *See id.* at 178–79.

⁷⁶ *See* FORMAN, *supra* note 49, at 17–46, 65–66.

⁷⁷ *Id.* at 31–32, 40, 42–43.

⁷⁸ *Id.* at 31–33.

⁷⁹ *Id.* at 44–45.

⁸⁰ *See id.* at 17–46.

Alexander maintains, but much deeper structures as well.⁸¹ Among them were technological shifts that brought black migrants out of the South and then left them struggling to find work in a postindustrial, urban landscape.⁸² Complicating this were depletions in urban services, wrought by departures of middle- and upper-middle-class urbanites, coupled with poorly-funded police forces, and an overwhelmed criminal justice system.⁸³

Such forces left African Americans trapped in urban cores with few options for dealing with unemployment, substandard housing, and poor education, all factors that contributed to spikes in crime.⁸⁴ Complicating this was heroin and other narcotics, which flooded urban streets in the 1970s and contributed—along with a profusion of firearms—to the creation of violent, illicit markets.⁸⁵ Though such markets provided some with an alternate means of survival, they instilled in others a sense that more prisons and police were necessary to restore order.

Missing were services, or what Forman calls a “Marshall Plan,” for urban America that African Americans hoped for but never received.⁸⁶ Had such a plan been implemented, with jobs, housing, health care, education, and other forms of support, crime may never have reached the levels that it did, and calls for prisons and police may have subsided. However, voters turned the opposite way, moving away from Johnson-era calls for a Great Society and towards a more punitive model, a choice that Forman argues was not simply a plot to reinstate racial caste in the post-Jim Crow era, but a byproduct of a deep-seated belief in moral choice, personal responsibility, and punishment.⁸⁷

The extent to which popular support for punishment drew strength from latent racism is not clear. Alexander argues that it was the single largest factor behind the punitive turn in American criminal justice, a point that could conceivably be explained by the holdover of a racialist *mentalité* in the United States following the Civil Rights Era, a *mentalité* reinforced, ironically, by spikes in black crime. Though Alexander does not mention it, for example, her theory of

⁸¹ See *id.* at 10–14.

⁸² See LATZER, *supra* note 54, at 152–53.

⁸³ See FORMAN, *supra* note 49, at 12.

⁸⁴ See *id.*

⁸⁵ See *id.* at 25–26, 50.

⁸⁶ *Id.* at 12–13.

⁸⁷ *Id.* at 76–77.

animus could actually be strengthened if it were cast as a response, in part, to the crime wave of the 1960s and 1970s. Such a claim, were it true, would be a more accurate, structuralist account of why animus drove the war on drugs, an account free from speculative claims about human nature, but still supportive of Alexander's theory. Put another way, conservative whites found their racialist theories confirmed once they read news accounts of black crime.

Of course, such a conclusion would lend itself to a different set of policy implications than straightforward criminal justice reform. According to Forman, America's affinity for incarceration stems from even deeper roots than its views on race, roots linked to biblical notions of punishment and personal moral responsibility.⁸⁸ Such ideas are religious in origin, not racist, and tie in closely to core American ideals, including the idea of freedom of religion, freedom of expression, and liberty itself.

In all fifty states, for example, criminal codes focus on personal moral choice as the basis for punishment, ignoring structural causes of crime. An individual's limited number of choices, limited number of opportunities, or limited education is irrelevant to whether or not they will be punished. Children of poor migrants, who leave one region for another, fail to find jobs, and end up trapped in isolated, crumbling urban cores, are treated no differently from children of privileged elites who are born into wealth and opportunity.

Further, American law limits what the government can do for minorities, particularly racial minorities, in the interest of preserving liberty. In a string of cases handed down during the era of mass incarceration, the United States Supreme Court put a series of roadblocks in the way of structural reform. Among these were *San Antonio v. Rodriguez*, which upheld disparate funding of public schools;⁸⁹ *Milliken v. Bradley*, which prevented multidistrict solutions to problems of segregation, white flight, and urban isolation;⁹⁰ and *Regents v. Bakke*, which declared programs specifically aimed at addressing generalized past harm a violation of equal protection.⁹¹ All of these opinions drew inspiration from the Court's stated commitment to limiting state power and preserving, to the greatest extent possible, personal liberty—including the liberty to

⁸⁸ See *id.* at 40 (discussing the community's response to attempts to legalize marijuana in Washington, D.C.).

⁸⁹ *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

⁹⁰ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁹¹ *Regents v. Bakke*, 438 U.S. 265 (1978).

move from place to place, whether from South to North or city to suburb, unregulated.

Because most Americans—white and black—believe in individual liberty and personal moral responsibility, we are poorly equipped to address problems that are structural in origin. This includes problems of racial animus, which draw strength from deep seated *mentalités* but are hard to eradicate—particularly when the Constitution protects racist speech—as well as deeper problems of demographics, economics, and limited government power. To note this, however, is not to detract from Alexander’s story of mass incarceration, but to put it on a more structuralist footing.