

The Racial History of Criminal Justice in America¹

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Abstract

The United States today has the highest incarceration rate, as well as the largest number of people living under correctional control more broadly (including probation and parole), than any other country on the globe. The size of the American criminal justice system is not only internationally unparalleled, but it is also historically unprecedented. This system is also deeply racialized. African Americans, Latinos, and indigenous populations (Hawaiian, Puerto Rican, Native American), are all represented in U.S. jails and prisons in numbers dramatically disproportionate to their representation in the population as a whole, and every non-white population is incarcerated at a rate far surpassing that of whites. Notably, however, while the scale of the today's criminal justice system is unsurpassed and unprecedented, its severe racial disproportionality has always been a defining feature. Only by taking a close look at the long and deeply racialized history of the American criminal justice system, and more specifically at the regularly discriminatory application of the law as well as the consistent lack of equal justice under the law overtime, that we can fully understand not only why the American criminal justice system remains so discriminatory, but also why prison populations rose so dramatically when they did.

Introduction

This paper seeks to offer a deeper historical and analytical context for understanding today's American criminal justice system—both its rise to its remarkable size and its stunning racial disproportionality. As it will make clear, although today's rate of incarceration is both historically unprecedented and internationally unparalleled, its racially discriminatory character is not. And, these points are related in important ways. Only by taking a close look at the long and deeply racialized history of the American criminal justice system, and more specifically at the regularly discriminatory application of the law as well as the consistent lack of equal justice under the law overtime, can we fully understand why the American criminal justice system today remains so discriminatory despite the victories of the civil rights era, as well as why prison populations rose so dramatically precisely when they did.

¹ The author would like to make clear that the historical examples used in this paper are by no means exhaustive since space constraints prevent such a comprehensive treatment of the past in all of its complexity. Nevertheless, every effort has been made to ensure that the examples given here are representative and reflect the historical record more broadly. Likewise, this paper can only draw from, and reference, a fraction of the historical literature available on the subject covered here. Nevertheless, every effort has been made to present the historical arguments regarding causation that are best supported by the historical record, and most-widely accepted by the historical profession.

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Part One

Conquest and Criminalization: The Birth of the Nation and Birth of Prisons

Unsurprisingly, this nation’s origin story is complex and scholars who have sought to recover it differ a great deal regarding what should be highlighted about that story for the general public. Some scholars, particularly of the older, Frederick Jackson Turner, generation, have sought to recover the heart wrenching and herculean histories of bravery, self-reliance, the frontier, and Manifest Destiny. Such renderings tend to focus on larger-than-life figures such as Davy Crockett, or the scores of homesteaders who risked everything to settle the West, or those who risked their fortune to build the railroads. The more recent historical scholarship, however, has recovered, and now feels honor bound to share with the public, a much grimmer origin story. This scholarship is rife with tales of conquest and nothing less than genocide. This literature makes crystal clear that there was nothing “natural” about whites having the bulk of the power in this country or owning the vast majority of its resources. As scholars such as Patrick Wolfe point out, that power and ownership was made possibly only because the “native” had been eliminated.²

And from the prairies and plains, to the island of Hawaii, and from Native Americans to Hawaiians, Mexicans, and Puerto Ricans, the newest literature also brings to light that where the act of conquest and practice of genocide failed fully to secure sole white dominance in the political, social and economic sphere, they quickly embraced another way to secure it—criminalization.³ White settlers who for a century had attempted to control Indian land with guns or acquired it by the spread of disease, still met serious opposition to their colonial desires.⁴ What cemented their control was the criminalization of Native populations—for example, marking their child rearing practices as backward and removing their children to boarding schools across the nation.⁵ Some were literally enslaved as punishment as well.⁶ Similarly, white settlers and government officials seeking to expand the borders of the United States didn’t rely solely on violence to secure full control over, for example, Mexicans, Hawaiians, (and later) Puerto Ricans.⁷ They understood as well to criminalize the original residents of those areas was to mark them as unfit to rule or to manage their own nation’s rich resources.

As white explorers and settlers eliminated and criminalized native populations on this soil and as far away as Hawaii, they meanwhile also controlled and profited off of the land in the southern half of the nation by conscripting the labor of people of African descent whom they brought to this land

² Wolfe, Patrick. 2006. “Settler Colonialism and the Elimination of the Native.” *Journal of Genocide Research* 8(4):387–409.

³ For a critically important look at carcerality in the Colonial period and other ways in which criminalization worked in this period see: Manion, Jen. 2015. *Liberty’s Prisoners: Carceral Culture in Early America*. Philadelphia, PA: University of Pennsylvania Press.

⁴ Smith, Andrea. 2005. *Conquest: Sexual Violence and American Indian Genocide*. Cambridge, MA: South End Press; Madley, Benjamin. 2016. *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873*. New Haven, CT: Yale University Press.

⁵ Chávez-García, Miroslava. 2012. *States of Delinquency: Race and Science in the Making of California’s Juvenile Justice System*. 1st ed. Oakland, CA: University of California Press; Gram, John. 2016. *Education at the Edge of Empire: Negotiating Pueblo Identity in New Mexico’s Indian Boarding Schools*. Seattle, WA: University of Washington Press.

⁶ Reséndez, Andrés. 2016. *The Other Slavery: The Uncovered Story of Indian Enslavement in America*. New York, NY: Houghton Mifflin Harcourt; Miles, Tiya. 2015. *Ties That Bind: The Story of an Afro-Cherokee Family in Slavery and Freedom*. Oakland, CA: University of California Press.

⁷ Fischer, John Ryan. 2015. *Cattle Colonialism: An Environmental History of the Conquest of California and Hawai’i*. Chapel Hill, NC: UNC Press; Anderson, Gary Clayton. 2005. *The Conquest of Texas: Ethnic Cleansing in the Promised Land, 1820-1875*. Norman, OK: University of Oklahoma Press; LeBrón, Marisol. 2019. *Policing Life and Death: Race, Violence, and Resistance in Puerto Rico*. 1st ed. Oakland, CA: University of California Press.

as slaves (and then enslaved the children they birthed). In the long period before the abolition of slavery, prisons as we know them today didn't exist. There was a turn to an ostensibly more "modern" form of punishing (mostly) whites when the Walnut Street Jail was constructed in Philadelphia in 1790, and the nation did begin building penitentiaries in the 1800s. Most famous of these were Auburn State Penitentiary opened in 1818 and Eastern State Penitentiary in 1829. But just because few African Americans or other black or brown inhabitants of this nation rarely ended up behind bars in a "prison" before 1865, this did not mean our understandings of who was "deviant" or most "criminal" were not already, and from the nation's inception, deeply racialized. From the earliest white portrayals of Indians as "savages" bent on murdering helpless homesteaders on the plains and prairies, to their regular claims that African Americans were sexual "brutes" who must be prevented from raping white women, the notion that brown and black people must be controlled and confined due to their innate and inherent criminal and deviant natures is, as historian Khalil Muhammad puts it, "embedded in the cultural DNA of the nation." Even the most basic descriptions and artistic renderings of evil in America from its earliest days were black and were juxtaposed always to the purity and virtues of white.⁸

That the growth and demographic profile of the modern American criminal justice system would be directly informed by whites' deeply held notions about innate black criminality was not obvious as long as slavery was legal. Although still regularly criminalized during slavery, when African Americans were accused of wrongdoing they most often were punished well outside of the court system and rarely were imprisoned. With the abolition of slavery, however, penal institutions in existence began immediately to fill with people of color in numbers well out of proportion with their presence in the population. As historians such as Talitha LaFlouria, Sarah Haley, Mary Ellen Curtin, and Alex Lichtenstein make plain, within one generation of the abolition of slavery the percentage of black prisoners reached 30% in 1890 because of specific newly adopted laws intended to target newly freed blacks, because of existing laws that were applied with particular vigor to newly freed blacks, and because of both legal and extra-legal efforts on the part of southern whites to police black behavior and spaces.⁹ As Khalil Muhammad has written:

Black Codes, Pig Laws, convict leasing, and chain gangs were all manifestations of new criminal justice policies intended to limit political, economic, and social agency among the newly freed. Although proponents of these laws and punishments claimed they

⁸ Khalil Muhammad has noted in an unpublished version of this piece that we cowrote in 2012: "Between 1676 and 1800, [historian Richard] Slotkin identified 33 published execution sermons about black criminals or in reference to the criminal offenses of condemned white colonists—such as in the Salem witch trials—as a "black example." Cotton Mather, for example, published four execution sermons, including Tremanda in 1721. Joseph Hanno, an enslaved man who murdered his wife, sits condemned before Mather and a congregation of Calvinists. Mather's prayer is that this "Black Thing that you have in Irons here before us" be an example to the congregation that all might too repent of their sins and ask the "SAVIOR [to] Change my Heart...[so that] Thy Soul shall become as White as snow." In this case, criminality and sin are both figuratively "black" and Hanno, the condemned black man, embodies the archetypal criminal. Moreover, the threat of black male criminality was heightened by anxieties of interracial sex between black male slaves and white female servants, defined almost exclusively as rape. "The image of the black man that emerges from the crime narratives is that of an oversexed brute, ungrateful for the blessings bestowed by his white masters, with a proclivity for crime and criminal conspiracies against the masters, and white society in general," according to Slotkin. Of the 33 execution sermons, 22 focused on "sexual offenses," anticipating the rape myth of the postbellum period."

⁹ Lichtenstein, Alex. 1996. *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South*. New York, NY: Verso; LaFlouria, Talitha L. 2015. *Chained in Silence: Black Women and Convict Labor in the New South*. Chapel Hill, NC: UNC Press Books; Curtin, Mary Ellen. 2000. *Black Prisoners and Their World, Alabama, 1865-1900*. Charlottesville, VA: University Press of Virginia; Haley, Sarah. 2016. *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity*. Chapel Hill, NC: UNC Press Books.

were about crime control. Newspapers and white crime victims frequently claimed that black theft was common. Detractors, including federal officials, pointed out time and time again that black voting, landowning, contract negotiating, retailing, self-defense, and simple unemployment or leisure could lead to a long sentence of hard labor on a prison farm, in a coal mine, or on a road crew.¹⁰

The upshot of this response to black claims on equality was that, virtually overnight, prisons across the South transformed from being all white to virtually all black. In Alabama, for example, the state's prison population was only 1% black in 1850, but a mere five years later it was 75%, and by the late 1880s, it was a full 85%.¹¹ Notably the ability to fill the nation's penal institutions so disproportionately with black bodies after the Civil War depended upon the longer pre-history of equating blackness with inherent criminality. As important in this period, of course, was the fact that white southerners' entire economy depended upon black labor and because the amendment that outlawed slavery also included an exception for anyone convicted of a crime, by filling penal institutions and prison farms with blacks, they could once again be forced to labor for no remuneration. Thanks to key wording in the 14th amendment, being convicted of a crime also meant losing any right to vote, which was a central reason why whites were able to keep complete control over the South politically.

The specific origins of this nation's first major spike in incarceration, which took place in the American South in the immediate wake of 1865, are deeply instructive. They make crystal clear that the economic and political anxieties and desires of whites with power, not crime per se, determined the rate of incarceration as well as which residents of this nation would most likely find themselves first criminalized and then confined. Notably, northern and western penal institutions mirrored this process in the same period. Although African Americans were a minority in, say, New York, by 1920 (as were Native Americans and Mexican Americans by that time in cities such as Los Angeles), as officials increasingly came to rely on jails and prisons in these regions, the targeted criminalization of black and brown people (which meant their disproportionate policing and monitoring compared with whites) ensured their disproportionate presence in these non-southern institutions as well. Historian Khalil Muhammad delves deeply into this post-Civil War northern story and shows a consistent pattern in which police attention shifted quickly and markedly from poor white immigrants to newly arrived blacks, overnight making them the most criminalized group in northern cities. And, even though northerners have always assumed themselves to be less bigoted and backward than southerners, a close look at the penal institutions of the North in the period between the Civil War and WWII indicates that they were as brutal as anything southern African Americans endured in that region's prison farms or penitentiaries.¹²

¹⁰ Muhammad, Khalil and Heather Ann Thompson. 2012. "Historical Causes of Mass Incarceration." Unpublished paper.

¹¹ Curtin, *Black Prisoners and Their World*.

¹² Thompson, Heather Ann. 2010. "Blinded by the 'Barbaric' South: Prison Horrors, Inmate Abuse, and the Ironic History of American Penal Reform" Pp.74-96 in *The Myth of Southern Exceptionalism*. Edited by Matthew Lassiter and Joseph Crespino. New York, NY: Oxford University Press.

Part Two

Criminalizing Race Redux: The Criminal Justice System before Mass Incarceration (1945-1965)

In the decade prior to, during, and immediately after World War II, the crime rate and the imprisonment rate continuously fluctuated and there was little correlation between them. The prison and jail population nationally in 1930 had been 180,889, rose to 272,955 in 1940, and by 1950 it was back down to 252,615.¹³ And while that would seem logical if one looked only at the homicide rate of 1940 (6.3/100,000) and 1950 (5.3/100,000), the rate in 1930 (8.8/100,000) shows that prison rates are often disaggregated from the rate of actual crime ordinary people experience on the ground.¹⁴

But though fluctuating crime rates did not translate neatly into a rise or fall of the imprisonment rate, whites' deep-seated association between blackness, brownness, and criminality continued to inform who was policed, arrested, and ultimately imprisoned, and southern blacks still most acutely felt the ill-effects of white assumptions about their inherent criminality. As the 20th century unfolded they continued to fill southern prison farms and jails in numbers well out of proportion to their presence in the population as often well disconnected from who in this region was also breaking the law. African Americans living north of the Mason Dixon line also continued to be singled out for policing, arrest and incarceration. Indeed as even more southern blacks moved north seeking economic and social opportunity during and after WWII than had migrated in the wake of the Civil War and with the onset of WWI (nearly five million people), northern prison populations became as markedly racially disproportionate as southern.¹⁵ As important, historian Kelly Lytle Hernández and sociologist Victor Rios each show clearly that these same racialized patterns of imprisonment played out in the West as well, with Mexican Americans in particular being targeted by law enforcement and locked up in numbers well out of line with their presence in the overall population.¹⁶ U.S. territories and far flung states such as Puerto Rico and Hawaii engaged in significantly racialized criminal justice practices as well.¹⁷

¹³ “Graph 1: Number of Prison and Jail Inmates, 1910-2000.” 2000. *The Punishing Decade: Prison and Jail Estimates at the Millennium*. Washington, DC: Justice Policy Institute.

¹⁴ This fact is, of course, glaringly obvious today when we have unprecedented incarceration rates and historically low crime rates. For more on this see: National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Edited by J. Travis, B. Western, and S. Redburn. Washington, DC: The National Academies Press. For data cited in text see: Key Facts at a Glance: Homicide rate trends. 1900-2006. Office of Justice Programs, United States Department of Justice. Washington, DC: Bureau of Justice Statistics.

¹⁵ For more on the ways in which criminal justice system remained racialized in the postwar period, and the ways in which blackness was associated with criminality see: Robert Perkinson's comprehensive history of that system in Texas: Perkinson, Robert. 2010. *Texas Tough: The Rise of America's Prison Empire*. New York, NY: Metropolitan Books. Also see: Kennedy, Randall. *Race, Crime, and the Law*. 1997. New York, NY: Vintage; Sampson, Robert and William J. Wilson. 1995. "Toward a Theory in Race, Crime, and Urban Inequality." Pp.37-54 in *Crime and Inequality*. Edited by J. Hagen and R. Peterson. Palo Alto, CA: Stanford University Press; Quillian, Lincoln and Devah Pager. 2001. “Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime.” *American Journal of Sociology* 107(3):717–67.

¹⁶ Hernández, Kelly Lytle. 2017. *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965*. Chapel Hill, NC: UNC Press Books; Rios, Victor M. 2011. *Punished: Policing the Lives of Black and Latino Boys*. New York, NY: NYU Press.

¹⁷ Debrah, Ama. 2012. “Special Report: Bias Against Native Hawaiians in Hawaii Criminal Justice System.” ACLUHawaii; LeBrón, Marisol. 2017. “They Don’t Care If We Die: The Violence of Urban Policing in Puerto Rico.” *Journal of Urban History*.

Of all racial groups, however, the racial disproportionality of African Americans in the U.S. prison population stood out after WWII. In sum, the U.S. Department of Justice concluded in its study of racial patterns of incarceration from 1926 to 1986, “From 1926 to 1986 the recorded black percentage among admissions to State and Federal prisons more than doubled from 21% in 1926 to 44% in 1986. This growth is not explained by general population trends. The number of blacks relative to the general population was about the same in both years: 10% in 1926 and 12% in 1986.”¹⁸

While most scholars concede that the late-19th century South was rife with laws that disproportionately targeted blacks thus leading to a situation in which “the incarceration rate among African Americans was roughly twice that of whites,” few are willing to see this same pattern playing out in the later 20th century in areas of the country that had not been so-tainted with a slave past. And yet, as Bruce Western and Becky Pettit point out, “the demographic erosion of Jim Crow through the migration of Southern African Americans to the North increased racial disparity in incarceration through the first half of the twentieth century” everywhere and, in fact, the racial disparities in incarceration rates were actually “higher in the North than the South.” Just as it had been in the South, this disparity was made possible by laws that singled out blacks over whites, and policing that did as well. From new ordinances that criminalized the act of “loitering” or neighborhood “blight” in areas of cities where only blacks resided, to enforcing existing laws against, say, after hours drinking establishments only in those same areas, laws and policing were used regularly by whites to control black spaces.

That the law was applied unequally and that it was racialized at every point, is particularly obvious if one looks closely at the history of northern cities such as Detroit after WWII. In this period there was, in fact, a dramatic upsurge of crimes committed *by whites against African Americans* who tried to move into white neighborhoods or work in factories that had previously hired only whites in this period. Rarely, however, were whites arrested for engaging in such criminal acts. From the so-called “hate strikes” in places like Detroit’s Packard plant or the Philadelphia Transit strike of 1944, to the mob violence that black families experienced trying to move into public housing and residential neighborhoods across the nation, when whites attacked blacks they rarely were arrested.¹⁹

Although 200 police officers were on duty at the Sojourner Truth Homes in Detroit, a federal housing project, when black families tried to move in white mobs attacked them. Ultimately at least forty citizens were badly injured from the many pick axes that whites wielded and stones that they threw. Although police officers arrested 220 people in the melee, even the *New York Times* remarked that 217 of those arrested were the African Americans who were defending themselves from mob violence.²⁰ Likewise, a month later white mobs roamed again through Detroit attacking blacks during a major three-day race riot. When a black man was severely beaten getting off of a bus on Woodward Avenue

¹⁸ Langan, Patrick. 1991. *Race of Prisoners Admitted to State and Federal Institutions, 1926-86*. NCJ 125618. Office of Justice Programs, United States Department of Justice. Washington, DC: Bureau of Justice Statistics.

¹⁹ Roediger, David R. 1994. *Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History*. New York, NY: Verso.

²⁰ For more on white racial violence and the disparate policing of blacks versus whites in postwar cities see: Sugrue, Thomas. 1996. *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*. Princeton, NJ: Princeton University Press; Hirsch, Arnold. 1998. *Making the Second Ghetto Race and Housing in Chicago 1940-1960*. Chicago, IL. University of Chicago Press. For specifics on violence at Sojourner Truth homes see: Smith, A.M. 1942. "The Race Problem in Detroit, Article I: The Negro Problem in Detroit." *The Detroit News*, October 5; Smith, A.M. 1942. "The Race Problem in Detroit, Article III: A Natural Problem, Too." *The Detroit News*, October 7; Kapell, Matthew Wilhelm. 2009. “‘Miscreants, be they white or colored’: the local press reactions to the 1943 Detroit ‘race riot.’” *The Michigan Academician*.

in front of four policemen, no effort was made to protect the victim or arrest the whites committing the assault.²¹ Even when four white youths actually shot and killed a 58-year-old black man named Moses Kiska during the riot because, they explained, “we didn’t have anything to do,” they were found guilty only of manslaughter and were given sentences ranging from 1-15 years.²² Ultimately in that 36-hour riot, 25 African Americans were killed and, although there were more than 1,800 people arrested during the upheaval, the vast majority of those were also black.²³

Not only did law enforcement single out blacks over whites for arrest during and after the Second World War, by the 1950s city officials were bombarded with complaints filed against members of local police forces indicating that they also actively mistreated the African Americans in their charge.²⁴ By 1957, for example, the Detroit NAACP went public with a study that it had conducted of the scores of police brutality complaints that black residents had filed between January 1956 and July 1957 so that the mayor might deal with what it felt had become a serious problem in that city. Their study noted with alarm that the most frequent type of complaint involved “physical assault followed by racial epithets” and that, as importantly, “90% of the complainants are working people without a previous record who believe they are subjected to unwarranted abuse because of their race.”²⁵

By the 1960s the discriminatory way that law enforcement treated black citizens, both in personal interactions with them and in terms of singling them out for arrest, meant that prison populations were not remarkably high overall by that decade, but they were notably and even more disproportionately African American than they ever had been. Importantly, African Americans were not merely being policed, arrested, and incarcerated at rates out of sync with their presence in the population and with crimes actually committed by the 1960s; they were also singled out for excessively harsh treatment while serving time.

Again, that such abuses took place in the South surprise few observers today. In fact, northerners often decried such acts of barbarism such as the case in which one “fourteen-year-old black youth who had been serving ninety days for shoplifting” was, for no apparent reason, “shot in the face by a trustee, ... causing total blindness and permanent brain damage,” or ones in which black men like George Humes were “handcuffed to bars, on tiptoes for 2 days without food, water, or bathroom facilities” while men such as Walter Nathan were “handcuffed and hung from tree.”²⁶ Indeed, in the South prisons were, in essence, modern day slave plantations where guards acted like overseers using everything from “Black Annie” (a thick strapped whip) to the notorious “Tucker Telephone” (with live electric wires to be attached to inmates’ genitals) to keep their captive workforce in line.²⁷

²¹ Baulch, Vivian and Patricia Zacharias. 1999. “The 1943 Detroit Race Riots.” *The Detroit News*, February 11.

²² Ibid.

²³ Ibid.

²⁴ For an excellent historical treatment of this phenomenon and the civil rights reaction of city blacks in New York see: Biondi, Martha. 2006. *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City*. Cambridge, MA: Harvard University Press.

²⁵ Thompson, Heather Ann. 2001. *Whose Detroit?: Politics, Labor, and Race in a Modern American City*. Ithaca, NY: Cornell University Press. P.22.

²⁶ Oshinsky, David. 1997. *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. New York, NY: Free Press. Pp.238, 243.

²⁷ Murton, Tom and Joe Hyams. 1969. *Accomplices to the Crime: The Arkansas Prison Scandal*. New York, NY: Grove Press; Thompson, “Blinded by the ‘Barbaric’ South.”

Just as it had been in the period before WWII, however, the treatment of black prisoners in the North was also disproportionately abusive and grim throughout the postwar period. There too disproportionate policing, arrest, and conviction also meant disproportionately bad treatment once incarcerated. After seeing prisons at work in both regions, professor Bruce Jackson called attention to how badly prison officials treated inmates in the South but was quick to say “so does the North, and no one likes to talk about it.”²⁸ Jackson was particularly appalled by the Massachusetts Correctional Institution at Bridgewater, which he dubbed “one of the most wretched” prisons in the country and the “worst place” he had “visited, north or south.”²⁹ This facility had much company, however. African American inmates in Philadelphia, for example, were routinely used during the 1950s and 1960s as test subjects for medical experimentation. Indeed, inspired by the successes of medical experimentation on the insane and the incarcerated in other states such as Ohio, Michigan, and California, officials at Holmesburg Prison granted the University of Pennsylvania Medical School carte blanche with its wards beginning in the 1950s. During the Vietnam War the concentration of test subjects at Holmesburg Prison was also most attractive to the U.S. Department of Defense. According to the official photographer for Dr. Albert Kligman, one of Holmesburg’s primary experimenters, “They were just preying on people. Using an inmate was cheaper than buying a chimpanzee, and the results were better.”³⁰ Medical experimentation was also taking place in famous northern prisons such as Attica into the 1970s.³¹

Black men at the Attica State Correctional Facility in upstate New York and others weren’t only the subject of medical testing, but they also, disproportionately, experienced ill-treatment at the hands of guards and other prison officials. Notably, from the time it opened until the mid-1970s, every prison guard at Attica was white and, yet, Attica’s inmate population had grown less white with each passing decade. In 1966 62% of Attica’s prison population was African American and Puerto Rican, and a mere four years later it had increased further to 68.5% thanks to an escalation of so-called Terry Stops in the all- or mostly-black enclaves of big cities such as New York City, Buffalo, and Rochester.³² Poorly trained and jaded white correction officers did not always respond dispassionately to the inmates of color on their cell blocks. Scores of grievances and lawsuits emanating from this facility indicate that such guards too often dished out racial epithets as well as beatings when they became frustrated. Not insignificantly, the state-issued baton carried by every Attica guard was known by all inmates in the prison as a “Nigger stick.”³³

Part Three

Criminalization and Control Redux: The Ironic Origins of Mass Incarceration (1955-1975)

The overzealous policing of African Americans, and their disproportionate subjection to ill treatment at the hands of police in the nation’s cities and correction officers in the nation’s prisons, eventually led black citizens in both places to rebel. While it is beyond the scope of this paper to recount the full history of either the American civil rights movement or its prisoner rights movement, it is important to note that both movements were sparked and fueled by the fact that law enforcement

²⁸ Jackson, Bruce. 1968. “Our Prisons are Criminal.” *New York Times*, September 22.

²⁹ Ibid.

³⁰ Hornblum, Alan. 1999. *Acres of Skin: Human Experiments at Holmesburg Prison*. New York: NY: Routledge. Pp.7, 24, 166, 171, 172; Thompson, “Blinded by the ‘Barbaric’ South.”

³¹ Thompson, Heather Ann. 2017. “Attica: It’s Worse Than We Thought.” *New York Times*. November 19, A23.

³² Testimony of David Addison. 1972. The McKay Commission: New York State Special Commission on Attica. Albany, NY: New York State Archives. Jan 12, p.23.

³³ Thompson, “Blinded by the ‘Barbaric’ South.”

was singling out communities of color when it came to policing, arrest, and ill-treatment. That is to say that, well before the historically unprecedented rise of incarceration rates—rates that we will see followed directly on the heels of the Civil Rights 60s just as they spiked the first time in the wake of black claims on equality after the Civil War—incarceration rates had always been racially disparate and, in ways that prove most ironic, *it was that very disparity, that fueled the unrest of this tumultuous period that, in turn, would lead to the crisis of racialized mass incarceration we live with today.*

It is clear from the historical record that from Watts, to Detroit, to DC, to Newark, the civil rights activism and urban protests of the 1960s were fueled by African Americans' desire for city officials to remedy the fact that members of law enforcement were singling them out for surveillance, arrest, ill-treatment and imprisonment.³⁴ As President Johnson's Commission on Civil Disorders noted, one of the most serious problems facing the nation's inner cities was strained "police-community relations" and, significantly, according to this study, "police actions were 'final' incidents before the outbreak of violence in 12 of the 24 surveyed disorders" that erupted in these same cities with police actions being a "prior" precipitating factor in the remaining 12 incidents of urban unrest.³⁵

Prisons also experienced a number of dramatic protests in this period and, like in the cities, the issue of how inmates of color were being singled out for poor treatment within penal facilities was central.³⁶ At Attica, for example, even white inmates acknowledged the extent to which racial discrimination shaped the lives of the black and Puerto Rican prisoners in ways palpable. As white inmate William Jackson put it when asked whether he thought that guards applied "rules differently to black inmates and white inmates," yes, "very much so."³⁷ He went on to chronicle specific examples of how white guards treated non-white inmates differently than they did prisoners like him whom they could better "relate to."³⁸ Although they usually denied it, from time to time even the white guards themselves would admit that such discrimination flourished at Attica. One, a sergeant Cochrane, for example, grudgingly conceded that "the same amount of prejudice that society does have, put into a strictly authoritarian circumstance, results in it being a much more oppressive thing than in the outside

³⁴ On the historical relationship between police brutality and Sixties-era urban rioting see: Horne, Gerald. 1995. *Fire This Time: The Watts Uprising and the 1960s*. Charlottesville, VA: University of Virginia Press; Risen, Clay. 2009. *A Nation on Fire: America in the Wake of the King Assassination*. Hoboken, NJ: John Wiley & Sons, Inc.; Elfenbein, Jessica, Thomas Hollowak, and Elizabeth Nix, eds. 2011. *Baltimore '68: Riots and Rebirth in an American City*. Philadelphia, PA: Temple University Press; Farber, David R. 1994. *Chicago '68*; Johnson, Ann K. 1996. *Urban Ghetto Riots, 1965-1968: A Comparison of Soviet and American Press Coverage*. New York, NY: East European Monographs; Distributed by Columbia University Press; Fine, Sidney. 2007. *Violence in the Model City: The Cavanagh Administration, Race Relations, and the Detroit Riot of 1967*. East Lansing, MI: Michigan State University Press; Hersey, John. 1998. *The Algiers Motel Incident*. Baltimore, MD: Johns Hopkins University Press; Mumford, Kevin. 2008. *Newark: A History of Race, Rights, and Riots in America*. New York, NY: NYU Press; Thompson, *Whose Detroit*.

³⁵ "Our Nation Is Moving Toward Two Societies, One Black, One White—Separate and Unequal": Excerpts from the Kerner Commission Report. National Advisory Commission on Civil Disorders. Washington, DC: U.S. Government Printing Office.

³⁶ For more on the prisoner rights movement see: Chase, Robert. 2009. "Civil Rights on the Cellblock: Race, Reform, and Violence in Texas Prisons and the Nation, 1945-1990." Maryland: PhD Dissertation; Berger, Daniel. 2010. "We are the Revolutionaries": Visibility, Protest, and Racial Formation in 1970s Prison Radicalism." University of Pennsylvania: PhD Dissertation; Chase, Robert. 2012. "Slaves of the State: Southern Prison Labor and a Prison-Made Civil Rights Movement" in *Life and Labor in the New, New South*. Edited by Robert Zieger. Gainesville, FL: University of Florida Press; Gomez, Alan. 2009. "Nuestras Vidas Corren Casi Paralelas: Chicanos and the Prisoner Rebellion in Leavenworth" in *Behind Bars: Latino/as and Prison in the U.S.* Edited by Suzanne Oboler. Basingstoke, United Kingdom: Palgrave MacMillan.

³⁷ Testimony of William Jackson. 1972. The McKay Commission: New York State Special Commission on Attica. Albany, NY: New York State Archives. April 12, p.160.

³⁸ *Ibid.*, 40.

society where that kind of prejudice is avoidable.”³⁹ Unsurprisingly, then, when inmates took over Attica on September 9, 1971, central among their demands was that the state “Educate all officers in the needs of inmates,” that it “[i]nstitute a program for the employment of black and Spanish-speaking officers,” and that it “[e]stablish an inmate grievance delegation comprised of one elected inmate from each company which is authorized to speak to the administration concerning grievances, and develop other procedures for community control of the institution.”⁴⁰

Without question African American activism against racially discriminatory treatment in the nation’s cities and prisons for a time netted concrete improvements in police-community relations (leading to landmark Supreme Court rulings such as *Miranda v. Arizona*, 1966), and in prison conditions (with crucial rulings such as *Monroe v. Pape*, 1961; *Robinson v. California*, 1962; and *Holt v. Sarver*, 1969). It is clear from the historical record, however, that such challenges to the political and racial status quo also led, simultaneously, to whites increasingly believing that African Americans were most responsible for crime, to an even more aggressive policing of black communities and, most importantly, it led also to a dramatic increase in monetary and institutional support for law enforcement as well as tougher laws that would, in turn, lead to more policing, more arrests, and significantly higher rates of incarceration in the United States.

Although the civil unrest of the 1960s overwhelmingly stemmed from African Americans’ long-held grievances about being discriminated against when it came to equal employment, schooling, housing, health care, etc., as well as their long-standing frustration at being singled out for policing and mistreatment by members of law enforcement, historians have documented well that America’s white citizenry viewed such unrest as merely criminal behavior and it responded by calling for more, not less, policing of black residents of the city.⁴¹ Historian Michael Flamm most clearly illustrates this connection between white anxieties about black activism— anxieties, he argues, that were “at fever pitch” in the 1960s in no small part because of “urban riots, and political demonstrations” and the association they made between this unrest and an escalation in “street crime.”⁴² As one white Detroitier wrote to the mayor of that city in “We whites are getting sick! Sick! Of the crying Do-gooders, NAACP, etc.—that are always on the side of the person who robs, kills, or beats a person to death just for kicks.”⁴³ Another wrote, “believe me, without police protection our civilization will go back to jungle law and cannibalism in a very short time.”⁴⁴

³⁹ Testimony of Sargent Cochrane. 1972. The McKay Commission: New York State Special Commission on Attica. Albany, NY: New York State Archives. April 13, p.290.

⁴⁰ See original typed copy: “Proposals acceptable to Oswald at this time.” McKay Collection. #15855-90, Box 84. Albany, NY: New York State Archives.

⁴¹ For works that connect this period of unrest with renewed fears of black criminality see: Rieder, Jonathan. 1985. *Canarsie: The Jews and Italians of Brooklyn Against Liberalism*. Cambridge, MA: Harvard University Press; Matusow, Allen J. 1984. *The Unraveling of America: A History of Liberalism in the 1960s*. New York, NY: Harper and Row; Edsall, Thomas Byrne and Mary D. Edsall. 1992. *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*. New York, NY: W.W. Norton & Company; Jacoby, Tamar. 1998. *Someone Else’s House: America’s Unfinished Struggle for Integration*. New York, NY: Basic Books; Flamm, Michael. 2007. *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*. New York, NY: Columbia University Press; Perlstein, Rick. 2010. *Nixonland: The Rise of a President and the Fracturing of America*. New York, NY: Simon and Schuster; Schoenwald, Jonathan. 2001. *A Time for Choosing: The Rise of Modern American Conservatism*. New York, NY: Oxford University Press; Isserman, Maurice and Michael Kazin. 2007. *America Divided: The Civil War of the 1960s*. New York, NY: Oxford University Press.

⁴² Flamm, *Law and Order*, 168.

⁴³ Heather Thompson, *Whose Detroit*, 41

⁴⁴ *Ibid.*

Notably, this popular view was actively fueled by well-respected politicians. Vesla Weaver, for example, provides strong evidence that in their speeches to constituents, 60s-era politicians regularly “attached civil rights to lawlessness by arguing that civil disobedience flouted laws and would inevitably lead to more lawless behavior” and they expressly made the argument that “movement activists” were “the major culprit in the crime increase.”⁴⁵ Never mind the fact that “[t]his claim was empirically unfounded” and that even the arrests [that were] “related to collective action protests did increase during this time” were “not of a scale” to explain any “aggregate crime rate increase,” by the mid-1960s a “new doctrine” had emerged and the idea that “civil rights demonstrations amounted to violence and created a climate of lawlessness” had become gospel to large segments of the American voting public.⁴⁶

Significantly, it wasn’t just the white residents of cities such as Detroit, nor southern politicians such as George Wallace who had grown increasingly convinced by 1964 that crime was the nation’s most pressing problem and that the origins of this rise in crime was black militancy. The President of the United States and Great Society liberal Lyndon Johnson had come to the same conclusion. Not only was Johnson speaking regularly about the nation’s crime problem as early as 1964, but in 1965 he took an historic step to deal with the “crisis” of crime most aggressively with passage of the Law Enforcement Assistance Act (LEAA) of 1965 which immediately and preemptively provided unprecedented financial, bureaucratic, and tactical support to law enforcement agencies across the country.⁴⁷ In concert with, and in aid of, LEAA’s crime fighting agenda, the nation’s legal system underwent important changes as well. Within ten years of LEAA’s passage, numerous new crime bills and laws had also passed—all oriented toward making certain long-standing human actions—particularly those related to the actions of poor urbanites—illegal, and making the penalties for breaking existing laws much stiffer.

That Johnson initiated a major new War on Crime in the year 1965 is in fact very significant. Of course it shows, as political scientists Naomi Murakawa and Marie Gottschalk both argue in careful detail, that the rise of historically unprecedented incarceration rates was a deeply bipartisan effort from its origins to the present day.⁴⁸ As important, however, it allows us to explore whether, as later politicians, policy makers, and pundits would argue, the War on Crime began due to rising crime levels and was not, as the historical literature suggests, a political response to black claims on the polity and social as well as economic standing. In short, a close look at the detailed history of the *entire* decade of the 1960s indicates serious problems with this argument. As historian Elizabeth Hinton makes clear, the Johnson administration tagged black youth as “potential” criminals in ways that dictated where greater resources for policing would be dispensed.⁴⁹ Julilly Kohler-Hausmann too provides ample evidence of the ways in which certain, particularly black and brown, communities were targeted as likely criminal, and thus generated crime fighting rhetoric and resources divorced from actual evidence

⁴⁵ Weaver, Vesla M. 2007. “Frontlash: Race and the Development of Punitive Crime Policy.” *Studies in American Political Development* 21(2):230–65. P.247.

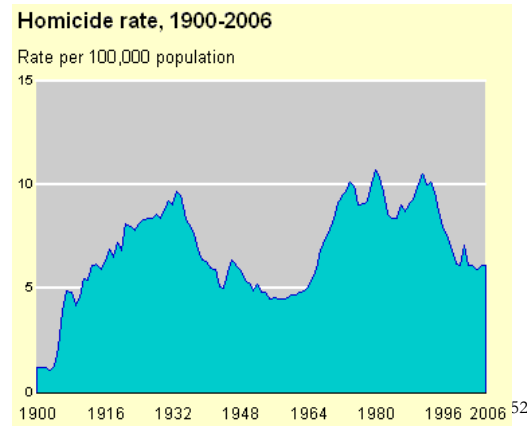
⁴⁶ *Ibid.*

⁴⁷ For an excellent new study of the history of LEAA and how it preemptively launched a war on crime see forthcoming dissertation from Columbia University (2012). Also see the forthcoming article by Elizabeth Kai Hinton, “Pre-Emptive Federal Policy and the Incarceration of Black Urban Youth in the 1970s.” *Journal of Urban History*.

⁴⁸ Murakawa, Naomi. 2014. *The First Civil Right: How Liberals Built Prison America*. New York, NY: Oxford University Press; Gottschalk, Marie. 2016. *Caught: The Prison State and the Lockdown of American Politics*. Princeton, NJ: Princeton University Press.

⁴⁹ Hinton, Elizabeth K. 2016. *From the War on Poverty to the War on Crime*. Cambridge, MA: Harvard University Press.

of criminality.⁵⁰ Indeed when one historicizes the crime rate of the specific decades in which the War on Crime began it quickly becomes apparent that the crime rate in 1964 was not only unremarkable for that decade (the murder rate in 1962 was 4.8 and in 1964 it was only 5.1) and it was also historically unremarkable since, for example, far more murders were committed in 1924 and 1934 than were committed that year.⁵¹



Indeed, taking the violent crime rate overall, over time, it is clear that American citizens were in far greater danger of being victimized by a violent crime once the War on Crime was in full swing and had been our nation’s main policy priority for several decades than they had been when politicians decided that such a war was necessary to wage. Notably, whereas the violent crime rate in 1965 was 200.2 per 100,000, by 1985 it was 556.6 in 1985 and by 1994 it was 684.6.⁵³

Not only were crime rates historically unremarkable when the War on Crime began but, historically, even when crime rates did begin to climb in the wake of LEAA those numbers were problematic. With LEAA came a major incentive for urban police departments to change the way that they categorized and counted crime because higher crime rates translated directly into more federal support. As my own research, and that of Elizabeth Hinton on “preemptive” policing, makes clear, a good case in point comes from the city of Detroit.⁵⁴ When crime rates began to inch up in the late 1960s, Detroit’s mayor and police brass admitted that “new methods of counting crime” had played

⁵⁰ Kohler-Hausmann, Julilly. 2017. *Getting Tough: Welfare and Imprisonment in 1970s America*. Princeton, NJ: Princeton University Press.

⁵¹ *Key Facts at a Glance: Homicide rate trends. 1900-2006*. Office of Justice Programs, United States Department of Justice. Washington, DC: Bureau of Justice Statistics. Also see: Thompson, Heather Ann. 2010. “Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History.” *Journal of American History* 97(3):703–34.

⁵² *Key Facts at a Glance: Homicide rate trends. 1900-2006*.

⁵³ On the rates of violent crime over time, see “Crimes Known to the Police by Type and Area: 1965.” 1967. Statistical Abstract of the United States. U.S. Department of Commerce. Washington, DC: Bureau of the Census. P.149, table 209; “Crimes and Crime Rates by Type of Offenses: 1985–1995.” 1997. Statistical Abstract of the United States. U.S. Department of Commerce. Washington, DC: Bureau of the Census. P.201, table 313; and “United States Crime Rates, 1960–2009.” Disaster Center.

⁵⁴ Hinton, Elizabeth. 2015. “Creating Crime: The Rise and Impact of National Juvenile Delinquency Programs in Black Urban Neighborhoods.” *Journal of Urban History* 41(5):808–24; Thompson, *Whose Detroit?*

an important role in “distorting the size of the increase.”⁵⁵ This phenomenon of police manipulating crime statistics upward in order to get more resources played out in much later decades as well. As one investigation of Florida’s police departments found, many of them “fudged crime statistics and exaggerated local drug crimes in an effort to get more military weaponry.” One panhandle town, Lynn Haven, actually “reported a 900 percent rise in armed robberies....without telling regulators that the raw number of robberies rose from 1 to 10, then fell to 1 again just as quickly.”⁵⁶

Still, by the close of the 1960s, and certainly by the 1980s and 1990s, crime rates were clearly higher than they had been in, say, the late-1950s. Again, though, as Vesla Weaver reminds us, “rising crime” does not explain the advent of high rates of incarceration because “the historical record is replete with cases when crime rose but was not followed by punitive legislation or a national campaign, including rising crime in the post WWII period.”⁵⁷ Indeed, according to Weaver, the assumption that increases in crime are behind changes that led to increasing prison populations is “simplistic” because it fundamentally “ignores the politicization of the issue, how target groups were socially constructed, and elite incentives and agency.” She also points to the timing of LEAA’s passage in 1965—noting that it had much more to do with the passage of the Civil Rights Act of 1964 than with crime rates.⁵⁸

Indeed, Weaver argues, by both turning the nation’s attention to the crime issue at the very moment that Civil Rights Act of 1964 passed, and by successfully “pitting the priorities of crime and civil rights against each other” in the mind of the voting public, conservative politicians who disliked this law were able to “eclipse the dominance of the civil rights issue.”⁵⁹ And conservative success at undermining a national civil rights agenda was actively facilitated by liberal politicians. Such politicians were well aware that their voter base—the coalition of black and white voters that had put them in office—was cracking and passing LEAA but one year after passing the Civil Rights Act of 1964 would, they hoped, keep their party strong and in office. In the case of both conservative and liberal politicians of the 1960s, “crime” was first and foremost a rhetorical tool to meet political goals.

Although the historical record is clear that today’s high rates of incarceration are rooted in the politically tumultuousness of the 1960s rather than in a spike in crime, there are additionally important elements of the rise of mass incarceration that merit serious attention—elements that help us to further understand the political, cultural, and economic context within which mass incarceration unfolded.

Like myself, Flamm, Weaver, Western, and others, Marie Gottschalk also locates the rise of today’s massive carceral state in the racial politics of the 1960s. Rather than focus on front- or backlash politics, Gottschalk shows the ways in which the activist movements of this period *themselves* helped to fuel prison growth. “The victims’ movement, the women’s movement, the prisoners’ rights movement, and opponents of the death penalty [also] mediated the construction of the carceral state

⁵⁵ “Detroit’s Mayor Assails Critics: Goes on Television to Defend his Record on Crime.” 1967. *New York Times*. May 18, p.33. For more on the manipulation of crime in the 1960s, see

Thompson, Heather Ann. 1999. “Rethinking the Politics of White Flight in the Postwar City: Detroit, 1945–1980.” *Journal of Urban History* 25(2):163–98; Long, Gehbard et al. 1970. “Detroit Police Department—A Research Report on Previous Studies; Criminal Statistics; and Police Technology, Productivity, and Competence.” Box 37, Kenneth Cockrel/Sheila Murphy Cockrell Collection. Walter Reuther Library of Labor and Urban Affairs, Detroit.

⁵⁶ Murphy, Chuck and Sydney P. Freedberg. 2003. “Fort Florida.” *St. Petersburg Times*, March 2.

⁵⁷ Weaver, “Frontlash.”

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

in important ways,” she writes.⁶⁰ Indeed, according to Gottschalk’s evidence, it was the very success of these movements in clamoring for new protections under the law that helps to explain the bloated carceral state we have today—their successes at replacing death sentences with life sentences, their successes at stronger penalties for crimes such as rape, and so on. According to Gottschalk, if we really want to understand the causes of high rates of incarceration, we must “look more systematically at groups and movements who are not the usual suspects in penal policy and yet have played pivotal roles in making public policy more punitive.”⁶¹ This point is important because it again reminds us that changes in crime policy are rooted in politics not crime.

Bruce Western also deepens our understanding of why incarceration rates begin to rise in the latter third of the 20th century and alert us to the political and economic nature of this shift. While Western also locates the nation’s turn to incarceration in the political battles of the civil rights 60s, he additionally calls our attention to the fact that incarceration rates first rose, specifically, in states with weaker social welfare systems and, as importantly, they rose nationally as welfare programs eroded.⁶² Western’s point, it seems applies to the erosion of social spending even beyond that on welfare programs clearly marked as such. Indeed, overtime, there was also a correlation between declining budget for schools and increases in the size of the carceral state. Nationwide, as education budgets fell, corrections budgets rose so that, by 2007, for every dollar that the state of Michigan spent on higher Education, for example, it spent 98 cents on corrections. Interestingly, every one of the five U.S. states that were spending at least as much, if not more, on corrections than they spent on higher education by that year were in the North, a region of the country usually credited with valuing education (as opposed to the South).

Not only does Western illuminate another important explanation for when, where, and how rates of imprisonment increased in this country after the 1960s, he also shines additional light on why this nation’s high rates of incarceration are so racialized.⁶³ In short, by showing the positive correlation between the citizenry’s diminished access to the welfare state and its increasing imprisonment, Western’s data and analysis makes clear why such a large percentage of the nation’s prison population is comprised of people of color.

Just as Western further fleshes out the causes of mass incarceration by looking more closely at poor peoples’ eroding access to resources in the late-20th century, so does Loïc Wacquant. According to Wacquant, we must locate the rise of the carceral state not only in the tumult of the 1960s, but also in the economic downturn of the 1970s. With deindustrialization, he argues, black neighborhoods atrophied and, since blacks had few skills and little cultural capital, their unemployment rate grew. Prisons, then, became the place where this newly and increasingly poor population ended up.⁶⁴

Perhaps the most interesting new work regarding why incarceration rates rose so dramatically when they did, but more importantly, why they remained so racially disparate, comes from law professor James Foreman, Jr. Although he also locates the rise of more punitive laws and more

⁶⁰ Gottschalk, Marie. 2006. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. Cambridge, United Kingdom: Cambridge University Press. P.8.

⁶¹ *Ibid.*, 9.

⁶² Western, Bruce and Becky Pettit. 2010. “Incarceration & Social Inequality.” *Daedalus* 139(3):8–19.

⁶³ Beckett, Katherine and Bruce Western. 2001. “Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy.” *Punishment & Society* 3(1):43–59.

⁶⁴ Wacquant, Loïc. 2002. “From Slavery to Mass Incarceration.” *New Left Review* (13):41–60; Wacquant, Loïc. 2001. “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh.” *Punishment & Society* 3(1):95–133.

aggressive policing of black spaces in a draconian white response to black civil rights, he notes that the notion of black criminality and fear of black crime was so powerful that it soon shaped the way black prosecutors dealt with black defendants, too. In short, black police and black prosecutors eventually were also responsible for the historically unprecedented rise of prison populations in this country.⁶⁵

Part Four

From the War on Crime to the Crisis of Mass Incarceration (1965-2018)

While the timing and political context of the War on Crime indicates clearly that it was not launched initially due to a marked jump in the nation's crime rate, the issue of crime is nevertheless crucial here. Specifically, dramatic changes to criminal law, changes to penalties associated with committing a crime, and changes that communities experienced as a result of hyper-criminalization, all made incarceration rates skyrocket as soon as politicians began waging their new War on Crime. What is more, the very particular way that these changes played out help to explain why those incarcerated in the period 1970-present were even more increasingly people of color.

It is well understood that a revolution in drug law was one of the most important changes to criminal law that took place vis-à-vis impacting this nation's incarceration rate over time. Interestingly, as Julilly Kohler-Hausmann's important historical work shows, we must locate even the dramatic changes in drug law in the broader political context of the transformative 1960s.⁶⁶ Like Vesla Weaver, Hausmann's work makes clear, politicians' move away from the notion that addicts were people with a disease who needed help to the idea that addicts were the disease that needed to be contained had everything to do with the racial tensions of this period.

Moreover, it wasn't simply that politicians were deciding in the late-1960s that resources were wasted on rehabilitation and that it was time to pass laws criminalizing both addicts and pushers. As, Kohler-Hausmann notes, "the addict/pusher targeted by [new] laws was almost universally understood to be a Black or Puerto Rican man [and] these characterizations had widespread political implications at a time when society wrestled over civil rights activists demands for full, equal citizenship."⁶⁷ For one thing new draconian drug laws served to delegitimize the proponents of civil rights by equating them with weakness, disease, and danger. For another, according to Kohler-Hausmann, this "punishing legislation worked to salvage and remake state legitimacy, as well as to rationalize racial and other equalities spotlighted by the social unrest of the period."⁶⁸ In the post-Rockefeller Drug Law world, blacks were not disproportionately poor, unemployed, and imprisoned because of any social, economic, or political inequality or injustice. They were all of these things because they involved themselves with drugs. Important new work by historian Matthew Lassiter and Donna Murch show not only that these criminalization of drugs was, from the beginning after WWII, racialized, but also that blacks and Latinos were well aware that their communities were in particular being ravaged by the War on Drugs.⁶⁹

⁶⁵ Forman, James, Jr. 2017. *Locking Up Our Own: Crime and Punishment in Black America*. New York, NY: Farrar, Straus and Giroux.

⁶⁶ Kohler-Hausmann, Julilly. 2010. "The Attila the Hun law: New York's Rockefeller drug laws and the making of a punitive state." *The Journal of Social History* 44(1):71-95. P.74.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ See: Lassiter, Matthew D. 2015. "Pushers, Victims, and the Lost Innocence of White Suburbia: California's War on Narcotics during the 1950s." *Journal of Urban History* 41(5):787-807; Murch, Donna. 2015. "Crack in Los Angeles: Crisis,

Due to these same racialized drug laws, incarceration rates rose precipitously after 1973. In the 1980s, while the number of arrests for all crimes had risen by 28%, the number of arrests for drug offenses rose 126%.⁷⁰ Whereas there had been only 322,300 drug-related arrests in 1970, in the year 2000 there were a staggering 1,375,600.⁷¹ Significantly, by 2010 the majority of federal inmates were serving time for drug offenses and less than 10% of them were there for a violent offense.⁷²

As Jonathan Simon finds, however, it was not merely addressing the problem of drug addiction through the lens of crime and criminality that caused imprisonment rates to soar in this nation. By the close of the 20th century virtually all social problems, institutions, and interactions were viewed, understood, and governed through the lens of crime and criminality. As crime discourse became an increasing part of general public discourse, “collective insecurities” were produced that could “be addressed only by incapacitating incarceration” and, in turn, prison populations grew.⁷³ Notably, by 2010, a full 35% of inmates in federal prison were there for committing so-called “public-order offenses.”⁷⁴ Mass incarceration was “an inevitable effect of reshaping political authority around crime.”⁷⁵ The circumstances which merited the attention of law enforcement in this new fear-of-crime era were, Simon concludes, “circumstances highly correlated by race.”⁷⁶

Today’s high rate of incarceration stems not just from changes to criminal law, but it also resulted from the fact that the sentences meted out for committing a crime lengthened dramatically over the course of the late-20th and into the 21st centuries. One of the first major bills calling for mandatory minimum sentences at the federal level was introduced as early as 1976 in the U.S. Senate and, with more stringent sentencing laws passing across the country thereafter, prison terms across the country grew substantially longer within a mere three decades. According to a report by the Urban Institute, between the 1980s and the 1990s, “the chances of receiving a prison sentence following arrest increased by more than 50 percent” and “the average length of sentences served increas[ed] by nearly 40 percent.”⁷⁷ Significantly, with regard to the racialized nature of this nation’s eventually staggering rates of incarceration, by the 1980s black juveniles who were arrested “were 37 percent more likely to be transferred to adult courts, where they faced tougher sanctions” and African Americans of every age “were more likely than whites to be committed to prison instead of jail, and they were more likely to receive longer sentences.”⁷⁸

Militarization, and Black Response to the Late Twentieth-Century War on Drugs.” *Journal of American History* 102(1):162–73.

⁷⁰ Austin, J. and A. D. McVey. 1989. *The 1989 NCCD Prison Population Forecast: The Impact of the War on Drugs*. NCJ 122794. National Council on Crime and Delinquency, U.S. Department of Justice.

⁷¹ Dorsey, Tina and Marianne Zawitz. 2005. *Drugs and Crime Facts*. NCJ 165148. Office of Justice Programs, United States Department of Justice. Washington, DC: Bureau of Justice Statistics. Pp.61-62.

⁷² Guerino, Paul, Paige M. Harrison, and William J. Sabol. 2011. *Prisoners in 2010*. NCJ 236096. Office of Justice Programs, United States Department of Justice. Washington, DC: Bureau of Justice Statistics. Pp.61-62.

⁷³ Simon, Jonathan. 2007. *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York, NY: Oxford University Press. P.202.

⁷⁴ Guerino, Harrison, and Sabol, *Prisoners in 2010*.

⁷⁵ Simon, *Governing Through Crime*, 8.

⁷⁶ *Ibid.*, 142.

⁷⁷ Sabol, William J., Katherine Rosich, Kamala Mallik-Kane, David P. Kirk, and Glenn Dubin. 2002. “The Influences of Truth-in-Sentencing Reforms on Changes in States’ Sentencing Practices and Prison Populations.” Justice Policy Center, Urban Institute.

⁷⁸ Alexander, Michelle. [2010] 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Reprint edition. New York, NY: The New Press. P. 97; Weiman, D.F. and C. Weiss, “The Origins of Mass Incarceration in New York State:

New federal criminal laws and longer sentences each did their part to fuel the high rates of incarceration we have today. So too did the fact that the police dramatically stepped up the number of drug raids they engaged in, as well as the number of times they stopped and frisked citizens in public spaces. No knock police raids, for example, increased from approximately 2,000 to 3,000 a year in the mid-1980s to initiating between 70,000 to 80,000 a year by the new millennium.⁷⁹ Just as this dramatic spike in no-knock raids led, over time, to a higher arrest and incarceration rate in the United States, so did the marked increase in so-called “Terry Stops” and “Terry Frisks”—what would come to be known simply as “Stop and Frisk”—each year after 1968. Whereas NYC police officers made 97,296 such stops in 2002, in 2003 they made 160,851 stops and in 2011 they engaged in 685,724 stop-and-frisk encounters, the highest level ever recorded.⁸⁰ In total, NYC’s stops increased 600% from 2002 to 2011.⁸¹ Notably, because of an increase in both drug raids and Terry Stops, the number of arrests for marijuana, for example, skyrocketed between 1990 and 2000. “[M]arijuana arrests increased 155% during the 1990s, from 287,850 in 1991 to 734,498 in 2000.”⁸²

There was not merely a dramatic increase in the policing of private and public spaces after the 1960s, policing and prosecutions grew ever more racially selective which, importantly, helps to explain why the increase in arrest and incarceration rates over the course of the 20th century itself grew even more racially disproportionate. Notably with regard to stop and frisks for precincts where black and Latinos made up less than 10% of the population, according to a report by the New York State Attorney General, “individuals identified as belonging to these racial groups nevertheless accounted for more than half of the total ‘stops’ during the covered period. Blacks accounted for 30% of all persons ‘stopped’ in these precincts; Hispanics accounted for 23.4% of all persons ‘stopped.’”⁸³ Even when one accounts for the “differing crime rates” in predominantly white versus predominantly black or Latino areas of the city, “blacks were ‘stopped’ 23% more often than whites, across all crime categories....[and] Hispanics were ‘stopped’ 39% more often than whites across crime categories.”⁸⁴

With regard to the racialized result of drug raids, even as early as the 1970s, according to the Office of Drug Abuse and Law Enforcement performed, “the majority of the arrested were black.” Nationally, when it comes to arresting marijuana users, the arrest rate for blacks is 94% higher than the rate for all users.⁸⁵ Michael Tonry explains:

Group differences in violent crime do not explain racial disparities in prison. What does explain them is a combination of police practices and legislative and executive policy decisions that systematically treat black offenders differently, and more severely, than whites. Policy makers emphasized law enforcement approaches to drug abuse over preventive ones. Police drug law enforcement focused effort on

The Rockefeller Drug Laws and the Local War on Drugs,” in *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom*. Edited by Steven Raphael and Michael Stoll. New York, NY: Russell Sage Foundation. P.81.

⁷⁹ Barnett, Ron and Paul Alongi. 2011. “Critics Knock No-Knock Police Raids.” *USA TODAY*, February 13.

⁸⁰ Baker, Al. 2012. “New York Police Release Data Showing Rise in Number of Stops on Streets.” *New York Times*, May 12.

⁸¹ Haberman, Clyde. 2012. “Stopping to Question the Numbers.” *New York Times*, June 18.

⁸² Gettman, Jon B. 2005. *Crimes of Indiscretion: Marijuana Arrests in the United States*. Washington, DC: National Organization for the Reform of Marijuana Laws. P.21.

⁸³ Office of the Attorney General investigation into the New York City Police Department’s use of the investigative technique commonly known as “stop & frisk.” Commenced: March 18, 1999. P.viii.

⁸⁴ *Ibid.*, x

⁸⁵ Gettman, “Crimes of Indiscretion,” 65.

inner-city, primarily minority, neighborhoods, where many black Americans live, and on crack cocaine, of which blacks are a large majority of arrested sellers. Police officers engaged in widespread racial profiling and stopped blacks on streets and sidewalks much more often than is justifiable in terms of objective, race-neutral criteria. More broadly, legislatures and administrative agencies established policies in the 1980s and 1990s that mandated sentences of historically unmatched severity for violent and drug crimes, for both of which blacks are disproportionately often arrested and prosecuted.⁸⁶

And, with regard to the question of who ends up serving time once arrested, the work of John Pfaff shines important new light. As he makes clear prosecutors have extraordinary power, and one of their most-used tools when confronting usually black or brown and always poor, defendants, is the plea bargain. Because poor black and brown people who find themselves under arrest and facing charges worry mightily about taking their chances before a jury (because they have poor legal representation and/or because prosecutors have threatened them with serving unimaginable time should they be found guilty), an astounding 95% of people arrested find themselves behind bars by agreeing to plead guilty—whether they did or did not do what officers accused them of doing.⁸⁷

Finally, while changes in criminal law, sentencing policy, and especially policing practices all help to explain today's high rate of incarceration as well as why that rate is so racially skewed, ironically, today's high rate of incarceration *itself* is also a factor. Prisons are criminogenic. Not only are they schools of crime. They also destroy the social fabric of families and communities, according to Todd Clear.⁸⁸ Because of mass incarceration's scale and impact on poor communities of color, the children of incarcerated adults experience greater poverty as well as increased anti-social behavior and illegal activity. The results are higher rates of policing, more incarceration, more poverty, and so on. "Mass incarceration was not simply, as the sociologist Loïc Wacquant suggests, "a political response to the collapse of the ghetto." It was a historical phenomenon that—like deindustrialization and white flight—*itself* caused crisis, collapse," and more incarceration.⁸⁹

This, ultimately, then becomes one of the most important, and devastating consequences of high rates of incarceration in general, and of high rates of racialized incarceration in particular. It is important to realize that Detroit, an overwhelming African American city, not only sends more of its residents to prison than any other city in Michigan but the percentage of Detroit families living below the poverty line is also more than 72% higher than the state average. As one local paper put it: "The community los[t] the resources of its young men because so many are jailed." Indeed in 2000 a full 41% of prisoners from Wayne County, Michigan returned to only eight particularly devastated zip codes in the city of Detroit. And Detroit's story has played out in other all-black neighborhoods across the country. By the close of the 20th century entire swaths of the New York City borough of Brooklyn, and specifically its most African American and Puerto Rican areas, were similarly ravaged by mass

⁸⁶ Tonry, Michael. 2010. "The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System." *Crime and Justice* 39(1):273–312. P.274.

⁸⁷ Pfaff, John. 2017. *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform*. New York, NY: Basic Books. For an excellent review of the of problems with this book see: Weaver, Vesla. 2017. "The Untold Story of Mass Incarceration." *Boston Review*, October 24.

⁸⁸ Clear, Todd R. 2009. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. Oxford University Press.

⁸⁹ Thompson, "Why Mass Incarceration Matters."

incarceration, and they had become, by the new millennium, so-called “million dollar blocks” for what it cost to incarcerate so many of its residents.

And, of course, while most attention is today focused on high rates of incarceration and why they are so racialized, it is important as well to not to forget the ways in which the racial legacy of the much earlier period of conquest and settlement still resonates today as well. While black and brown citizens have always been disproportionately been criminalized in this country, and while their relentless criminalization explains not only why today’s prison population is so disproportionately black and brown, but also why the nation’s prison population rose so dramatically when it did; black and brown non-citizens (from Somalis to Mexicans and Guatemalans) have also, always, been unremittingly criminalized. In short, we can’t understand the spike in immigration detention in this country either, without understanding that long history of criminalizing race.

Part Five

Racialized Mass Incarceration: Lessons from history

Today’s high rate of incarceration is fundamentally rooted in this nation’s 19th and 20th century political, economic, and racial history. This nation has a long history of responding to social and political upheaval by making laws more stringent, by increasing penalties for law breaking, by beefing up law enforcement, and by choosing to arrest and incarcerate those most deemed to be troublemakers in a given historical moment. The history of the 19th and 20th century is also a history in which people of color have always been associated with troublemaking in general, and criminality in particular. Whether it was Native Americans thought to be standing in the way of progress in the West, native Hawaiians seeming a blight on the tourist dreams of whites in the Pacific, Puerto Ricans who challenged discrimination in cities like New York, or Mexicans seen as flooding our borders and taking our jobs, our police have always been deployed disproportionately to monitor the behavior of non-whites in this country and, as a result of this disproportionate policing, our prisons have always been a reflection of white desires for dominance as it does who is actually causing harm to others. And, as the demographics of our prisons and jails make clear, African Americans have in our nation’s long history have been particularly targeted by laws, singled out for policing, and thus, have been overly represented among the population of the incarcerated. Whether one is examining this nation’s historical record during the moment of emancipation, migration, depression, or civil rights revolution—all historical moments of intense social, political, and economic upheaval—one sees not only a move toward more draconian laws, more policing, and more arrests, but also an intensification of racially disproportionality when across the entire system.

Therefore, what is unique about the high rates of incarceration today is neither its origins nor its demographic profile. What is noteworthy is merely its magnitude which, it would seem, is the result of how historically unprecedented was the scope and intensity of the political, legal, and law enforcement reaction to the tumult of the 1960s. It is crucial that scholars of today’s carceral crisis read the historical record carefully so as to avoid misreading the contemporary data before them. We must first be leery of embracing the popular argument that high rates of incarceration were a legitimate response to out of control crime by actually looking at the history of crime rates over time and in the specific years of the 1960s. As importantly, we must also reject the notion that the disproportionate numbers of people of color ensnared in today’s criminal justice system tell us something about black versus white criminality. The history of the 19th century alone should make clear that high black arrest and incarceration rates say far more about *white* notions of black criminality than it does about who actually commits crime in this country. Finally, we must understand that the consequences of today’s

high rates of racialized incarceration are just as devastating as they were after the American Civil War. As back was the case 150 years ago, today's racially concentrated and staggering imprisonment rates impoverish, orphan, erode, and devastate communities of color. And, as was also the case back in the late-19th century, today's racially concentrated and staggering incarceration rates are rooted far more in the *politics of race* than in wrong-doing.