Is Mass Incarceration History?

FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING
    OF MASS INCARCERATION IN AMERICA. By Elizabeth Hinton.
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Introduction: The End of Mass Incarceration

"The Owl of Minerva spreads its wings only with the falling of the
dusk."[1]

Despite Hegel's ultimately reassuring premise, it never seemed
inevitable that the emergence of mass incarceration as a proper historical
subject would occur simultaneously with its institutional and political
demise. History, as a scientific and humanistic tradition with its own
methodologies, sources, and conventions, inevitably keeps some distance on
the present. Typically, a generation or two has passed before a truly
significant political development, like the New Deal or the Cold War, escapes
the pull of presentist hagiography (or demonology) and comes under the full
possession of professional historical gaze, after journalism and political
science have had their varying efforts at neutralizing the present. In contrast,
the point at which a significant political phenomenon has lost its dominance
over the present is a much less regular or inevitable pattern.[2] And yet, the

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Society, U.C. Berkeley.

1. G.W.F. HEGEL, PHILOSOPHY OF RIGHT 16 (Stephen Houlgate ed., T.M. Knox trans., Oxford
Univ. Press 2008) (1821).

2. *See* Jeffrey S. Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice
in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 35 (2015) (quantitatively studying the
relationship between crime and punishment in the early twentieth century); Robert T. Chase, *We
Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners' Rights
Movement*, 102 J. AM. HIST. 73, 74–75 (2015) (surveying prisoners' rights movements in the South
in the 1970s and 1980s "through the lens of prisoner-initiated civil rights complaints and social
protest"); Miroslava Chávez-García, *Youth of Color and California's Carceral State: The Fred C.
Nelles Youth Correctional Facility*, 102 J. AM. HIST. 47, 48 (2015) (discussing the use of scientific
research methods to prevent and suppress crime in California in the early twentieth century); Kali
Nicole Gross, *African American Women, Mass Incarceration and the Politics of Protection*, 102 J.
AM. HIST. 25, 26 (2015) (outlining the historical treatment of African-American women in the
prison system); Torrie Hester, *Deportability and the Carceral State*, 102 J. AM. HIST. 141, 141
(2015) (describing how immigration-related crimes have come to represent the leading cause of
imprisonment in the federal system, overtaking drug-related crimes); Kelly Lytle Hernández et al.,
Introduction: Constructing the Carceral State, 102 J. AM. HIST. 18, 20–21 (2015) (introducing the
historical background of mass incarceration); Elizabeth Hinton, *"A War within Our Own
Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST.
100, 112 (2015)(describing the legacy of the Great Society's "punitive transformation of domestic

recent wave of historical analysis of mass incarceration, a development that began in the 1970s, happens to be emerging at a moment of political questioning more profound than at any time since the late 1960s and early 1970s. From the Supreme Court's powerful condemnation of California's overcrowding[3] to the Black Lives Matter movement's growing presence in the streets and voting booths of major cities, the contemporary carceral state is under attack.

While there is no guarantee that we will in fact see substantial institutional change in the size and nature of the carceral state, the emerging historiography of mass incarceration has been shaped by the very possibility of that change and has lessons that could be crucial in strengthening the growing movement for reform. Elizabeth Hinton's impeccably researched study of federal crime policy from the Kennedy through Reagan Administrations is the most telling account yet of this new history of the American carceral state.[4] This has been a topic of considerable interest to political scientists and criminologists since the 1990s,[5] but Hinton is able to

urban policy" and its effect on African-Americans and the youth of America); Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, The Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87, 87–88 (2015) (arguing for "approaching the dramatic growth of the carceral system and welfare state retrenchment of recent decades as historically intertwined phenomena"); Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperative of America's War on Drugs*, 102 J. AM. HIST. 126, 127–28 (2015) (reviewing how the war on drugs has safeguarded young, usually white, middle-class drug users and penalized urban minority operations); Alex Lichtenstein, *Flocatex and the Fiscal Limits of Mass Incarceration: Toward a New Political Economy of the Postwar Carceral State*, 102 J. AM. HIST. 113, 113–14 (2015) (discussing how historians have begun to define mass incarceration as a defining and troubling feature of the twentieth century); Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs*, 102 J. AM. HIST. 162, 163 (2015) (examining the history of the response of African-American communities in Los Angeles to the militarization of the war on drugs); Micol Siegel, *Objects of Police History*, 102 J. AM. HIST. 152, 152 (2015) (exploring the history of the Office of Public Safety, a now-inactive federal agency, whose former employees have led the militarization of U.S. police forces); Timothy Stewart-Winter, *Queer Law and Order: Sex, Criminality, and Policing in Late Twentieth-Century United States*, 102 J. AM. HIST. 61, 61–62 (2015) (studying the "neglected intersection of the histories of sexuality and the carceral state" in the 1970s); Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 703–04 (2010) (examining the social, political, and economic impact of mass incarceration in the twentieth century).

3. Brown v. Plata, 563 U.S. 493, 545 (2011).

4. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

5. *See, e.g.*, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 28–43 (1997) (describing the history of crime control in the United States and the use of the crime issue in national politics by Republicans); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 55–60 (2001) (describing the American critique of correctionalism that emerged in the 1970s); RUTH WILSON GILMORE, GOLDEN GULAG: PRISON, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA 5–7 (2007) (discussing the growth and costs of California's prison system, which grew almost 500% between 1982 and 2000 and built twenty-three new major prisons between 1984 and 2007); STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 75–88

draw on confidential memos and other materials from the National Archives and presidential libraries to draw a far more precise picture than ever before of what national leaders believed they knew about crime and how they intended to act on the problem. Her account, likely to be the most definitive one for years to come, confirms the centrality of political considerations to the shaping of mass incarceration as urged by earlier studies, while giving us a much more detailed and pointed analysis of what those political considerations were.

In particular, Hinton's analysis places concern over the political and social threat of collective violence by black youth growing up in segregated neighborhoods of concentrated poverty at the very heart of crime as a national problem[6] and as the focal point of increasingly punitive "solutions" from Kennedy to Bush I (and if her history continued through both Bushes).[7] Trying to prevent black youth from turning to crime and contain those involved with crime with aggressive policing and excessive incarceration became in many respects America's chief domestic objective from the Vietnam War to the wars in Iraq and Afghanistan.[8] This obsessive fear of black youth and totalizing national commitment to their surveillance and control makes all of the contemporary talk from national leaders about trying to rebuild trust between police and young people of color ludicrous so long as the war on crime continues.

Hinton's study comes at a time when most of the action from scholars in trying to explain mass incarceration has moved to state and even local levels.[9] While the carceral state in our federalist system is primarily one of state and local governments, Hinton's account begins during a period when the federal government, particularly its Executive Branch, made a concerted effort to alter the size and character of local criminal justice agencies, including police departments, courts, and correctional systems throughout the United States.[10] Premised on what was depicted as a serious and growing

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(1984) (considering the history of the politicization of crime and law and order); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 89–106 (2007) (describing the legislative shift beginning in 1968 from the war on poverty to the war on crime); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 156–75 (1991) (discussing the impact of criminal justice policies that were designed to affect prison populations in the United States).

6. HINTON, *supra* note 4, at 219–20.

7. *Id.* at 2–4, 314–21.

8. *See id.* at 2–3 (describing the policy shift from a progressive trajectory to more aggressive and exhaustive policing practices targeting black urban areas that began during the Johnson Administration).

9. *See generally* MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2010) (discussing Arizona's historical use of punitive strategies to combat crime); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010) (studying the effect of prison litigation on mass incarceration in Florida).

10. HINTON, *supra* note 4, at 87–89, 163–79.

threat of violent crime localized in large cities throughout the nation, the war on crime involved the dispersal of billions of dollars (nearly two billion per year in contemporary dollars, three-quarters of which went into policing between 1965 and 1981)[11] as well as the creation of model laws and policies that the money helped to promote—policies that had previously been considered unwise or unconstitutional (including preventive pretrial detention and mandatory minimum sentences).[12] Political scientists studying the war on crime in its early stages already concluded it had largely failed in its goals of improving the effectiveness of law enforcement or reducing crime (something Hinton's research reaffirms),[13] but as Hinton documents, it was an enormously successful exercise in state building.[14] Creating fear as a byproduct of its success at putting crime at the very center of American life, the war on crime became self-perpetuating and continued during the first two decades of this century even as crime indexes dropped to historic lows[15] and fear of crime largely diminished as a national political issue. Only today, a half-century after the key events and decisions that produced the war on crime, and in the face of repeated scandals of racism, inhumanity, and failure by the carceral state, have we seen growing social-movement resistance to end that war.[16]

Although historiographical-research time frames (based in large part on archival access policies) determine that her narrative ends some twenty-five years prior to the present moment,[17] Hinton's themes connect directly to the growing discontent with the systems of punitive policing and mass incarceration, and carry clear implications for those who would seek to reform or radically change those systems. Chillingly for reformers and radicals alike, almost all of the ideas being circulated in the name of "reforming" the carceral state today were already parts of the thinking that shaped the war on crime and are thus quite unlikely to alter its fundamental character.

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11. *Id.* at 2.

12. For earlier studies of the war on crime, see SCHEINGOLD, *supra* note 5, at 196–97 (discussing sentencing guidelines and the effects they may have on future criminal court reform).

13. MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978, at 5–6 (1980) (discussing the failure of the Safe Streets Act of 1968).

14. HINTON, *supra* note 4, at 333–35.

15. Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, ATLANTIC (Apr. 15, 2016), http://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/ [https://perma.cc/KTB3-7B2M].

16. *See, e.g.*, *Platform*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/EG52-KJRQ].

17. *See* Exec. Order No. 12,958, 60 Fed. Reg. 19825, 19828–29, 19832 (Apr. 17, 1995) (requiring most classified information to be made public after twenty-five years); Matt Elton, *When Does History End?*, HISTORYEXTRA (Oct. 28, 2009), http://www.historyextra.com/feature/when-does-history-end [https://perma.cc/8EJP-4QDD] (presenting views of history professors on when an event is subject to historical analysis, such as, in the view of one scholar, thirty years).

After reviewing Hinton's major findings, this Book Review turns first to Hinton's historiographical contributions and second to her lessons for those who would like to make history by ending mass incarceration.

I. From War on Poverty to War on Crime

In Hinton's convincing account, the road from a federal campaign to eliminate entrenched poverty in the United States to a much larger one aimed at fighting crime by policing and punishing people in poverty was a remarkably short one, and the long war on crime and drugs pursued since then has been a boringly repetitive one.[18] From its beginnings in the Kennedy Administration, the "war on poverty" was braided closely with questions of crime, and particularly, delinquency.[19] The latter was taken to be a product of lacking opportunities for integration into the mainstream of social and economic life in combination with the reinforcing stigma of criminalization and punishment.[20] The attempted solutions were efforts to accelerate the exposure of these same youths to mainstreaming opportunities. The upbeat name for this concept was "Mobilization for Youth"—a program aimed at young people generally in poor neighborhoods.[21] At its most ambitious level, and never in more than a small portion of the nation's needy areas, this effort placed federal grants into the hands of frontline antipoverty organizations and community organizers ("community action workers" in the terminology of the moment) to socially organize and politically empower poor families and communities.[22] Five years later in the Johnson Administration, and despite that President having made an even louder commitment to waging war on poverty than his predecessor, efforts to mobilize youth in poverty had been substantially superseded and assimilated into a far larger effort to maintain surveillance and control over black youth living in neighborhoods of concentrated poverty.[23]

This newly dubbed "war on crime" was to be run through the law enforcement-oriented Department of Justice, and its foot soldiers, rather than

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18. *See* HINTON, *supra* note 4, at 3–4 (describing the quick evolution from Kennedy's attack on delinquency to Johnson's "War on Poverty" to Nixon's punishing policies).

19. *See id.* at 3, 12, 20–48 (describing the history and development of Kennedy's attack on delinquency and its role as the beginning of increasing efforts to reduce poverty and crime).

20. *See id.* at 45–46 (describing the antidelinquency efforts which included providing social services in settings that would reduce stigma while addressing the societal problems such as illiteracy and unemployment that often resulted in delinquency).

21. *See id.* at 39–48 (detailing President Kennedy's efforts to reduce the risk of youths to fall into delinquency through "Mobilization for Youth").

22. *See id.* at 49 (noting that the urban intervention was a relatively small effort, only funding programs in sixteen cities, with goals to transform both urban social institutions and individuals).

23. *See id.* at 61–62 (describing the efforts to merge the war on crime and the war on poverty).

"community action workers," were big city police forces,[24] perhaps the most antiblack organized force in America in those years of still-expanding civil rights. Its goals remained mixed at first, to mainstream youth perceived as at risk of becoming involved in crime but also to confront, arrest, and punish those black youths whose potentiality for crime crossed over into criminal behavior.[25] Even before the feverish year of 1968 and Nixon's dog whistling "law and order" campaign,[26] the die was largely cast. Poverty elimination would have to wait for a successful effort to reestablish urban social control over segregated neighborhoods of concentrated poverty. The Nixon Administration would accelerate this already rapid shift by introducing model laws for the District of Columbia aimed at increasing police power and the punitive potential of criminal convictions, and pivoting from Johnson's overwhelming investment in policing toward a more balanced portfolio of police, courts, and corrections departments.[27] Ford and Carter would bring important innovations toward ever-lengthening prison sentences and an increasingly fortified urban–suburban landscape.[28] Yet all of this remains largely in the tight operating principles of the war-on-crime logic that Hinton sees in place of the very appointment of the Johnson Administration's much vaunted National Commission on Law Enforcement and the Administration of Justice.[29] What happened?

Hinton places even more emphasis than previous accounts have on the political significance of the pattern of urban riots or uprisings that, beginning with the Watts Riots in Los Angeles in 1965, shook America's large- and medium-sized cities and the political landscape through most of the summers into the early 1970s.[30] Unlike the more generalized idea of "crime in the streets" into which they obviously played, urban riots galvanized very specific concerns of collective violence directed against white society and its governmental forces (particularly the police). In fact, to the extent that these events had a political logic, it was one very much aimed against big-city police whose forms of order maintenance had always involved routine racial

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24. *See id.* at 56–57, 61–62, 87–88, 99 (describing President Johnson's Law Enforcement Assistance Act of 1965 and the large amount of training and monetary aid sent to police forces as a result of the program).

25. *See id.* at 103–06 (describing President Johnson's adoption of a "middle ground" between more social programs and improvements in law enforcement).

26. *See id.* at 134 (explaining that lawmakers had "already begun to retreat from social welfare interventions" during the Johnson Administration).

27. *See id.* at 134–38, 163–79 (providing an overview of President Nixon's actions regarding crime, including the District of Columbia Court Reorganization Act of 1970 and large investments into police, courts, and corrections departments).

28. *Id.* at 252–53, 305–06 (noting that President Ford's efforts to reduce crime related mostly to sentencing and incarceration, while Presidents Carter's efforts centered among police–community tensions and relations).

29. *Id.* at 80–81.

30. *Id.* at 66–77, 108, 115, 131–33 (detailing the Watts Riots, surrounding events, and resulting consequences).

harassment and, in the increasingly turbulent 1960s, were becoming more violent and confrontational.[31] Ironically, the major solution the Johnson Administration promoted, notwithstanding much talk of investment and rebuilding, was even larger, better equipped, and more lethal police forces.[32]

If riots could be seen as protests of the inadequate pace of antipoverty policy and the unmediated tyranny of virtually all-white urban police forces (and the often white supremacist political machines to which they were attached), they were an even more potent weapon in the hands of those who argued that criminality arising from the "tangle of patholog[ies]" associated with segregated neighborhoods of concentrated poverty was a threat to national security.[33] Even the sympathetic liberals of the Johnson Administration saw the riots as signs that antipoverty programs, at least at the individualized behavioral level to which post-New Deal liberal politics consigns them, might not stem the tide of black violence in time to prevent, if not a revolution, at least a fatal rupture of support for the Johnson agenda nationally.[34] Much like the increasingly grim conflict in Vietnam to which a wide variety of observers drew parallels,[35] the war on crime would have to reestablish a coercive balance of control before more hopeful efforts to win the hearts and minds of young residents of segregated neighborhoods of concentrated poverty could be attempted. The strategy would prove futile in both domestic and foreign policy, but it would take far longer to declare the war on crime a failure.

The riots were important also because they reinforced the racialized criminology that formed the core intellectual framework for the war on crime. In this analysis, drawn from the midcentury and at least initially from liberal social scientists like Daniel P. Moynihan, James Q. Wilson, and Edward Banfield, crime as a problem stemmed from the transformations of the modern city and the rise of what a later generation would call the

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31. *See id.* at 67–68 (detailing the destruction that occurred during the Watts uprising and noting that the damage was concentrated on stores and shops owned by whites, while public buildings in the black neighborhoods suffered minimal damage).

32. *Id.* at 87.

33. *Id.* at 58–61.

34. The Johnson Administration saw the riots as evidence black nationalists and revolutionaries were gaining ground and that his liberal social agenda was in danger. His solution was to accelerate the war on crime. *Id.* at 112.

35. *See* Michael W. Flamm, *From Harlem to Ferguson: LBJ's War on Crime and America's Prison Crisis*, ORIGINS: CURRENT EVENTS IN HIST. PERSP. (Apr. 2015), http://origins.osu.edu /article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis   [https://perma.cc/H3EW-E6DF] (quoting a New York City detective as stating: "I hope this doesn't happen, but more Americans may get killed in Harlem this summer [1964] than in Vietnam"); Robert Higgs, *The Vietnam War and the Drug War: America's Futile Crusades*, INDEP. INST. (Apr. 20, 1995), http://www.independent.org/newsroom/article.asp?id=330 [https://perma.cc/2BSD-XV8N] (noting the parallels between the Vietnam war and the war on drugs).

"underclass."[36] Captured perhaps most enduringly by Moynihan's imagistic concept of the tangle of urban pathologies (read urban as black), this theory saw the deformed black family produced by the aftermath of slavery and, more recently, the Great Migration (single parent, female headed) as the key source of a demographic and cultural tide of nonconformity and violence that threatened American society and certainly the claims of liberalism to govern it.[37] The riots proved that this tide was already present and capable of overwhelming the local police forces (many if not most of the riots involved national guards force being mobilized by the Governor and in some cases federal troops ordered by the President).[38] To avoid a military commitment perhaps many times the scale of Vietnam, it would be necessary to permanently bolster the scale and military capacity of local police, while counterbalancing the dangerous population through aggressive use of arrest and imprisonment.[39]

As much as this is a book about mass incarceration, it is also a book about policing and particularly the way that expanding policing in the 1960s and 1970s paved the road to a larger prison population in the 1980s and 1990s. It is essential that we link mass incarceration to the kind of aggressive preemptive policing that has been a major product of the war on crime and that forms the core of what today is becoming intolerable to many Americans about our carceral state. Johnson and Nixon shared an obsession with growing and transforming American police forces, which both presidents saw as the frontline troops who could contain the crime threat of alienated black youth.[40] In addition to expanding the size of police forces and giving them the kind of military equipment necessary for fighting Vietnam-like counterinsurgency wars,[41] the war on crime, early on, embraced a transformation of policing toward preemptive confrontation with the "enemy," an enemy increasingly defined as all black young men in segregated neighborhoods of concentrated poverty. The enormous influence of George Kelling and James Q. Wilson's 1982 "Broken Windows" article

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36. *See, e.g.*, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 3–4 (1987) (explaining the difficulty describing or classifying the problems of minorities in the inner city).

37. *See* OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 15–19, 29–45 (1965) (widely known as *The Moynihan Report*) (discussing the "tangle of pathology" resulting from family structures caused by a history of slavery and discrimination).

38. *See, e.g.*, HINTON, *supra* note 4, at 64 (noting the use of the Army and National Guard to reinforce police officers in South Central Los Angeles during the Watts Riots).

39. *See id.* at 87–88 (discussing the militarization and increase in manpower of state and local law enforcement arising from federal funding in the wake of the Watts Riots).

40. *See id.* at 87–88, 140 (discussing Johnson's and Nixon's commitments to investing in local law enforcement).

41. *Id.* at 87–88.

has led to the association of this kind of policing with that decade and since,[42] but Hinton draws direct lines from the Johnson–Nixon war-on-crime centers in the Justice Department to this new model.[43] It is from these origins in the intersection between the war on poverty and the war on crime that the new policing received its indelible ambiguity as to whether it is about policing that is responsive to minority communities ("community policing," "problem centered policing"),[44] or whether it is about policing that is responsive to technocratically set management objectives (CompStat, predictive policing, hotspots policing).[45] It has always been both but with the heaviest commitment to the latter.

This new policing model largely superseded a model that had just recently been invented under the modernizing influence of two influential chiefs that typified midcentury commitments to professionalization of policing, William Parker of Los Angeles and O.W. Wilson of Chicago, and based on more efficient and rational management of car-based patrols.[46] This approach was intended to increase response time and recapture discretionary hours left to police conduct in area-based patrols. Even if it did not do much to reduce crime by increasing arrests, motorized patrol in time might have had a good influence on police racism and violence against people of color since it subjected police to the centralized controls of dispatchers.[47] Instead, the new imperatives of the war on crime made what had seemed modern outmoded and allowed a radically transformed version of the "old time" foot-patrol model to return in the form of a deeply hostile sort of counterinsurgency policing.[48]

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42. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/J59L-Q6WE].

43. HINTON, *supra* note 4, at 289.

44. *See* BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION, NAT'L CRIM. JUST. REFERENCE SERV., at vii (Aug. 1994), https://www.ncjrs.gov/pdffiles/commp.pdf [https://perma.cc/MP5R-8CD7] (defining community policing as a policing policy consisting of community partnership and problem solving); *What is POP?*, CTR. FOR PROBLEM-ORIENTED POLICING, http://www.popcenter.org/about/?p=whatiscpop [https://perma.cc/S3CK-Y6TX] (defining problem-oriented policing as an approach that targets discrete problem areas and subjects those areas to "microscopic examination" to develop an effective strategy in addressing the problems).

45. HINTON, *supra* note 4, at 23 (discussing CompStat and other statistical programs that aid police in predicting criminal activity).

46. *Id.* at 182. Parker was deeply racist, and Wilson was not. Both ran departments so deeply committed to white supremacy at that point that the Chiefs' philosophies may have mattered little. *Id.* at 70; *see* Gary Potter, *The History of Policing in the United States, Part 5* (July 23, 2013), http://plsonline.eku.edu/insidelook/history-policing-united-states-part-5 [https://perma.cc/QLN4-9SVQ] (reporting why Wilson's race-neutral vision of police professionalism actually resulted in routinely targeting young, minority males).

47. HINTON, *supra* note 4, at 182.

48. *See id.* at 160, 183, 338 (discussing the drastic increase in foot patrolmen, a majority of whom were white and concentrated in urban areas, that occurred during the war on crime and the

Some of Hinton's best work is tracing ideals forged in Washington to their implementation in places like Detroit, Los Angeles, and other large cities experiencing the dislocations of deindustrialization and middle-class suburbanization even as the Great Migration continued to bring blacks from the South to cities in the Midwest and West.[49] Some of these programs, funded by the Law Enforcement Assistance Administration (LEAA) and based on this preemptive model, like Detroit's STRESS program (for Stop the Robberies, Enjoy Safe Streets), and Los Angeles CRASH (for Community Resources Against Street Hoodlums), and the federal government's Office of Drug Abuse Law Enforcement (ODALE), have been discussed by previous studies of the crime war,[50] but never with as much detail and connection between model and outcome. In retrospect the contradictions of these programs were hiding in the plain sight of their acronyms. Who was supposed to enjoy the "safe streets" produced by STRESS? Certainly not the young men of color who were confronted, humiliated, and sometimes killed outright. The community whose resources would be used to attack "street hoodlums" obviously did not include young black men living in segregated neighborhoods of concentrated poverty.

If police were the foot soldiers of America's parallel Vietnam, then young black men living in segregated neighborhoods of concentrated poverty were the Viet Cong—the enemy. The question of how many of them were hardcore combatants whose security could only be achieved through death or incapacitation and how many of them were alienated youths who could be nudged back into channels of social integration created a space for some contestation within the overall war-on-crime paradigm, but the consensus was clear on the question of dangerousness of this population and agreed that this danger lay in the traits low-income urban youth had as a population and not in their individual characteristics.[51] In the Johnson Administration, Youth Service Bureaus were imagined to be "institutional substitutes for parents" where police officers could help replace the lost, normative force of proper two-parent households.[52] By the Ford Administration, the focus would be more on targeting "hard-core" youth offenders for permanent

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resulting "[d]isproportionate numbers of African Americans that received criminal records and prison sentences").

49. *See generally id.* at 180–217.

50. *See generally* EDWARD J. EPSTEIN, AGENCY OF FEAR: OPIATES AND POLITICAL POWER IN AMERICA 18–20 (2d ed. 1990) (remarking on the ODALE's odd origins and "extra-legal" powers); Edward J. Littlejohn, *Law and Police Misconduct*, 58 U. DET. J. URB. L. 173, 208–19 (1981) (discussing the rise and fall of STRESS); Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1942 (2000) (reviewing DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999)) (pointing to the "lawlessness of the CRASH Unit and the numerous dubious convictions obtained as a result").

51. HINTON, *supra* note 4, at 115.

52. *Id.* at 117.

incapacitation through federal prosecution and long-term imprisonment.[53] Yet throughout, liberals and conservatives agreed that this population (and public safety) would be best served through exposure to ever greater "treatments" of aggressive policing.[54]

The chapters on the Ford and Carter Administrations were some of the most rewarding for this author. I had naïvely suggested in my own study of the war on crime that these post-Watergate years saw some relaxation on the grip of battling crime by the American Presidency and its Pentagon-like Department of Justice.[55] In fact, both accelerated the war on crime even while seeking to bring a more technocratic and less ideological tone to it. Consistent with both trends, the Ford Administration sought to increase the focus on particularly dangerous persons, supposed "career criminals" (or at least those with a long record of being arrested for crimes) or gang members, that offered the prospect of a more efficient war on crime (although this focus was mostly added on to existing criminalization), marking perhaps the beginning of the "new penology" as Feeley and I described the trend toward risk rationalization inside the carceral state.[56]

Hinton's story of the path toward mass incarceration is so bleak and so determined that it is difficult to notice that she also points frequently to the paths not taken and now long covered by the "success" of mass incarceration as a project.[57] The Kerner Commission, appointed by President Johnson after the Detroit and Newark riots in 1967, described the emerging war on crime as heading toward a "'spiral' of segregation, violence, and police force" suggesting that only a substantial effort to break the back of urban segregation could escape that cycle.[58] Inside the segregated neighborhoods of concentrated poverty, activists like the Black Panthers proposed their own versions of antipoverty and crime programs.[59] Either of these projects might have had just as much success against crime and collective violence as the war on crime (which had very little), while having the great benefit of not

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53. *Id.* at 248–49.

54. *Id.* at 254–55.

55. *See* SIMON, *supra* note 5, at 54 (describing the Ford and Carter Administrations as "a time-out in the escalation of the war on crime," and noting that both administrations "sought to model an executive of limitations and legality").

56. *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458–59 (1992) (describing the shift in American incarceration strategy toward statistical prediction, concern with groups, strategies of management, and labeling the new strategy as the "new penology").

57. *See* HINTON, *supra* note 4, at 27–32 (discussing the alternative strategies considered by the Kennedy and Johnson Administrations that would have focused on urban-youth issues more comprehensively).

58. *Id.* at 124–27. Perhaps reflecting Johnson's own contending ideas, the Kerner Commission included many more civil rights-oriented liberals than the earlier and more determinative Crime Commission. *Id.* at 127.

59. *See id.* at 206 (noting how the Los Angeles chapter of the Black Panther Party provided free healthcare, food, and other much-needed services in segregated urban neighborhoods).

leading us inexorably toward mass incarceration. In retrospect, it seems difficult to believe that any of these projects could have moved fast enough to head off the urban riots of the late 1960s which were anchored in the increasingly violent attacks of racist big-city police forces against black communities (a violence anchored, in turn, in police resistance to changing social norms brought on by the rise of the Civil Rights Movement). This is especially true when you consider how much federal policy outside the crime arena was altering the fate of the great cities. These policies, including promoting the movement of the middle class to segregated all-white suburbs, carving freeways through dense urban corridors to facilitate suburbanization and interstate markets, the deindustrialization of the major Northern cities facilitated by that subsidized transportation network, and the antiunion tilt of federal labor law after the 1940s, left central cities in a precarious state on the eve of the 1960s.[60] The emerging, post-modern city was an awkward balance between fortified central business districts, dependent on freeways and suburban shoppers, and segregated neighborhoods of concentrated poverty, places inherently susceptible to crime and difficult to police based on traditional (foot patrol) or modern (car patrol linked to dispatch) methods.[61]

Hinton adopts a thoroughly and justifiably skeptical view of crime statistics in this period. Convinced crime was rising rapidly, especially in the large cities, national leaders made improving the collection of crime reports a major priority for improving the police. Of course this led to rises, sometimes substantial rises, in reported crime rates, precisely the outcome that was driving fear of crime.[62] The war on crime contributed to crime in even more insidious ways, such as effect that aggressive decoy operations made on the homicide rate in cities like Detroit.[63] Yet what we know today about the environmental and situational roots of crime suggests serious crime probably did go up significantly in segregated neighborhoods of concentrated poverty during the 1960s and 1970s as criminogenic conditions met a policing strategy that was uncertain and shifting (and implemented by a

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60. *See* THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 4 (First Princeton Classics ed. 2014) (introducing the various explanations for the decline of Northern cities).

61. *See* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 226–36 (2d ed. 2006) (discussing the "spatial apartheid" now visible in many post-modern cities).

62. *See* HINTON, *supra* note 4, at 85 (noting how disproportionately high police attention paid to segregated neighborhoods in the 1960s resulted in an increase in reported crimes).

63. *See id.* at 191–202 (detailing how Detroit law enforcement's decoy program "demonstrated the violent consequences of decoy squads"). This came to mind recently when reporting on Brazil and the Rio Olympics noted that police killings in Rio amounted to 16% of the homicides in 2014. Nash Jenkins, *Brazilian Police Killed More Than 5,000 Civilians in Rio Between 2005 and 2014, Report Says*, TIME (Aug. 4, 2015), http://time.com/3983338/brazil-police-killed-civilians-rio/ [https://perma.cc/3Q87-8KEA].

policing work force that at that time in history was undeniably dominated by straight-up racists).[64]

While Hinton's approach is the right one for a history of state power, we still lack a proper history of the war on crime from the popular perspective. The wave of urban histories of the post-war period has given us a clear view of the disarray created even before reported crime rates began to go up.[65] Hinton has given us a newly precise picture of how Washington-based planners saw their objectives and obstacles from the Pentagon of the war on crime. We next need new histories of urban popular forces and their experience of criminalization itself; naturally these archives never open (or close).

II.   Historiography of Mass Incarceration

We are in the midst of a wave of mass incarceration history. Hinton's study of the war on crime comes several years after a widely discussed special issue of the *Journal of American History* devoted to the history of mass incarceration.[66] Heather Thompson's history of the Attica Prison uprising and its influence on the shape of the American carceral state was published in August of 2016.[67] All of these differ from earlier histories of particular prisons or even state prison systems because they make mass incarceration as such the subject and attempt to increase our understanding of both the causal mechanisms that triggered and sustained it, and the lost possibilities for a different present covered over by the success of mass incarceration. Hinton's study exemplifies many features that are crucial to doing the history of broad governmental programs like the war on crime that can get lost between the appeals of social history on the one hand and more traditional history of legislation on the other.

A.   *The Importance of Ideas and Specific Intellectuals*

Ideas and the academic entrepreneurs behind them matter greatly in Hinton's analysis. Looming especially large is the trio of James Q. Wilson, Edward Banfield, and Daniel Moynihan. The first two were political

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64. *See* Jonathan Simon, *Policing After Civil Rights: The Legacy of Police Opposition to the Civil Rights Movement for Contemporary American Policing*, *in* THE SAGE HANDBOOK OF GLOBAL POLICING 373, 373–87 (Ben Bradford et al. eds., 2016) (outlining the historical relationship between race relations and law enforcement).

65. *See* SUGRUE, *supra* note 60, at 5–6, 143–52 (discussing the deteriorated condition of Northern cities, specifically Detroit, post-World War II).

66. *See* sources cited *supra* note 2.

67. HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA UPRISING OF 1971 AND ITS LEGACY (2016). *See generally* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA (2014) (examining the history of black activism and organizing in prison); KERAMET REITER, 23/7: PELICAN BAY AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016) (exploring the history of the Pelican Bay prison in California).

scientists (Banfield was Wilson's doctoral supervisor[68]), both interested primarily in race and the governance of the post-war cities, especially in policing. Banfield is best remembered for his sulfurous but fascinating portrait of the contradictions underlying urban social policy in the 1960s.[69] Wilson, the student, would be much more important to the actual policy stream, promoting the idea that a modest but significant increase in the actual use and length of imprisonment could substantially reduce then-rising rates of reported crime and later the idea of "broken windows" policing.[70] Later still, in the 1990s, Wilson promoted racialized ideas about what had driven the high reported crime rates of the late 1980s,[71] and in the work of one of his students, John DiLulio, promoted the most ideological of all the war-on-crime constructions, the "super-predators"—juveniles who were brought up in the female-headed homes common in segregated neighborhoods of concentrated poverty.[72] Moynihan, a sociologist who would become a central domestic policy advisor to both the Johnson and Nixon Administrations and eventually a long-serving U.S. Senator from New York, authored the famous internal memo known as the Moynihan Report, which blamed high crime levels on long-term damage done to the black family structure by slavery and its aftermaths.[73] While somewhat different in their specific projects, Wilson and Moynihan shared a common focus on the black family and what Moynihan called the "tangle of pathology" that tied blacks living in segregated neighborhoods of concentrated poverty to crime.[74] Hinton argues that the common policy conclusion was an ever-tightening

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68. HINTON, *supra* note 4, at 185.

69. *See generally* EDWARD C. BANFIELD, THE UNHEAVENLY CITY (2d ed. 1970).

70. *See* James Q. Wilson, *"What Works?" Revisited: New Findings on Criminal Rehabilitation*, PUB. INT., Fall 1980, at 3, 17 (suggesting that stricter punishments may produce desirable changes in the "serious, chronic delinquent"); Kelling & Wilson, *supra* note 42 (advocating police efforts to maintain "order" and enforce the letter of the law may, in turn, reduce the rates of violent and other serious crimes).

71. *See* JAMES Q. WILSON & RICHARD J. HERRENSTEIN, CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME 461–68 (1985) (acknowledging the higher rates of crime among African-Americans and discussing several explanatory theories); James Q. Wilson, *Crime*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 115, 123 (Abigail Thernstrom & Stephan Thernstrom eds., 2002) (connecting higher per capita crime rates in black populations to the "weak character" of "poor, badly educated, fatherless children").

72. John J. DiLulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160 [https://perma.cc/8W3Y-SJSG] (connecting the emergence of "super-predators" to "moral poverty," including families with "no father in the home").

73. *See generally* DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

74. *See id.* at 29–30 (asserting that the "resurgence" of post-slavery black populations would be "doomed to frustration unless the viability of the Negro family is restored"); Wilson, *supra* note 71, at 123 (blaming the "weak character" at the root of black crime largely on the prevalence of "unmarried mothers" and "fathers who will [not] help raise their children").

noose of policing and prison around the necks of young black males living in these pathology-tangled neighborhoods.[75]

Hinton's thorough exploration of the intellectual grounds of the war on crime highlights many other significant social science interventions, not all of them as intentionally oriented toward enhancing the scale of the carceral state as the previous three (Wilson, Moynihan, and DiLulio). In the early days of what became the war on poverty, the work of sociologists Lloyd Ohlin and Richard Cloward promoted the idea of direct interventions aimed at reversing the social and economic isolation that channeled youth in segregated neighborhoods of concentrated poverty toward crime.[76] While not aimed at promoting law enforcement strategies, the underlying theory that conditions associated with black, segregated neighborhoods were criminogenic underscored the potential threat if antipoverty approaches failed. Hinton persuasively suggests that there was little to prevent this logic from supporting a police-first approach to controlling poverty-based crime.[77]

One of the most important and underrecognized social scientists that Hinton covers here was the late Marvin Wolfgang of the University of Pennsylvania, whose ideas have not been nearly as controversial as Wilson's but pointed toward the same racial strategy and whose statistical studies of the distribution of arrests among a cohort of Philadelphia boys born in 1945 (the baby-boomers) helped to crystalize the threat posed by black youth.[78] Wolfgang's headline finding that a small percentage of the youth accounted for more than half the total arrests in the cohort has shaped many dreams since of targeting imprisonment on a group of career criminals, high-rate offenders, or super-predators.[79] Wolfgang's research and its reception crystalizes many of Hinton's themes. His funding was coming from the war on crime, and his uncritical reliance on police arrests allowed the filter of police selection and distribution to shape who the dangerous, high-rate persistent youth would be (black males from segregated neighborhoods of concentrated poverty).[80]

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75. *See* HINTON, *supra* note 4, at 58–62 (discussing the ever-increasing surveillance and police patrols that occurred in segregated neighborhoods that resulted in racial inequalities).

76. *See* RICHARD A. CLOWARD & LLOYD E. OHLIN, DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS 150–52 (3d prtg. 1963) (hypothesizing that, were disadvantaged adolescents given ample "legitimate means" of achieving success and were "illegal or criminal means" not readily available, criminal subcultures would not develop amongst those adolescents).

77. *See* HINTON, *supra* note 4, at 84 (recounting that despite input from "a few amenable academics" in the 1960s, "the criminal justice and law enforcement community almost exclusively shaped" the government's perspective on crime).

78. *See* MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 245 (1972) (finding that, more than education level, changes in residence and school, and I.Q., race and socioeconomic status "were most strongly related to the offender-nonoffender classification").

79. *See id.* at 248 (finding that 18% of the cohort were "chronic offenders," responsible for more than 50% of offenses, and that nonwhites were five times more likely to be chronic offenders).

80. *See* HINTON, *supra* note 4, at 224–26 (highlighting federal policy makers' disregard of Wolfgang's reliance on contact with police as a proxy for delinquency, despite "the fact that African

Hinton highlights some moments when social science offered truth telling that might have provided reasons to resist the embrace of mass incarceration. Most notable are two policy experts who combined law and criminology, an interdisciplinarity rare at that time and now, James Vorenberg[81] of Harvard Law School and Frank Zimring,[82] then of Chicago and more recently of U.C. Berkeley; both criticized efforts at prediction and preemption as misbegotten and likely to reinforce patterns of racial disadvantage. While both were funded by war-on-crime research funds, their policy warnings were largely ignored.[83]

Of course the ideas that triumphed turned out to be highly productive precisely because they promoted forms of governmental action against the crime threat, as it was coming to be politically defined, without creating the direct public strategy on the economic and social isolation of these communities that the Kerner Commission called for in its "enrichment" strategy.[84] Yet, it would be a mistake to see these intellectual interventions as serving simply an ideological purpose of providing a patina of social science respectability to a control agenda forged on other ground and by other strategists (although some examples like the "super-predator" concept that emerged from Wilson's thought via DiLulio clearly fit an ideological role). These intellectual interventions were politically effective because they offered anticrime strategies that provided real objectives for federal investments to shape local policing and imprisonment strategies around. In that sense, social scientists in the war on crime are examples of what Michel Foucault called "specific intellectuals" in contrast to the "universal intellectual" whose broad ideas reshape fundamental principles.[85] Specific intellectuals—Robert Oppenheimer was one of Foucault's memorable examples[86]—use their theoretical knowledge to forge practical projects

Americans were more likely to be stopped by police on 'suspicion,' to be assaulted verbally or physically, and to be arrested").

81. *Id.* at 123 (quoting then-Crime Commission Director Vorenberg as warning against creating "a self-fulfilling prophecy" by labeling youth as delinquents).

82. *Id.* at 241 (quoting Professor Zimring as warning of the likelihood that the 1980s would see disparate numbers of minority youth in juvenile and adult correctional facilities).

83. *See id.* at 123 (rebuking war-on-crime policy makers, including Vorenberg himself, as "largely blinded" from policy alternatives "outside of the punitive realm").

84. *See id.* at 126 (discussing the Kerner Commission's evaluation of available policy options and noting the Commission's preference for structural changes).

85. Michel Foucault, *Truth and Power*, Interview with Alessandro Fontana & Pasquale Pasquino, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 109, 128–29 (Colin Gordon ed., 1980) ("The 'universal' intellectual derives from the jurist or notable, and finds his fullest manifestation in the writer, the bearer of values and significations in which all can recognize themselves. The 'specific' intellectual derives from quite another figure, not the jurist or notable, but the savant or expert.").

86. *See* SILVAN S. SCHWEBER, EINSTEIN AND OPPENHEIMER: THE MEANING OF GENIUS 198 (2008) (discussing Foucault's initial classification of Oppenheimer as a "specific intellectual" for his work as a "scientist-statesman" on the first two atomic bombs before Oppenheimer reverted

around which governmental capacities can be concentrated, like the Manhattan Project.[87] While based on a shockingly thin empirical basis, the winning ideas behind the war on crime created practical linkages between the crime threat and ways of redeploying and expanding existing governmental capacities (policing and incarceration).[88] Viewed as a legal phenomenon— law breaking—war on crime is an impossible metaphor to realize. Reconstructed as a sociological phenomenon—black youth in segregated neighborhoods of concentrated poverty—a war on crime was all too practical.

B.   Technologies of Carceral Power

Another strength of Hinton's historiographical strategy is its description of the way administrative policies and legal amendments created new and unprecedented governmental capacities to surveil and incarcerate citizens. Two of the most important were stop-and-frisk policing and mandatory minimum sentences.[89] The first was a modification of the motorized-patrol approach to policing that was being promoted as a modern bureaucratic alternative to the old foot-patrol policing when the war on crime began. Now instead of responding to dispatched calls for assistance, police in cars or on foot would use their own authority to engage individuals that they suspected of being involved in crime, generally on starkly racial grounds.[90] Along with even more aggressive methods like the use of undercover police as decoys, the new methods decoupled convictions (and thus potential imprisonments) from the responses of ordinary residents and produced a flow of potential prisoners far larger than could be produced by solving the kinds of serious crimes people report to the police. The Supreme Court removed any potential legal impediments through its decisions upholding virtually complete police discretion to use any kind of criminal violation as the basis for their stops, removing any potential judicial check on aggressive police use of this power.[91]

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back to a "universal intellectual" concentrating on "the nature of scientific knowledge and on the relation between science and society" after his security clearance was revoked).

87.   Foucault, *supra* note 85, at 127–28 (discussing the specific intellectual's ability to intervene in discourse due to specific and relevant knowledge).

88.   *See* Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), http://time.com/3746059/war-on-crime-history/ [https://perma.cc/ZE3Y-35HX] (detailing the expansion of federal action in local policing and incarceration policies through programs of agencies such as the Law Enforcement Assistance Administration).

89.   HINTON, *supra* note 4, at 82, 138.

90.   *See id.* at 128–29 (relating the Kerner Commission's findings that the techniques used by police patrols including stop-and-frisk may be used indiscriminately, resulting in racial harassment).

91.   *See* Illinois v. Wardlow, 528 U.S. 119, 124–26 (2000) (finding unprovoked flight from an area of heavy narcotics trafficking may justify being detained by the police); Terry v. Ohio, 392 U.S. 1, 22–24 (1968) (explaining that a police officer may detain an individual on the basis of reasonable suspicion that the individual may have or is about to commit criminal behavior even though the officer does not yet have probable cause to make an arrest). Even noncriminal violations

Mandatory minimums—an idea developed in the first Nixon crime bills,[92] expanded in the Reagan years, and heavily promoted to the states[93]—distorted the whole structure of sentencing upward. In many instances they were built into complex matrix systems fixing a sentencing range based on crime level and criminal history score. These systems were designed originally to assure horizontal equity among individuals, but now incorporated extreme punishments with no judicial discretion to respond to significant individual differences. As Hinton notes, a certain kind of color-blind antidiscrimination principle had become a core part of the national canon in the 1980s, and mandatory sentences could be seen as protecting individuals from disparate judicial treatment due to race (although it did nothing to control prosecutorial selection).[94]

C. Resistance

Hinton's story, although anchored in the strategies of the federal government, does not ignore the role of resistance. We have already discussed her focus on urban uprisings as—even more than any perceived rise in individual violent crimes—helping to define the war on crime.[95] Most of the riots began as collective protest action against the existing indignities imposed by the policing of the 1960s, generally triggered by an in-itself-not-extraordinary attempt to exercise police arrest powers.[96] The result was a further strengthening of the most offensive elements of that policing model. Political activists within the black community, like the Black Panthers, tried to discipline resistance to police violence into sustainable legal practices but were met with criminalization and sometimes murder.[97] They also offered alternative security proposals for segregated neighborhoods of concentrated poverty that did not rely on enhanced policing but instead on community organization.[98] These stories of resistance, long covered over by the success of the mass incarceration project, are important to recover as we consider what should succeed it. The Black Panthers' appeal to create popular patrols

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such as traffic stops have been found to justify searches for drugs, see for example, Ohio v. Robinette, 519 U.S. 33, 38–39 (1996) (allowing for searches of a person's car for contraband following a speeding violation without having to explain that individuals may be free to leave), and California v. Acevedo, 500 U.S. 565, 579 (1991) (eliminating the previous requirement for a warrant when searching closed containers in automobiles).

92. HINTON, *supra* note 4, at 138.

93. *Id.* at 272.

94. *Id.* at 271.

95. *See supra* text accompanying notes 27–38.

96. HINTON, *supra* note 4, at 55–56.

97. *See id.* at 149, 205–07 (describing the methods used by law enforcement to disrupt the activities of the Black Panther Party and similar activist groups).

98. *See id.* at 9 (describing the Black Panthers as calling for "armed self-defense," as well as the difference between how black activists and federal, state, and local authorities responded to crime).

to protect black neighborhoods from both crime and police may have new relevance as we consider the paradox that despite extraordinary levels of public spending on police, most homicides go unsolved in segregated neighborhoods of concentrated poverty.

III.   Ending Mass Incarceration

Hinton's account is both sobering and inspiring for those of us who want to see the current interest in criminal justice reform achieve enough momentum to undo the tremendous changes in the American carceral state wrought by the war-on-crime era. Her comprehensive account of the now-forgotten first half of the war on crime (the Clinton Era would add another layer, including 100,000 more urban police)[99] raises serious questions about whether many of the most popular reform approaches can truly break with the past. Yet in capturing the criminological climate of the mid-1960s with some nuance, Hinton reminds us that significant reductions in the use of imprisonment and the need for major reforms of policing both seemed possible, even urgent, on the eve of the war on crime despite rising crime rates.

A.   *Evidence Based Law Enforcement*

One of the most resonant themes in criminal justice reform today is refocusing policing and incarceration based on empirically tested strategies.[100] In part, the emphasis on recidivism and how to reduce it is a counterbalance to the extremism of the 1990s when laws like California's Three-Strikes gave prosecutors largely unaccountable discretion to decide when to use life sentences.[101] But establishing empirical evidence for effective policing and rehabilitative programs was also a major goal of federal funding during the first half of the war on crime.[102] This wave of research tended to reproduce the patterns established by police and

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99. *See* David Yassky, Opinion, *Unlocking the Truth About the Clinton Crime Bill*, N.Y. TIMES (Apr. 9, 2016), https://www.nytimes.com/2016/04/10/opinion/campaign-stops/unlocking-the-truth-about-the-clinton-crime-bill.html [https://perma.cc/3TTV-SY4N] (relating the specifics of the 1994 Crime Bill signed by President Clinton).

100. *See, e.g.*, KAMALA D. HARRIS, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER, 179–81 (2009) (detailing the use of data collection and other empirical methods in discouraging and reducing open-air drug dealing in High Point, North Carolina).

101. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 26–27 (2001) (detailing prosecutors' ability to use the strike system to ensure higher sentences).

102. *See* HINTON, *supra* note 4, at 79–86 (chronicling the role of Johnson's Crime Commission in developing research to help produce effective legislative policy in the early years of the war on crime).

prosecutorial discretion in the form of arrest and conviction statistics and to undermine hopes for alternatives like rehabilitation.[103]

An important component of these evidence-based strategies is their focus on statistical risk assessment. In the face of chronic overcrowding in many of the nation's prison systems (including the federal system) and jails, actuarial risk assessment is being reexamined with enthusiasm by reformers as a way to reduce incarcerated populations while rationalizing a system that, from the pretrial phase to the distribution of lengthy prison sentence enhancements, has little rational relationship to risk.[104] The revival of what Malcolm Feeley and I called "the new penology" is another sign of how deeply the legitimacy of the U.S. carceral state has been shaken.[105] Yet as Hinton's history reminds us, this refocusing of law enforcement and custody on "high risk" categories of people who can reliably be identified using ready-at-hand bureaucratic information is the repetition of a theme that has run throughout the war on crime period—that of beating crime by incapacitating its most active participants. Repeatedly, and despite relying on somewhat different theories and methods, this search for the dangerous has always rediscovered the priority of maintaining surveillance and control over young black people, especially men living in segregated neighborhoods of concentrated poverty. There is every reason to fear that renewed actuarialism would "rediscover" the same priorities. After all, as Hinton argues throughout, the intensification of policing of these suspect classes in these neighborhoods has produced in criminal records a knowledge foundation for an enduring, indeed inescapable, racial profile.[106]

B. War on Violence

Another way that reformers are seeking to save the carceral state from its current legitimacy crisis by rationalizing it is by refocusing the war on crime to violence by abandoning the war on drugs, which was a diversion.[107] In fact, the system has steadily been deemphasizing the war on drugs since the end of the 1990s (although as a legal matter it remains fully in place and weaponized),[108] and our long experiment in incentivizing policing drug

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103. *See id.* at 85–86 (explaining that the statistics the Crime Commission relied upon to develop policing and incarceration policies were highly skewed toward affirming then-existing views about such policies).

104. Feely & Simon, *supra* note 56, at 460–61.

105. *See id.* at 456 (noting that the new penology is a response to the increase in demands "for rationality and accountability").

106. *See* HINTON *supra* note 4, at 23–25 (describing a system, which utilized lists of minorities, that police used to profile and then justify arrests and overpolicing of communities).

107. Jonathan Simon, Essay, *Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 673–75 (2014).

108. *See id.* at 660–62 (noting that the proportion of African-Americans imprisoned for drug crimes had decreased from 38.5% in 1991 to 36.8% in 2001 and that, by 2006, the war on drugs

seizures almost certainly was a diversion from solving serious and violent crimes (not to mention alienating most of the community members whose cooperation would be necessary to solve those crimes). Yet as Hinton's account deftly shows, the war on drugs was always bound up with the same racialized construction of the serious crime problem that has been growing in political and scientific authority since the Kennedy Administration.[109] The war on drugs was always rationalized as a way to harness federal funds and legal authority to go after local persons that were believed to be involved in serious and violent crime.[110] As defenders of "broken windows" policing continue to argue even now, aggressive policing against drugs and other "low-level" crimes can provide a lever on serious crime through various theoretical mechanisms of deterrence and incapacitation.[111] Moreover, a refocusing on violent crime is almost certain to retain the racialized concentration of policing and the racial makeup of the carceral population while naturalizing a punitive sentencing structure that makes little sense in terms of penological objectives.

C. Supervision

The very disrepute that incarceration—especially imprisonment—now endures is such that a tempting pathway of reform is to substitute forms of carceral supervision over people convicted or convictable of crimes as an alternative to incarceration. Historically, probation as an alternative or sequel to jail, or as a substitute for imprisonment (when it follows prison carceral supervision it is often known as parole but terminology differs from state to state) has meant being subject to special conditions, more or less active supervision by a correctional agent, and the possibility of deeper sanctioning, including incarceration, based on a summary administrative procedure.[112] It has often been associated with efforts to help those being supervised achieve a sustainable crime-free life in the community but with deeply inadequate

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was "under substantial political attack with successful initiatives in several states in favor of treatment as an alternative to jail or prison for drug crimes").

109. *See* HINTON, *supra* note 4, at 12, 21–22 (commenting on the "Kennedy administration's 'total attack' on delinquency" as beginning "a series of direct government interventions" in black communities, which led to the "mass incarceration generation" of children born after the Civil Rights Era).

110. *See id.* at 215–16 (pointing out that the main rationalization for arresting black Americans for petty crimes was to prevent inevitable future violent or more serious crimes).

111. Kelling & Wilson, *supra* note 42 (discussing the link between unchecked disorderly behavior, trust in the police, and serious crime).

112. *See, e.g.*, MICH. COMP. LAWS ANN. § 771.4 (West 2016) (providing for the discretionary grant or revocation of probation); N.Y. CRIM. PROC. LAW § 410.91 (McKinney 2017) (requiring that a parole recipient "be placed under the immediate supervision of the department of corrections and community supervision and must comply with the conditions of parole"); TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2015) (providing for community supervision in some proceedings).

resources to make a credible job of that.[113]   Politically shifting from incarceration to supervision avoids crossing the potential red line of declaring these highly criminalized people no longer a presumptive menace to society, and therein lies its true failing as a solution to the present crisis. As Hinton shows, carceral supervision, either by police or probation (or the whole of what Victor Rios calls the "youth control complex"),[114] has been the overarching goal of the federal government's war on crime.[115]   These methods go back to the Progressive Era, when they were imagined as a necessary extension of social control over immigrants and minority citizens whose capacity for self-government was doubted by the scientific racism then part of the dominant intellectual framework of state power.[116] The war on crime brought the federal government and its financing and expertise into expanding this sector. The emphasis on incarceration was a distinct part of this overall strategy. A shift back to greater reliance on supervision may save the system some money and avoid some of the inhumanity brought on by overcrowding of prisons, but it leaves whole communities in daily exposure to degrading treatment by the carceral state. Almost anyone living in a segregated neighborhood of concentrated poverty is exposed to having their home searched or car stopped because they are, or are near someone, under correctional supervision. Carceral supervision also remains a major pathway to incarceration.

D. Abolition

If recovering the fuller history of the war on crime requires us to abandon some of the narrowest understandings of mass incarceration and therefore question the adequacy of some of the politically easiest approaches to reforming the American carceral state, it also invites us to consider whether a far more substantial departure might be possible. As Hinton shows, the consensus within the carceral state and its related fields of expertise on the eve of the war on crime was for substantial shifts in the dominant twentieth-century models of carceral control.[117]

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113. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 256–57 (2004) (outlining the staggering number of ex-offender reentries to communities that do not have the adequate resources to supervise and assist integration into civilian life).

114. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS, at xiv (2011).

115. *See* HINTON, *supra* note 4, at 3, 17, 34 (explaining that the main goal of these enhanced crime-stopping initiatives was supervision and control of black communities, specifically black youths).

116. ANTHONY M. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY 36–45 (Expanded 40th Anniversary ed., Rutgers Univ. Press 2009) (1969).

117. *See* HINTON *supra* note 4, at 7–25 (chronicling the shift in perspectives leading up to the war on crime that created a mindset that focused primarily on crime in black communities).

Urban police-professionalization-oriented police executives imagined a new, more modern, and organizational model of policing built around the automobile and radio dispatch. By pulling police out of their embedded positions in neighborhood precincts, the new approach promoted in Los Angeles and Chicago sought to shorten response times and arrest more suspects in action rather than waiting for victims to discover crimes often hours after the events.[118] This model also was used to break up an older model based on local police stations and foot-based patrols that was long associated with both corruption and racial arbitrariness.[119] It was also promoted as capable of deterring crime through shortening response times and increasing the chances of police observing a crime in progress.[120] By the 1980s it would be framed as the failed old order against which a neotraditionalist model of problem-oriented community policing was posed as an answer.[121]

In retrospect this reform view appears to have overstated the degree to which this model was ever fully implemented or tested and understated how much it was overtaken by a war on crime that promoted more aggressive neighborhood policing that could be disguised as community policing. Going forward, we could do worse things than reinvent mid-twentieth-century efforts to make police truly modern and bureaucratic. As an organization, policing never has been made fully bureaucratic in the Weberian sense of being subject to rules and accountability as police shootings in questionable circumstances[122] and continuing scandals around

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118. *See id.* at 182 (noting the significant shift from the prevailing ideas of the immediate postwar period in which reliance on police cars was more common because it allowed greater mobility and quicker emergency responses than foot patrols).

119. *See id.* at 187–88 (explaining how the mobility and professionalization of the police force was a response to the high-corruption and turnover rates propagated by community policing in the nineteenth century).

120. *See id.* at 182 (stating that the rationale behind the shift to motor vehicles was decreased response times to emergencies and crimes as they were being committed).

121. *See id.* at 182, 186–87 (describing the failure of mobilized patrols as a result of the disconnect created between the police and their communities, and explaining the rationale behind the increase in foot patrols in problem areas as an effort to try and combat crime by monitoring identified problem areas).

122. *See* Christine Hauser, *Man, 73, Shot Dead by Officer Had a Crucifix, Not a Gun, Police Say*, N.Y. TIMES (Dec. 15, 2016), https://www.nytimes.com/2016/12/15/us/man-73-shot-dead-by-officer-had-a-crucifix-not-a-gun-police-say.html [https://perma.cc/35ZK-ELR6] (reporting that an elderly man with dementia was shot by police and that he was holding a crucifix instead of a gun); Ashley Southall, *District Attorney Asks for Grand Jury in Police Killing of Deborah Danner*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/nyregion/district-attorney-asks-for-grand-jury-in-police-killing-of-deborah-danner.html [https://perma.cc/8A2R-6LVF] (explaining why a district attorney asked for a special grand jury in a case involving an officer who breached protocol when he shot a sixty-six-year-old black woman who was acting erratically); Liam Stack, *Video Released in Terence Crutcher's Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?_r=0 [https://perma.cc/LM44-W4X2] (discussing the shooting of an unarmed black

homophobic and racist text messages in San Francisco exemplify.[123] Returning police to a more responsive role and using technologies to break up racialized presumptions that shape law enforcement through forms of randomization might provide at least a valuable interim approach to breaking the hold of racial profiling on contemporary policing.

Conclusion

Observers frequently mistake the policies of the federal government as the story of government in our nation. This is especially true of criminal law and punishment, where government is particularly inapt. The vast majority of prisoners are under state custody, and the laws and policies that imprisoned them are the products of state legislatures, county prosecutors, and local police. Indeed, it takes a concerted, multifront campaign for the federal government to influence—let alone transform—something as intrinsically state and local as the American carceral state. Elizabeth Hinton's *From the War on Poverty to the War on Crime: The Making of Mass Incarceration* provides a far more detailed account and strong interpretation of the extraordinary campaign led by a series of presidential administrations of both parties and, importantly, championed by the presidents themselves and their attorneys general. This project of reversing the presumptive rise in crime, especially in American cities, seemed unlikely from the start given that the kinds of crimes receiving political attention—robberies, burglaries, and homicides—are among the most local of activities, and as noted, completely under local authorities to recognize (or not) and respond to. Although this project never succeeded by its own terms in reducing crime rates, which didn't begin to fall significantly until the mid-1990s and then appeared unrelated to war-on-crime innovations, it did work to transform the American carceral state into the punitive juggernaut it had become by the turn of the twentieth century and largely remains.

That it worked is a triumph of soft power in the interest of hard power; the power of incentives, ideas, and identities to drive a vast investment of state and local dollars in prisons and the infrastructure of criminal courts necessary to keep them filled. The first step in this, one taken early in the Johnson Administration, was to make police officers the key "recruiters" for participants in the federal government's effort to pacify the big cities ahead of multiple uprisings or even a sustained insurgency.[124] With federal funds

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man in Tulsa as he allegedly walked away from officers with his hands up). *See generally* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 1968).

123. Scott Glover & Dan Simon, *'Wild Animals': Racist Texts Sent by San Francisco Police Officer, Documents Show*, CNN (Apr. 26, 2016), http://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/ [https://perma.cc/95M5-9BZX] (detailing text messages sent to and from a police officer that disparaged blacks, hispanics, Indians, gay police officers, and residents of a largely minority and low-income district).

124. *See supra* note 33 and accompanying text.

supporting the hiring of more police officers and providing more hardware for them to use to suppress rioting and arrest criminal suspects, the scale of urban policing expanded enormously in the decade between the mid-1960s and mid-1970s. This happened despite grave concerns within the federal government itself about the incompetence and racism of local police forces and with no substantial commitment to reform them. Under Nixon this criminalization wave was reinforced, and the goal of turning those arrests into successful prosecutions and convictions, and imposing longer prison sentences was firmly established as best practice.[125] By the time Ford took over from Nixon, after the latter's own conduct became subject to criminal accusations and the likelihood of impeachment increased, mass incarceration as a project was already fully weaponized and ready to go, firmly embraced by both parties, with a few issues, like the death penalty, subject to party debate.

By the time Presidents Reagan and George H.W. Bush renewed the war-on-drugs brand and tied it to the new folk devils of urban decline (crack-cocaine dealers and users), prison populations in the states were rising rapidly, and the core focus on youth of color in segregated neighborhoods of concentrated poverty was firmly established.[126] The Reagan–Bush rhetoric made it easy for contemporaneous observers to blame the increasingly visible problem of prison population growth on right-wing politics and its obsession with the dangers and moral impurities of drugs.

Hinton's meticulous recovery of the first phase of the war on crime arrives at a perfect time to help ground the debate about future criminal justice reform. Many of the most "promising" and politically popular reforms involve rolling back the war on drugs that Reagan and Bush branded and which President Clinton sustained with his eager expansion of the police force.[127] Many of these proposals, if implemented more fully, would move us back toward the war-on-crime strategies of the Ford and Carter years. That might remove the most discredited and indefensible features of mass incarceration, but it would leave the basic political project of governing American cities through the surveillance and carceral control of the potential criminality of black (and other marginalized) youth fully operational. While progress requires action at the state level, Hinton reminds us why we need a national movement to end the war on crime.

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125. *See supra* note 27 and accompanying text.

126. HINTON, *supra* note 4, at 314–21 (tying the emergence of crack to "the cumulative impact of twenty years of disinvestment, neglect, and overpolicing" and also noting that the Anti-Drug Abuse Act, adopted by the Reagan administration and supported by Bush in his presidential bid, "specifically designate[s] 'high risk youth' as a primary target group"; and noting "the explosion in prison populations during the 1990s").

127. *See supra* note 99 and accompanying text.