The Foundational Lawlessness of the Law Itself: Racial Criminalization & the Punitive Roots of Punishment in America

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Empirical researchers and criminal justice practitioners have generally set aside history in exchange for behavioral models and methodologies that focus primarily on crime itself as the most measurable and verifiable driver of American punitiveness. There are innumerable legal and political questions that have arisen out of these approaches. Everything from the social construction of illegality to the politicization of punishment to the stigmatization of physical identities and social statuses have long called into question the legal structures that underpin what counts as crime and how punishment is distributed. And yet, until quite recently, the question of what history has to offer has mostly been left to historians, historically minded social scientists, critical race and ethnic studies scholars, community and prison-based activists, investigative journalists, and rights advocates. What is at stake is precisely the foundational lawlessness of the law itself. At all times, a White outlaw culture that rewarded brute force and strength of arms against racialized others unsettles basic assumptions about how we are to understand criminalization and punitiveness over time: that is, who has counted as a criminal and to what end has the state used violence or punishment?

The United States is the most punitive country in the world. By population, by per capita rates, and by expenditures, the United States exceeds all other nations in how many of its citizens, asylum seekers, and undocumented immigrants are under some form of criminal justice supervision. Over the past two decades, there has been an explosion of reports by government agencies, nonprofits, and international advocacy organizations exploring the dimensions of this peculiar form of American exceptionalism. While empirical and comparative data on the size and scope of the American system and its many "clients" will continue to lie at the heart of many of these reports, only within the past decade has research on the historical roots of American punitiveness gained increasing attention.

Why the United States is so punitive may be the most relevant question to answer. But it is also among the most difficult. The challenge is not the lack of various historical drivers or causes or even the range of possible philosophical expla-

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nations for how Americans have imagined crime, sin, human nature, and the utility of punishment going back to the Enlightenment period. The problem is that historical and philosophical explanations have been the least credible or authoritative in explaining mass incarceration among policy-makers.

Empirical researchers and criminal justice practitioners have generally set aside history in exchange for behavioral models and methodologies that focus primarily on crime itself as the most measurable and verifiable driver of American punitiveness. Innumerable legal and political questions have arisen out of these approaches. Everything from the social construction of illegality to the politicization of punishment to the stigmatization of physical identities and social statuses have long called into question the legal structures that underpin what counts as crime and how punishment is distributed. And yet, until quite recently, the question of what history has to offer has mostly been considered by historians, historically minded social scientists, critical race and ethnic studies scholars, community and prison-based activists, investigative journalists, and civil and human rights advocates.

The disconnect between the primary knowledge-producers of criminal justice data and interpretation and everyone else is striking. One of the legacies of the federal explosion in crime legislation and crime-control spending in the 1960s was the gradual collapsing of academic research into technocratic-based and practitioner-centric research communities.[1] To put it simply, over the last fifty years, empirical researchers have focused on the needs and interests of law enforcement and corrections officials and vice versa, limiting the impact of other forms of knowledge. The fact that historically informed research has often buttressed critiques of, and political resistance to, police, prisons, and the courts demonstrates just how fraught the politics of knowledge has been.

This raises a first-order problem in any effort to use history to reimagine how to make America less punitive today. To what extent can the targets of reform – practitioners and policy-makers – be moved by the past if they think it is immaterial to the present? What imaginary line do people draw in the chronological sands of time that makes history "ancient" or irrelevant to them, no matter how compelling the historical evidence is? Without taking into account how often history is discounted in policy circles, much of what proceeds in this essay may not matter to those whose need to understand the past is greatest. This may be the biggest challenge, rather than the simple recovery and teaching of these founding historical problems of our punitive nation.

From the beginning, the United States has been what historian Dan Berger calls a "captive nation." In summer 2019, Americans commemorated the four hundredth anniversary of the dawn of chattel slavery and the arrival of African captives in Jamestown, Virginia. There is no American history in which

European-descended people did not use racialized forms of punishment, war, or containment against Indigenous tribes, immigrants, or enslaved people of African descent. Settler-colonists first used the logic of elimination then turned to ideas of exploitation to make way for their permanent residency. Two-and-half centuries before the nation was founded and for nearly a century after, the core institutions of American democracy and the economy were built on the land of the Indigenous and the backs of the enslaved. Berger writes,

> Race, especially anti-black racism, has been the primary modality through which this pairing of colonization and confinement has transpired in the United States. Forcible confinement haunted black life from capture in Africa through the Middle Passage and sale in the Americas. Chattel slavery initiated a racial regime rooted in confinement: plantation slavery was as much a carceral force as the early penitentiary.[2]

The historical institutions of Native reservations and African American slavery were the most durable legacies of a number of ideas and ideologies that helped forge the punitive foundations of American society. The frontier myth of a virgin land, waiting to be tamed and cultivated by a "master race," animated much of the colonial justification for Native displacement and genocide. As generation after generation of White colonists and later citizens moved West, the choice to define Native populations and Mexicans as savages or criminals by law, custom, and practice rationalized the eventual creation of the nation from sea to sea. That Europeans did not encounter the legal restrictions and physical constraints of the Old World and turned to religion to justify conquest gave them a sense of legitimacy to what they called "manifest destiny."[3] Philosophers and political theorists – from Adam Smith to John Locke and Thomas Hobbes – helped by justifying conquest as the march of civilization. By the nineteenth century, a system of federalism had evolved, which maximized various states' monopolies on violence to ensure conquered Indigenous and Mexican land would be converted to private property by Whites and capitalized by enslaved Black people.[4]

What is at stake in this brief sketch of the early history of the United States is precisely the foundational lawlessness of the law itself. At all times, a White outlaw culture that rewarded brute force and strength of arms against racialized others unsettles basic assumptions about how we are to understand criminalization and punitiveness over time: that is, who has counted as a criminal and to what end has the state used violence or punishment?

In historian Kelly Lytle Hernández's recent study *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771 – 1965*, she finds a remarkably stable pattern of criminalization and incarceration going back to a single carceral site on the Tongva Basin, once part of Mexico and named for the Native community that originally occupied the land for seven millennia. What is modern-day Los Angeles. "Crime and punishment, in other words, emerged as the platform for

the racialized inequities established during the colonial era to flourish in the Republic of Mexico. By the end of the 1820s, the new nation's jails, prisons, and convict labor crews were overcrowded with the historically marginalized of the old colonial order, largely a population of Natives, Africans, mulattos and mestizos."[5] As displaced or landless people, they were arrested on public order charges, such as "vagrancy, disorderly conduct, and drunkenness." She notes that in order for manifest destiny to have become more than a "proclamation" or "simple fact of conquest by treaty," the law needed an infrastructure.[6] "The local jail, therefore, represented the foundational structure of U.S. conquest in Los Angeles," Hernández writes. It was how the rule of law was established. By 1850, the city passed an ordinance that deputized all Whites – "on complaint of any reasonable citizen" – and established racialized municipal chain gangs and convict leasing nearly a generation before the end of slavery.[7]

What happened next when slavery ended is one of the most examined chapters in American history. Within months of the end of the Civil War, the former Confederate states began passing new criminal legislation, known as Black Codes, targeting African Americans with the goal of limiting their newly gained rights as citizens. New vagrancy laws, felony enhancements, statutes against interracial socializing, and a newly expansive definition of parental neglect, rending children from their parents to be sold at auction to former masters, demonstrate how quickly Southerners turned to the apparatus of the law to simply criminalize Black freedom. Or, as Hernández describes Natives in Los Angeles, Whites criminalized Blacks' "right to be." Although mass criminalization first awaited mass freedom for African Americans, seemingly overnight, scenes of sheriff's auctions replaced slave auctions.

The Thirteenth Amendment abolished slavery and indentured servitude in 1865. But it contained a loophole or an exemption clause: "except as punishment for crime whereof the party shall have been duly convicted." While prison and community activists have long pointed to the slavery loophole in the Constitution – still the law of the land – as the reason for the enduring racial disparities in the system, historians had not paid as much attention until fairly recently. Scholars have traced the loophole to the Northwest Ordinance of 1787 and to antebellum laws in which the condition of free Blacks rested precariously against the backdrop of fugitive slave laws and 90 percent of African Americans still in bondage.[8] In this, both precedents prefigured the failure of the abolitionist movement and the Union defeat of the Confederacy to extinguish the flame of human bondage forever.

Literature scholar Dennis Childs has called the Thirteenth Amendment one of the "most devastating documents of liberal legal sorcery" ever created in Western modernity. He notes that the loophole was not only deliberately carried forward,

but some Republican leaders and former Union officers understood exactly what the loophole intended. It was to ensure permanent racial subordination. In Senate testimony of the 39th Congress, Union Major General Carl Schurz stated: "But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all the independent state legislation will share the tendency to make him such." The amendment legalized racial criminalization at the second founding or rebirth of American democracy.[9]

The loophole also made possible Southern redemption, even as the Black Codes were outlawed by the Fourteenth Amendment and new civil rights laws during Reconstruction. Criminal legislation passed the new constitutional hurdle with color-blind language and an 1871 court ruling in *Ruffin v. Commonwealth*. The Virginia Supreme Court officially sealed the fate of African Americans by ruling that a convict was indeed a "slave of the State." No other group had been enslaved in the United States and as such the criminal law itself rendered meaningless any distinction between Blackness and new conditions of state-sanctioned servitude. That Whites experienced hard labor (slavery-like work) regimes in the North and South did not change the legal or juridical meaning of the law.[10] From then until now, some Whites have also paid dearly, at times, for the racialized nature of punishment since the Civil War.

The punitive excesses that Whites experience in the system might be called anti-Black criminalization by proxy and proximity. In her Inside-Out teaching at Putnamville Correctional Facility in Indiana over the past several years, historian Micol Seigel has observed firsthand how incarcerated White men saw themselves as Black-adjacent. "Some even identify themselves as marked by that history of racial discrimination in recognizing that anti-black lawmaking is behind the sweeping legislative changes that widened the net of the criminal justice system, eventually catching them," she writes. "Racism is much more than the hatred of Afro-descended people; it is one of the most capacious tools of state power." As with food stamps, welfare, and health care, Whites often equate the stigma of poverty and punishment with the natural condition of Black people, even as Whites are the largest beneficiaries of state provisions. Provisions like punishment are still marked as things Black people take and receive.[11]

Some of the most revealing and essential new historical scholarship on American punitiveness is on the gendered dimensions of punishment. Two recent studies return to the well-studied Georgia convict lease camps and chain gangs of the postbellum South to map the unique punitive pathways for Black women, defined in opposition to White womanhood and feminine notions of deviance. From the end of slavery until 1908, African American women made up 3 percent of leased felons in the state, but 98 percent of female prisoners. They were marked for hard labor and punishment, according to historian Talitha Le-

Flouria. "They were scattered in railroad camps, prison mines, lumber mills, brickyards, turpentine camps, plantations, kitchens, stockades, washhouses, and chain gangs."[12] African American studies scholar Sarah Haley describes Black women's convict work as a "double burden." They did the backbreaking work of men in lease camps plus they cooked, cleaned, and washed the clothes of fellow prisoners and guards alike. "Black female labor continued to be conscripted for both production and reproduction," Haley finds, including rape and sexualized violence by White male guards.[13] Indeed, sexual access to Black women's bodies was institutionalized in camps as an employee benefit. "They were caught in double binds, double burdens, and double jeopardy when it came to both labor and violence."[14]

The gendered criminalization of Black women and the extreme punishment they faced lay in what historian Kali Gross calls the legacies of "an exclusionary politics of protection."[15] From the colonial period to the present, laws governing the protective status of womanhood either did not legally apply to Black women or were selectively nullified so as to exclude them. Scientific experts racialized women's bodies to justify the laws' exemptions. "Criminal anthropologists assessed female deviance, in part, by subjects' proximity to, or distance from, Western ideals of femininity, morality, and virtue – standards against which black women failed to measure up."[16]

Across time, space, and region, Black women were subjected to greater rates of conviction and incarceration. At the extremes, as in Tennessee in 1868, Black women represented 100 percent of the state's female prisoners, whereas Black men accounted for 60 percent of the male prisoners. Gross found that in late-nineteenth-century Philadelphia, Black women served 14.1 months on average per sentence compared with 8.5 months for White women for similar offenses. At the height of the war on drugs in the 1980s and 1990s, drug-related arrests of Black women skyrocketed by 828 percent, triple the rate of White women and double that of Black men.[17]

The lack of protection extends to domestic violence and intraracial sexual violence today. Nearly nine out of ten Black women incarcerated presently report a history of such violence as compared with less than one-quarter of White women nationally. Gross writes, "Exclusionary notions of protection have created a need for black women to trade in extralegal violence for personal security."[18] In the recent high-profile Florida case of Marissa Alexander, who fired a warning shot when her husband threatened to kill her, Alexander was not allowed to stand her ground. By contrast to George Zimmerman, acquitted on murder charges after claiming self-defense when he stalked and killed Trayvon Martin in July 2013, Alexander was originally sentenced to twenty years in prison for aggravated assault. After protests against what activists called a double standard, an appellate court ordered a new trial in September 2013. After a plea deal, Alexander served two additional years under house arrest.

Racist stereotypes of Black women as sexually promiscuous and overly masculine start early. For trans women and girls, such stereotypes are lethal.[19] Historians have only just begun to trace how gender nonconformity within LGBTQ communities elicited state violence in the past.[20] However, all Black cis and trans women, according to historian Cynthia Blair, have been subjected to violent media caricatures going back to the late nineteenth and early twentieth centuries. They are described frequently as women who are "extraordinarily large in height and girth and possessing brutish strength and cunning." Gross found ubiquitous depictions of "colored Amazons" in the Philadelphia press during the same period.[21]

These stereotypes also shaped how courts punished Black girls. They were more likely to be remanded to custodial institutions than their White counterparts and less likely to end up in gender-specific reformatories or cottages.[22] Historian Tera Agyepong studied the first half-century of Chicago's juvenile justice system. "Staff members masculinized African American girls and constructed them as the most violent and aggressive residents," Agyepong found at one of the large institutions she examined. "In spite of the reality that African American girls were typically younger than white girls and the fact that a disproportionate number of them were sent to Geneva not because they had committed any crimes but because there were no institutions available for dependent African American children." She found that the purported rehabilitative ideal of the court generally did not apply to Black girls.[23]

While the gendered dimensions of criminalization and punishment for Black and brown boys were different than for girls, they were similarly subjected to stereotypes and scientific racism. In her research on California's early reformatories for boys, historian Miroslava Chavez-Garcia shows how notions of deviance were mapped onto the physical bodies of Mexican, Mexican American, and African American youth. "Eugenic fieldworkers at the California Bureau of Juvenile Research invoked long-held assumptions about biological differences" and crafted typologies of a "Mexican type" or "big coon type." Dysgenic traits were outer signs of an inner inferiority, eugenicists claimed, which were reflected in the poor quality of their homes. "There is a relation between the social quality of homes and the social quality of the people who live in them," wrote a fieldworker in the 1920s. As such, they treated delinquency as a social contagion in need of eradication. Hundreds of thousands of California youths, Chavez-Garcia writes, were labeled "defective" and sterilized.[24]

In juvenile court systems around the country between the 1930s and 1960s, system actors focused on providing a "protective buffer for white youths" to keep them out of adult prisons. Historian Carl Suddler found that Black youths, by contrast, "encountered a 'Jim Crow juvenile justice system' that refused to extend rehabilitative ideals and resources; regularly committed them to adult prisons; and

sentenced them to the convict-lease system, prolonged periods of detention, and higher rates of corporal punishment and execution." The denial of the special protections of the juvenile court, Suddler discovered, reflected a pervasive view that Black youth were "presumed criminal."[25]

The presumptions of Black youth criminality were fortified in the mid-twentieth century by the creation of the model minority myth. Chinese immigrants had long been subjected to xenophobic violence, moral panics, and racial criminalization as a drug-infested and prostitute-riddled community. "Yellow peril" journalism and social science stoked the flames of nativists who successfully closed immigration to them in the 1882 Chinese Exclusion Act. The precarious status of those immigrants and their children living in segregated Chinatowns was partly reflected in community anxieties about juvenile delinquency. In 1941, Lim P. Lee, a probation officer, described in the press a growing problem of delinquency in San Francisco's Chinese community of "misguided youth" and "dead end kids." And yet, historian Ellen Wu found that shortly thereafter, during the postwar years, Chinese community elites and White liberals conspired to craft a false narrative of "nondelinquency," which became an assimilation wedge for Chinese Americans and against African Americans. Media narratives shifted 180 degrees from the "yellow peril" of old to describe "Americans without a delinquency problem," as *Look* magazine did in 1958. The myth of their universal success was meant to show that racism was no barrier to achievement for all minorities, especially Blacks. "Chineseness worked to define blackness while blackness worked to define Chineseness," Wu writes.[26]

No aspect of caging, confinement, or corrections, from home arrest to school detention to local jails, penitentiaries, and detention centers, works without policing. More so than the prison itself, law enforcement is the greatest source of criminalization.[27] Policing spreads the reach of the carceral state in every nook and cranny of society. No home, no street, no neighborhood, especially in communities of color, can escape the reach of law enforcement's foot soldiers and technology.

Historians have written for decades about the class and racial biases of police officers based on the experiences of various European groups who competed for civil service work and the spoils of urban political machines.[28] Anti-red squads were also deployed to infiltrate and destroy radical and reformist labor groups. Much of this historical work was written before any full accounting of the racialized wars on crime and drugs caught the attention of a new cohort of historians. Here and there, historians of the Jim Crow South and the Great Migration North described how police regulated the boundaries of Black citizenship, housing, social mobility, and political organizing.[29] But it was really Heather Thompson's groundbreaking call for historians to revisit policing and punishment's direct

impact on urban space, labor organizing, and political-party realignment in the post–civil rights era that spurred new research.[30]

Police contact among Black youth has been a particularly ripe area of scholarship. Suddler describes "heightened surveillance" tactics in New York City dating back to the 1930s. Not only did these encounters inflate crime rates, they also "triggered racial antagonisms" and led Black youth to view police as a "repressive, unworthy authority." Suddler's important contribution was to push the timeline back from the Kerner era of urban uprisings to the 1930s and 1940s, when Harlem's Black youth first rebelled against systemic police brutality. Local White officials responded by investing in Police Athletic Leagues, which amounted to a form of surveillance and classification, tracking kids by their attendance and behavior, and rewarding the dutiful ones with field trips to baseball games, the zoo, and swimming pools. With more contact came more labeling of "potential delinquents," blurring the line between innocence and guilt. When Black youth protested discrimination or racial violence in the city, especially by the early 1960s, police used their long catalog of surveillance records to target activists, not criminals, for arrest.[31]

Historian Donna Murch similarly found that postwar Black migrants to Los Angeles and Oakland faced intense police scrutiny, abuse, and surveillance. Indeed, law enforcement, Murch writes, helped pave "the way for a new and more repressive postwar racial order."[32] By midcentury, the Golden State led the nation in youth incarceration. The California Youth Authority "combined forces with other state and local agencies to extend its reach into all domains of young people's lives from education to recreation, from schools to street."[33] Many of the young people who would later found the Black Panther Party for Self Defense in Oakland had come of age cycling in and out of the Youth Authority and forging an activist identity in the process. Some of these men would become activist prisoners and contribute to decades-long struggles for human rights from inside.[34]

What emerges with a long view of the deep end of the criminal justice pool is how much Black citizenship in the twentieth century was forged by police, who were, in the words of historian Simon Balto, the most "visible agents" of the state.[35] For youth and adults alike, police officers were the most common representation of the state's presence in Black people's daily lives. "Too often the policeman's club is the only instrument of law with which the Negro comes into contact," wrote Kelly Miller in 1935, a Howard University Black sociologist and antiracist reformer. Miller's observations were confirmed by a growing body of research led by National Urban League researchers in the 1920s and early 1930s.[36]

Balto's *Occupied Territory: Policing Black Chicago from Red Summer to Black Power* is the first major longitudinal study of racialized policing in a single Northern city. Like so much of the latest historical scholarship, its principal concern is understanding policing outside of the Jim Crow South. It challenges earlier Southern-centric research that fails to account for Northern-style stop-and-frisk policing,

which started to show up in the Great Migration North and evolved into more formal policy in the 1960s. As far as "the mechanisms and strategies of policing on the ground in urban America," he argues, "neither the War on Crime nor the War on Drugs actually constituted dramatic reinventions of the wheel." Such an insight is only possible by paying close attention to what came before in the same Northern cities known for consent decrees today.[37]

Elizabeth Hinton was the first historian to show overwhelming evidence of the profound criminogenic nature of federal crime legislation. Her work is now the baseline for how future scholarship will frame national crime policy from Lyndon Johnson to Ronald Reagan across multiple disciplines, especially in applied fields in which policy research matters. To describe how big a deal this is: Twenty years ago, criminal justice researchers began challenging the conventional wisdom that the historic crime drop of the 1990s and 2000s was due to massive prison growth. Ten years later, they debated the actual amount by which prisons reduced crime. Was it 25 percent or 5 percent? Then a few years ago, in 2014, a National Academy of Sciences' report determined that the most important finding was not how much prisons reduced crime, but that crime policy itself had created a massive prison problem. Now we know because of Hinton's work that prisons and policing also drove crime in a dynamic process. Contrary to popular understandings, Great Society legislation like the Economic Opportunity Act of 1964 was accompanied by Big Crime legislation, such as the Law Enforcement Assistance Administration (LEAA) passed under Johnson in 1965. The LEAA blurred the distinction between poverty and crime in such a way to redefine Black poverty as criminality.[38]

The expansion of policing powers, surveillance, and labeling of "future criminals" led to two outcomes. First, this early policy led to diversion from, and divestment in, Great Society antipoverty initiatives. Second, the legislation increased financing of federally funded social service work under the control and auspices of federally funded local law enforcement agencies. Not only did actual crime go up as a result, which Hinton interprets as a predictable consequence of the tepid "root cause" response, but Hinton says liberal policy-makers also doubled-down on more policing.[39]

By the time Nixon took office, the federal response to treating unemployment and segregation as crime problems rather than the enduring consequences of structural racism had already been built. The fact that crime was going up was not seen as a failure of liberal investments in a nascent war on crime, but instead was interpreted as proof of an insufficient investment in punitive measures and a foolish focus on antipoverty policy. That is, crime-control dollars under Johnson meant fewer dollars for dealing with "industrial decline, mass unemployment, and police brutality." And more money, Hinton found, went to "police-commu-

nity relations programs during the War on Crime." Future rises in crime in the 1970s through the 1980s only reinforced what became an ironclad belief: "cultural pathologies" and bad parenting ensured delinquency and crime, to which policing and incarceration were the most appropriate responses.[40]

Political scientist Naomi Murakawa finds that the basic wiring of the federal carceral machinery had been in place since the Truman administration. Twenty years before Johnson and Nixon took the reins, civil rights leaders had worked with President Truman on a federal "law and order" mandate focused on anti-Black racial terror. Murakawa explains how proceduralism sought to "decrease discretionary decisions and insulate the system from arbitrary bias." In her telling, the "history of federal crime politics inverts the conventional wisdom: the United States did not face a crime problem that was racialized; it faced a race problem that was criminalized."[41] At the dawn of the post–civil rights era, a number of punitive trends converged at every level of government and in every sector of society. Social policy itself, and welfare in particular, became criminalized, as historian Julilly Kohler-Hausmann has found. As welfare rights activists sought to hold the federal government accountable for addressing the historical neglect of poor communities of color, public officials of both parties increasingly defined dependency as criminality.

Kohler-Hausmann's research reveals the enduring pattern of punitive American exceptionalism: of settler-colonists who increasingly turned to the Los Angeles jail as an infrastructure to establish the rule of law and to enforce racial domination. "Just as the penal system used welfare programs to constrain felons' economic and social citizenship, the welfare system often enlisted the penal system and its rituals to signal the suspect position of recipients," she writes. "Increasingly, policies helped produce the political reality they purported to reflect, erecting barriers to the civic and economic participation of poor people, particularly in urban African American and Latino communities."[42] In other words, yet again, Black and brown people had little or no "right to be."[43]

The criminogenic impact of public policies created a real crisis of crime in Black urban communities. But such problems were never unique to those residents. White Americans had and continue to experience similar problems.[44] The difference has long been the ascription of racist notions of an inescapable biological or cultural pathology. Indeed, what has been unique, we know now, is the role the state has played directly in creating the conditions of lawlessness among police, public officials, and individual residents. As Seigel writes of Putnamville's incarcerated White men: "Anti-blackness has shortened and fouled their lives."[45]

That some African Americans embraced the punitive turn themselves, as political scientist Michael Fortner found, did not make the historical context (of how things came to be) any less relevant to how to get out of the mess.[46] A popular solution among an increasing number of Black first-time office holders and

agency heads in charge of urban police departments and city governments was to deliver public safety to their constituents as a civil rights promise, as legal scholar James Forman observes in his Pulitzer Prize–winning study *Locking Up Our Own*.[47] But the promise was an impossible mandate. The criminal justice system produces racism, inequality, and insecurity; it could not (and cannot) fix itself.[48] After all, America's carceral infrastructure is older than American democracy itself and may even be stronger and sturdier in the Trump era and beyond.

ABOUT THE AUTHOR

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[36] Quoted in Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010), 251.

[37] Balto, *Occupied Territory*, 4.

[38] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, Mass.: Harvard University Press, 2016).

[39] Ibid.

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[41] Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Princeton, N.J.: Princeton University Press, 2014).

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[43] Ibid., 293.

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