

RACING ABNORMALITY, NORMALIZING RACE:
THE ORIGINS OF AMERICA'S PECULIAR
CARCERAL STATE AND ITS PROSPECTS FOR
DEMOCRATIC TRANSFORMATION TODAY

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ABSTRACT—For those struggling with criminal justice reform today, the long history of failed efforts to close the gap between the promise of legal equality and the practice of our police forces and prison systems can seem mysterious and frustrating. Progress has been made in establishing stronger rights for individuals in the investigatory and sanctioning stages of the criminal process; yet, the patterns of over-incarceration and police violence, which are especially concentrated on people of color, have actually gotten worse during the same period. Seen in terms of its deeper history however, the carceral state is no longer puzzling: it has always governed more by norms of controlling abnormality than enforcing laws and, in the United States, this construct of abnormality has for centuries been deeply raced. If this is the right time to be optimistic about criminal justice reform, it is at least in part because the irrepressible emphasis on race by the agents of the carceral state has become more visible and its clash with American legal values less ignorable.

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INTRODUCTION

The U.S. carceral state has achieved global notoriety for its extremity. Comparative scholars of punishment and society have pointed to a variety of important structural and historical features of the United States that might account for this, including its early and high degree of democracy,¹ the localized and fragmented nature of government in the United States,² the high degree of market orientation in preferences for government,³ and our history as a settler colonial and slave society in which racial othering has remained a central axis of privilege and coercion.⁴ In this Essay, I will focus on the racial underpinnings of the carceral state. Race is the most consequential of these features, as it shapes the distinctively punitive and degrading nature of the U.S. carceral state. It is also, in my opinion, the most vulnerable to transformative change in the near term.

One signal of this is the striking resonance of the Black Lives Matters Movement with a near majority of white Americans and a majority of white millennials.⁵ Another signal is the eagerness of many criminal justice

¹ KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2d ed. 2004); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

² Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 *PUNISHMENT & SOC’Y* 454 (2015).

³ DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016).

⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); ANDREW DILTS, *PUNISHMENT AND INCLUSION* (2014); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

⁵ See PEW RESEARCH CTR., *ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART* 14–15 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf [<https://perma.cc/YP4P-FKR6>]. Despite the title, the fact

leaders and elected officials to champion reform of the system.⁶ With striking evidence of racial disproportionality in all aspects of its operations, the U.S. carceral state confronts an acute deficit, or even crisis, of legitimacy. This crisis is made starker by historically low levels of crime.⁷ If the carceral state cannot stand up to scrutiny even under the weak “color-blind” standard of equality that prevails in contemporary constitutional law and politics, and is not able to escape sustained demands for change through political fear over rising crime rates as it did in the 1960s, we may be able to achieve an historic realignment that will bring the carceral state back in line with global democratic norms for the extent of punishment and the protection of human rights.

In this Essay, I explore the “twinning” of the carceral state between its legal penal sphere and its police/prison sphere, which is a universal feature of the modern carceral state.⁸ I examine how, in the United States, this has been marked from the start by the fact of slavery and the creation of “whiteness” as a citizenship property of some Americans.⁹ This white

that a near majority of whites say they support the Black Lives Matter Movement is far more significant than that a substantial gap exists between whites and blacks.

⁶ Recent examples abound of large city district attorneys embracing the need to reform the criminal justice system and do something about its race-based practices as well as others who have lost elections to reformers who would. *See, e.g.*, KAMALA D. HARRIS WITH JOAN O’C. HAMILTON, *SMART ON CRIME* (2009); Emily Bazelon, *Kamala Harris, a ‘Top Cop’ in the Era of Black Lives Matter*, N.Y. TIMES MAG. (May 25, 2016), <https://www.nytimes.com/2016/05/29/magazine/kamala-harris-a-top-cop-in-the-era-of-black-lives-matter.html> [<https://perma.cc/K5UR-F35Y>] (discussing reform ambitions of former San Francisco District Attorney and California Attorney General and now Senator Kamala Harris); Steve Schmadeke, *Kim Foxx Promises ‘New Path’ of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html> [<https://perma.cc/ZGB2-YVCF>]. *See generally* Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* (Maximo Langer & David Sklansky eds., forthcoming 2018) (discussing the reform trend among prosecutors and the ideas that are replacing “tough on crime” verities of the recent past).

⁷ Between 1993 and 2015, violent crime victimizations declined from 79.8 to 18.6 per 1,000 persons age 12 or older. JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *CRIMINAL VICTIMIZATION, 2015*, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> [<https://perma.cc/V2LM-5RZP>]; Lori Robertson, *Dueling Claims on Crime Trend*, FACTCHECK.ORG (July 13, 2016), <http://www.factcheck.org/2016/07/dueling-claims-on-crime-trend/> [<https://perma.cc/PY73-7HSZ>].

⁸ *See* MICHEL FOUCAULT, *ON THE PUNITIVE SOCIETY: LECTURES AT THE COLLÈGE DE FRANCE, 1972–1973* (Arnold I. Davidson ed., Graham Burchell trans., 2015). In the next Section, I will develop Foucault’s account of this “twinning” of penal and penitential. For the most part we see this everywhere a modern state administration of justice has developed. The penal law is established in the first instance by state or national legislatures and in the second through their interpretation or application by state or national courts. But beyond this legal sphere, there has been since the end of the eighteenth century a growing coercive system of policing and imprisonment that is authorized by the law—and in theory “enforces” that law—but is barely regulated by the law.

⁹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1725–28 (1993).

background (not white people exclusively, but a form of privilege originally associated with white European settlers in distinction from indigenous, or slave populations) has framed the direct threats of slave uprising, Native American resistance to dispossession, and competition from Mexican citizens absorbed by the conquest of northern Mexico and in the West by immigration from China and Japan. The American carceral state in its inception was (and remains today) inseparable from these colonial projects.

Because the carceral state is a state, the meaning of citizenship is always of great consequence. The Civil War and Reconstruction created a singular national citizenship formally blind as to race.¹⁰ Since the end of Reconstruction, the modern American state has normalized ongoing racial othering largely by transforming its operation from the legal state to the less visible administrative state, and especially, the nearly invisible carceral state.

The abnormal is the “twin” of crime in the modern carceral state.¹¹ If the crime is something that state lawyers must prove beyond a reasonable doubt,¹² abnormality is the judgment made by police and correctional agents with no minimal legal burdens.¹³ This gap in the law and its administration created by the twinning of criminal law on the one hand, and the apparatus of police/prison power in the modern carceral state on the other, has, in the United States, been profoundly distorted by the racialized othering of colonial dispossession, slavery, and their afterlives. The broad principle of legality, which arose in the late eighteenth century and which the United States shares with the European legal systems and their global extensions, constitutes the central principle of legitimacy for democratic

¹⁰ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988).

¹¹ MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE, 1974–1975* (Graham Burchell trans., 2004).

¹² *Sandstrom v. Montana*, 442 U.S. 510, 520–21 (1979).

¹³ To fully discuss the legal doctrines that support this claim would require a law review article if not a treatise in its own right. The qualified immunity of police and correctional officers protects them from liability for violating all but the most clearly established constitutional rights in the most flagrant ways. The jurisprudence of the Fourth Amendment, since *Mapp v. Ohio*, 367 U.S. 643 (1961) (finding the exclusionary rule for violations of the Fourth Amendment applicable to state courts), has ostensibly sought to regulate police searches and seizures with a catalog of exceptions, most of them premised on judicial deference to police expertise. See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017). Exemplary of the significance of this deference and its elevation of the carceral state and its agents over the legal state and its agents, was *Terry v. Ohio*, 392 U.S. 1 (1968) (finding that a compulsory investigatory stop and physical “frisk” of a person reasonable if the stop was based on a reasonable suspicion of criminal involvement and the frisk was based on a reasonable suspicion of a weapon being present). In dissent, Justice William Douglas pointed out that the majority had held in effect that “the police have greater authority to make a ‘seizure’ and conduct a ‘search’ than a judge has to authorize such action.” *Id.* at 36 (Douglas, J., dissenting).

extensions, constitutes the central principle of legitimacy for democratic criminal justice systems as well as its engine of reform in many periods.¹⁴ Of course, from the beginning, reform everywhere has been offset by the power of the twinned carceral state and its alternative principle of abnormality. In the United States, however, this uneasy fusion of the legal and carceral states was uniquely deformed by whiteness in several broad features that have facilitated U.S. penal exceptionalism including¹⁵: our commitment to maximum discretion in the agents of the carceral state;¹⁶ the institutionalization of the carceral state at the local level of government (while harnessing the resources of the state and occasionally the national government to local ends) which assures that discretion will promote racial hierarchy;¹⁷ limited judicial oversight; and a deeper embrace of scientific racism at the turn of the twentieth century than any other democracy.¹⁸

Today, after decades of being cloaked by the war on crime, the racial nature of the U.S. carceral state has become strikingly visible and illegitimate to a growing number of Americans (including white Americans). For example, 49% of Americans (76% of blacks and 45% of whites) say that the criminal justice system is biased against blacks in a 2016 survey, compared to 33–38% in the 1993, 2008, and 2013 surveys.¹⁹ For the first time in decades we have the opportunity to reconsider what our

¹⁴ See Jonathan Simon, *The Second Coming of Dignity*, in *THE NEW CRIMINAL JUSTICE THINKING* 275–307 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing the legality principle as a driving force of criminal justice reform during periods of expanding democratization).

¹⁵ For an interpretive exploration of the differences between European and U.S. penal cultures and the major explanations for the divergence, see Joshua Kleinfeld, *Two Cultures of Punishment*, 68 *STAN. L. REV.* 933 (2016). European legality faced its own distinctive aberration in colonialism, but in externalizing this racial deepening of abnormality to the colonies, Europe may have been able produce a stronger legality principle at home—one that finds fruit today in the strong force of human rights law in the penal field. See generally WHITMAN, *supra* note 1.

¹⁶ This commitment was expressed most relevantly by Justice Lewis Powell in his opinion for the Court upholding the Georgia capital sentencing system against a statistically based equal protection challenge showing a race-of-victim effect that was both statistically significant and of large magnitude: “Because *discretion* is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the *discretion* has been abused.” *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (emphasis added).

¹⁷ See generally NICOLA LACEY, *THE PRISONER’S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008) (explaining that the fragmented nature of American criminal justice promotes penal extremism).

¹⁸ See JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

¹⁹ Frank Newport, *Public Opinion Context: Americans, Race and Police*, GALLUP (July 8, 2016), <http://www.gallup.com/opinion/polling-matters/193586/public-opinion-context-americans-race-police.aspx> [<https://perma.cc/WG6X-D5AB>].

carceral state would look like without whiteness as a constitutive background consideration.²⁰

This Essay first offers a brief history of how the carceral state in America became so deeply raced. It then considers the current conjuncture: one in which the combination of rising support for racial justice movements, widespread consensus that the carceral state is racially discriminatory, low crime rates, and growing support for noncriminal solutions to social problems offers the opportunity to fundamentally rebalance the relationship between the carceral state and legal state and promote a more equal and inclusive society.

I. HOW THE ABNORMAL BECAME RACED: A BRIEF HISTORY OF THE CARCERAL STATE

Focusing on the carceral state forces us to recognize that we are talking about government when we talk about criminal justice. We are not simply observing some peculiar dispute among individuals into which the state as prosecutor is inevitably drawn by concerns over the public's well-being and morality.²¹ That is helpful because the carceral state is very hard to see (unless it is in your face). While especially true if you are a lawyer (or judge), it is also true if your exposure to criminal law is mostly through television courtroom dramas. In this view, of which our courts are much enamored, the government is composed of legislatures, executives, and courts, all very visible and some of it transparent to electoral democracy. Nevertheless, it is sometimes acknowledged that a vast administrative state has grown around executives and judges.²² This administrative state, moreover, is far more influential over how we are governed as individuals and communities than those more visible and celebrated institutions of democracy and the rule of law. Few of us will ever stand before a judge,

²⁰ It is tempting to view the election of Donald Trump, who as a candidate made a point of sounding as bellicose as possible on crime and as supportive as possible for the carceral state, as discounting substantially the chances for reform. However, while important in accelerating existing trends, the federal government accounts for a relatively small part of the carceral state. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

²¹ *R v. Dudley and Stephens* involved a murder conviction for a killing for cannibalism by sailors under extreme deprivation after a shipwreck. [1884] 14 Q.B. 273 (Eng.). Although an English case, it has been taught to many generations of American law students in introducing criminal law and exemplifies this view of "criminal justice." On the common origins of the U.S. and English carceral states see Jonathan Simon, *Uncommon Law: America's Excessive Criminal Law & Our Common-Law Origins*, 143 *DAEDALUS* 62 (2014).

²² KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1st ed. 1969); Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1618 (1986) (explaining that taken for granted in judicial acts are the organized systems of violence that carry them out).

but many will be stopped by police officers (and when we are that experience is likely to be strikingly racialized).²³ If the administrative state is the “dark matter” of the modern legal state—making up the great bulk of actual regulation of economy and society invisible if largely intelligible to the principles of legality—the carceral state is the darkest region of the administrative state, even less visible to the public, and even less subjected to legal norms through the operation of court review and legislation.²⁴ Operating on the lowest status people in society, located mostly at the state and local level (which we tend to pay less attention to anyway), and mostly unelected, the carceral state is only forced into public attention at moments of collective violence.

Perhaps because the carceral state is so much less visible and accountable to public normative expectations, it has evolved more slowly in some respects than other aspects of the administrative state, let alone the legal state. We are using basic technologies of governance introduced mostly in the first half of the nineteenth century—the prison, uniformed police apparatuses of semi-military violence—and little has fundamentally changed (although more has been added on, as we shall see). This is especially true with respect to the nation’s complex “progress” toward equal dignity for all citizens regardless of racialization or queerness. When we look at our carceral state, it is like we are looking at a part of our political and social past. But, unlike some ancient supernova spotted in the Hubble Space Telescope, these outdated institutions, imbued with race and identity, are coexisting with us. Thus, the carceral state, deeply marked by racial othering and the privileging of whiteness in its foundations, has ever since lagged the legal state to which it is formally bound in its regard for equal dignity of all citizens.

The consequences of this may become clearer if we compare the United States to Europe.²⁵ Both created the modern carceral state of police and prisons around the same moment, 1780–1830.²⁶ In both, this took place simultaneously with the centralization of criminal law authority in

²³ See CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014).

²⁴ See BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 15–16 (2017).

²⁵ This has been a fruitful strategy in analyzing the American carceral state. See, e.g., DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2010); WHITMAN, *supra* note 1.

²⁶ See FOUCAULT, *supra* note 11. On the prison in the United States, see REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE 1776–1941* (2008). On police in the United States, see MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005) (describing a broad expansion in the police power, including urban police departments in response to the revolution).

legislatures and subordinated courts.²⁷ Sometimes described as the “legality principle,” this centralization is known best as a limit on the state’s power to punish, and is enshrined in constitutional provisions such as the ban *ex post facto* laws, in the due process vagueness doctrine, and in the bar on prospective application of criminal definitions expanded by judicial opinion (even though it corresponds to a great increase in the practical power of the criminal law). However, the aspiration of public law to regulate the authority of the criminal law had little practical application to the operation of the police and the penitentiary, which—over the course of the nineteenth century—formed the less visible foundations of the carceral state. In theory, these carceral organs are also creatures of the legislatures with the courts as the point of control. Thus the power of the police is, in principle, nothing but an extension of the legal authority of the legislature to be ultimately affirmed or not by the courts; likewise, nobody goes to prison, generally speaking, but through the order of court, or even to jail without the relatively prompt review of a court.

But, as students of the carceral state have rediscovered in every generation, theory and reality do not match.²⁸ For example, police decide which laws to enforce. Furthermore, police have near complete discretion to stop anybody because of broad terms of many criminal offense definitions and the huge penumbra of inaccuracy sanctioned by the concept of reasonable suspicion.²⁹ Prisoners in the United States are almost to a person held under a legally imposed sentence.³⁰ However, their actual conditions of confinement—including extended periods of solitary confinement in total isolation conditions common to supermax-style

²⁷ Perhaps the leading exponent of this in the Anglophone world, and heavily influential on American thinkers, was Jeremy Bentham, whose prominent works on the “science of legislation” in the late eighteenth and early nineteenth century described a system of legislative authority and judicial fealty to legislated law. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 220 (1989) (describing Bentham’s advocacy of legislative supremacy and his criticism of common law).

²⁸ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016).

²⁹ As long as the police have probable cause or reasonable suspicion they can subject anyone to at least a stop, even the crime for which the police are stopping them is a mere pretext to allow an investigation of another crime. *Whren v. United States*, 517 U.S. 806, 809–19 (1996).

³⁰ Margo Schlanger, *Differences Between Jails and Prisons* 42 (2003) (unpublished essay prepared for Prisons Seminar, Harvard Law School), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/The_Difference_Between_Jails_and_Prisons%20.pdf [<https://perma.cc/5L2D-696H>] (contrasting jails, which house pretrial defendants, with prisons, which house mostly long-term felony offenders).

prisons in the United States—is a function almost totally controlled by the correctional bureaucracy.³¹

At the center of this complex of legal and carceral power formed at the end of the eighteenth century in both Europe and the United States is a “twinned” subject whose double nature elides reform of criminal justice from one generation to another.³² One twin is the criminal law violator; the citizen who, having broken the social contract, is considered the proper target of retributive communal anger and the proper instrument to deter others. This twin is in the grip of the legal state, held or bailed, subjected to trial by jury, and only if found guilty of all the essential facts beyond a reasonable doubt, subjected to punishment. It is this twin, enshrined in the constitutional promise of due process onto which a series of legal rights has been attached—first against the federal government, and later, through the Fourteenth Amendment’s extension of that phrase, against the states—to the broad array of criminal defendants in the twentieth century.

But when we leave the sphere of the courts and enter into those less visible spaces of the carceral state (policing and punishment) to which, as we have seen, it has been attached since the end of the eighteenth century, we find that the law violator was only the momentary guise of another kind of subject.³³ This other subject, the twin of the law violator for the legal state, is the abnormal subject. The abnormal may be a citizen, or they may not be. They may be a law violator, or they may not be (yet). But it is not their violation of the social contract that brings them into the surveillance and control of the carceral state. Rather, the carceral state reaches out to touch them because of their abnormality, i.e., those traits or features that stand out as in some degree monstrous, aberrational, and above all dangerous.³⁴ Here the due process and rights so central to the state’s handling of the criminal violator can be dispensed with. Most of the coercion exercised on the abnormal subject will be done outside the domain of courts altogether, in interactions between citizens and police on streets or buses,³⁵ in schools,³⁶ or prison solitary units.

³¹ KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

³² FOUCAULT, *supra* note 11.

³³ I am borrowing Marx’s famous contrast between the sphere of circulation, where values like contract, property, and liberty, dominate, and what he calls the sphere of production, where coercive control by the owner of capital over the seller of labor power prevails. See 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY ch. 6 (Friedrich Engels ed., Samuel Moore & Edward Aveling trans., Lawrence & Wishart 1974) (1887).

³⁴ See FOUCAULT, *supra* note 11.

³⁵ The Supreme Court has repeatedly upheld searches by drug enforcement police who have stopped and boarded public buses for the purpose of identifying possible drug couriers and subjecting

When the highest authorities of the modern legal state acknowledge the carceral state and all the power it exercises over the abnormal subject at all, it is to gloss over or simply ignore the differences in the principles that guide the conjoined apparatuses of government. A good example on the penal side of the carceral state is the noble principle of proportionality that informs the Eighth Amendment's ban on "cruel and unusual punishments" and authorizes courts to overturn penal sentences that are "grossly disproportionate."³⁷ This principle might have some power if the purposes of punishment were limited to the purposes recognized by the generations that forged the legality principle, namely retribution and deterrence (with their internal self-limiting commitments).³⁸ However in the forging of the modern criminal law those ends were merged with two additional penal rationales born at the end of the nineteenth century and infused with eugenics and scientific racism, namely rehabilitation and incapacitation. These rationales would have been unrecognized by the great philosophers of the classical criminal law like Cesare Beccaria and Jeremy Bentham, and their legality principle,³⁹ and instead express the core motivations of the carceral state to identify and arrest abnormality and to cure or contain it if it threatens society.⁴⁰ The result of this unacknowledged merging of legal and

them to a seat-side public request to examine their bags as potentially consensual. *Florida v. Bostick*, 501 U.S. 429 (1991) (overturning a per se rule against bus searches); *United States v. Drayton*, 536 U.S. 194 (2002) (overturning a per se rule requiring that officers advise passengers of their rights during bus searches).

³⁶ Criminalization often begins in schools. VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011). The Supreme Court has held that school staff may search students without a warrant and with reasonable suspicion (rather than probable cause), *New Jersey v. TLO*, 469 U.S. 325, 341 (1985), or in some circumstances (athletes and competitive school organization participants) suspicionless searches in the form of drug tests, *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

³⁷ *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.").

³⁸ It is retribution and deterrence that defined ends of the criminal law from the middle of the eighteenth century until the end of the nineteenth century and still dominate its legal philosophizing. The Constitution placed them as a limit on the other purposes of punishment. The late Justice Antonin Scalia made this point in part of his concurring opinion in *Ewing v. California*, where he argued that only retribution, the principle that punishment is deserved for moral wrongdoing, could animate a meaningful proportionality principle. 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment). For Justice Scalia, the Constitution contained no such commitment to a single penal purpose and thus found no proportionality principle at all. *Id.* at 31–32.

³⁹ On Bentham, see LIEBERMAN, *supra* note 27. On Cesare Beccaria, whose 1764 book *On Crimes and Punishments* may have been the most influential book ever written on criminal law, see JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* (2014).

⁴⁰ In our legal theory, the law breaking citizen and the abnormal subject of surveillance and segregation should be hermetically sealed off. The state can segregate dangerous subjects or punish

carceral principles is nothing less than the death of the proportionality (perhaps the central Enlightenment virtue for penal law). Citing the importance of deferring to state choices among penal policies, and the rationality of extremely long prison sentences for minor crimes if based on the need to incapacitate the prisoner against future crimes, the Supreme Court upheld a twenty-five-year to life sentence for a property theft.⁴¹

On the police side, the legal state has insisted since 1961 on assessing the reasonableness of many police activities through the application of the Fourth Amendment and the exclusionary rule.⁴² This landmark ruling and the early efforts of the Warren Court to enforce it, marked a belated acknowledgment that the police side of the carceral state operated unregulated by and even in tension with the values of the legal state. As developed in the intervening decades, however, the jurisprudence of the Fourth Amendment has been one of exception after exception to the legal requirements of reasonableness in the name of the exigencies, special needs, or special expertise of the police.⁴³ Thus while the Eighth and Fourth Amendments purport to subordinate the carceral state in its prison and police modes to the legal state, the failure of the courts or legislatures to recognize the distinctive logic of the carceral state, or even worse to recognize it and defer to it, have made them hollow promises for the most part.

This uneasy marriage of legality and abnormality which characterized the emergence of modern criminal justice institutions in both Europe and the United States in the nineteenth century had a distinct political-economic context: the project of disciplining once semiautonomous rural laborers and adventurers into labor power that could be consumed, with surplus value extracted.⁴⁴ The enlarged carceral state that formed under the surface of the legal state and its sovereignty came to exert most of its

lawbreakers under two different sets of rules. But given the plasticity of the criminal law and the discretionary power of the carceral state, the two have always blended extensively. The four purposes of punishment are one of the few places our texts even obliquely reference this.

⁴¹ *Ewing*, 538 U.S. at 30–31 (plurality opinion) (upholding a twenty-five-year to life sentence under California's three strikes law as not grossly disproportionate given California's choice of incapacitation as its primary penal rationale).

⁴² *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that the exclusionary rule, as well as the Fourth Amendment itself, are incorporated in the Due Process Clause of the Fourteenth Amendment).

⁴³ *See, e.g., Kentucky v. King*, 563 U.S. 452, 455 (2011) (upholding warrantless entry to home to prevent the destruction of evidence even though provoked by police activity); *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (upholding a stop on less than probable cause based on police expertise and reasonable suspicions that a crime was occurring).

⁴⁴ FOUCAULT, *supra* note 11; MARX, *supra* note 33, ch. 6.

immense power over the bodies of working class communities.⁴⁵ In short, the scale of the carceral state was determined not by legal but by economic and social factors created by the emergence of capitalism.

For most of the nineteenth century, this dual structure allowed courts and lawmaking institutions to maintain superficial equality in their mandate while class based inequality received critical ideological and coercive support from the actual application of law mediated by police and penal establishments. But as working class citizens won the right to vote and created powerful labor parties in Europe and formed powerful urban political “machines” in the United States,⁴⁶ the influence of the legal state with the carceral state began to moderate the severity of the latter’s application to the general body of the working class.⁴⁷ After the catastrophe of World War II, the growth of national legal rights and then transnational human rights through the United Nations and (in the case of Europe) the Council of Europe has reshaped the carceral state into a subordinate unit of the welfare state. This produced a distinctive European penalty that emphasizes human dignity and reintegration.⁴⁸ Although the practice of the carceral state may often fall short of those goals, the embeddedness of legal norms there provides restraint largely absent in the United States.

In the American context, the first phase of this evolution proceeded quite similarly, perhaps even accelerated by the political revolution of 1776, which removed the monarchy, installed something close to universal white male suffrage, and generated widespread elite concerns about breakdowns in civil and familial hierarchies.⁴⁹ Yet, from the beginning of the Republic, the organization of legal authority—prosecutors and police—at the local level, has been an outgrowth of the need for a race-based system of social control that could turn the general laws of the state into the precise instruments of a defense of whiteness, whether against black, Mexican, Chinese, or Native American peoples as needed by location.⁵⁰

⁴⁵ Dario Melossi, *Introduction: The Simple “Heuristic Maxim” of an “Unusual Human Being,”* in GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* xii (rev. ed. 2003).

⁴⁶ WILLIAM STUNTZ, *COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (discussing role of urban political machines in moderating punitiveness of the carceral state in the early 20th century).

⁴⁷ DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* (1985).

⁴⁸ WHITMAN, *supra* note 1; see DIRK VAN ZYL SMIT & SONJA SNACKEN, *PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY: PENOLOGY AND HUMAN RIGHTS* (2009).

⁴⁹ DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (rev. ed. 1990).

⁵⁰ STEVEN WILF, *LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* (2010) (describing how local institutions allowed racial precision in penal control).

It is the maintenance and reinscription of that carceral state by race in the period after Reconstruction that perhaps more than the early Republic (including slavery itself) has determined the fate of the United States to be an exceptional carceral state. After the nation's brief flirtation with national intervention in local criminal justice for the purpose of de-racing it during Reconstruction,⁵¹ the growth of the carceral state would continue and indeed accelerate in the late nineteenth and early twentieth centuries, fanned by fears of immigrants in the North, "free" black citizens in the South, and theoretically equal fellow citizens in the conquered Mexican territories.⁵² Along the color lines of these already traditional low-level "civil wars" fought out at the local level in American society both before and after the great Civil War that created our version of national citizenship, the emergence of eugenics and state racism remade the carceral state at the turn of the twentieth century.⁵³

II. THE AGE OF EUGENICS

In retrospect, we can see that the relationship between the legal state and the carceral state in the United States, relative to Europe, was always distinguished around the problems of race and colonial domination, with a smaller, more locally-dominated legal state and a larger and less legally-bound carceral state taking shape in the United States.⁵⁴ The needs of slavery and sustaining the dispossession of indigenous communities by colonial expansion westward have no doubt left their mark on our contemporary carceral state, but their legacy was significantly altered in ways that have made them even more intractable by the great reframing of the carceral state that took place in both the United States and Europe at the end of the nineteenth and the beginning of the twentieth centuries and was associated with the rise of positivist criminology and scientific racism.⁵⁵

⁵¹ U.S. Army courts for example allowed black citizens to testify, something forbidden in state courts. FONER, *supra* note 10, at 8.

⁵² STUNTZ, *supra* note 46 (linking the growth of the criminal justice system in American history with racial and nativist fears).

⁵³ MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976* (Mauro Bertani, Alessandro Fontana & Arnold I. Davidson eds., David Macey trans., 2003). In the United States this also corresponds to the emergence of immigration exclusions based on nationality.

⁵⁴ WHITMAN, *supra* note 1.

⁵⁵ For general accounts of this turning point in the history of criminal justice, see DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980) (describing the American case), and GARLAND, *supra* note 47. More recently, Khalil Gibran Muhammad has highlighted how much this targeted black criminality. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA* (2010).

In important respects, the story of divergence accelerated at the turn of the twentieth century as the problem of governing societies in both Europe and the United States came to be defined in biological and evolutionary terms. The age of eugenics posited that variation among the major racial groups of humans explained the global success of Europe as the dominant colonizer, and the relative success of European-originating Americans (particularly western and northern European) in the United States and other settler colonial societies.⁵⁶ Eugenacists believed that practices of managing the racial makeup of the nation—both micro-interventions aimed at particular individuals and macro ones aimed at population flows—could be used to optimize the racial (and thus social and economic) health of the nation.⁵⁷ The most potent form of scientific racism in its influence on the carceral state was Cesare Lombroso's positive criminal anthropology, which posited that criminals were evolutionary throwbacks, whose deviant behavior was a natural expression of their more primitive constitution.⁵⁸ Lombroso and his acolytes across in Europe and the United States called for an end to retributive and deterrence-based punishment while advocating the acceptance of medicalized supervision and isolation of criminally abnormal individuals in the name of incapacitation (and perhaps rehabilitation where possible).

In Europe, jurists stiffly resisted the penetration of the legal and carceral states by eugenic thinking, because they saw scientific racism as a decisive challenge to legality (and thus their own authority).⁵⁹ But in the United States, with race already central to all aspects of government, the already strong grip of the carceral state on the legal state, and the unique role of the U.S. prosecutor as a translator between the two, eugenic ideas were embraced with enthusiasm and became central to the “reforms” we still call “progressive.”⁶⁰ The fairly broad carceral oversight and control of

⁵⁶ WHITMAN, *supra* note 18, at 50–52 (discussing American immigration laws based on racial preferences and as models for Nazi planners); Ann L. Stoler, *Making Empire Respectable: The Politics of Race and Sexual Morality in 20th-Century Colonial Cultures*, 16 AM. ETHNOLOGIST 634 (1989) (describing the centrality of eugenics to colonialist notions of European supremacy).

⁵⁷ ELAZAR BARKAN, *THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS* (1992); CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1991); STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. ed. 1996); NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE* (1982); Mae Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999).

⁵⁸ DAVID G. HORN, *THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE* (2003).

⁵⁹ *Id.*

⁶⁰ For a more in-depth analysis, see Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135 (2006). On the

the urban working classes developed in the nineteenth century came to be decisively fractured on lines of race at the turn of the twentieth. Immigrants of European origin were placed in a frame of possible improvement and socialization. However, blacks—escaping the deep South to northern and midwestern cities in large numbers in the early stages of the Great Migration—were framed as largely unassimilable and fit targets for punitive segregation and exclusion.⁶¹ From this period on, America’s carceral state enforced a color line not through a distribution to different institutions (slavery versus penitentiary) but through the construction of the black citizen (male or female, usually young but older as well) as the “symbolic assailant.”⁶² The black citizen was defined as the dangerous or hardened end of any continuum of abnormal citizens subject to the carceral state. Of course that has never meant an immunity for whites who, through their own deviance, queerness, or class othering, have always formed a large portion of the subjects of the carceral state.⁶³ It does, however, mean that every parameter along which we can measure disparity in carceral state contact and treatment—from arrest, through juvenile court waiver, through the death penalty—is distributed by race with blacks forming the more punished and whites the least.⁶⁴

The strong embrace of eugenics and state racism at the turn of the twentieth century led to the creation of a larger and more divergent continuum of carceral institutions in the United States to contain the defective and rehabilitate the redeemable. Only the fascist European states of the mid-twentieth century would come anywhere close to the level of U.S. enthusiasm for the use of carceral institutions to “govern” the

relationship of eugenic thinking to the Progressive Era reforms like juvenile courts, probation, and parole, see ROTHMAN, *supra* note 55, at 58.

⁶¹ Opposition to Southern and Eastern European immigrants was strong enough by the 1920s to end legal immigration. Those immigrants already here were viewed as dangerous, but potentially assimilable. In contrast, black migrants from the South were characterized as a threat to urban security that was far less amenable to socializing strategies, and to which the most punitive forms of segregation and exclusion were appropriate. See generally MUHAMMAD, *supra* note 55.

⁶² The term was originally coined in the 1960s by sociologist Jerome Skolnick. See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 44–45 (3d ed. 1994); see also Jeannine Bell, *The Symbolic Assailant Revisited* (Ind. Univ. Maurer Sch. Law Legal Studies Research Paper Series, Research Paper No. 371, Apr. 2017), <http://ssrn.com/abstract=2955845> [<https://perma.cc/6JS9-LEPV>].

⁶³ For example, white prisoners made up 34% of prisoners in 2015. See CARSON & ANDERSON, *supra* note 30, at 6 tbl.3.

⁶⁴ Thus, while white prisoners made up 34% of prisoners, only 312 whites were imprisoned per 100,000 free citizens over 18, while 1,745 blacks were imprisoned and 820 Hispanics per 100,000 in the over-18 population. *Id.* at 8 tbl.5.

population in racial terms—including sterilization of asylum and prison inmates, life sentences for recidivists, and in the racial focus of policing.⁶⁵

III. WAR ON CRIME

In Europe, beginning in the 1960s, states abolished the death penalty and, to varying degrees, accepted a human rights framework in which their historically lower levels of incarceration and more rehabilitative penal ideology has moved, to some degree, above politics.⁶⁶ In the United States, beginning at the same time, states reaffirmed their support for the death penalty and began to implement harsher sentencing laws and a penal ideology of harsh punishment and exclusionary segregation.⁶⁷

Historians will continue to debate the relative balance of factors that drove policymakers at the federal and state level to expand the carceral state many times during the last three decades of the twentieth century.⁶⁸ The politics included a toxic mix of popular anxiety over street crime in the cities,⁶⁹ elite anxiety over urban insurgencies like the Watts Riots of 1965 and prison riots,⁷⁰ and growing mismatches between urban poverty populations and low skill labor opportunities.⁷¹ Historians have been rightly troubled by the proximity between the rise of civil rights laws and values and expansion of the carceral states, as if the latter were a response to the former.⁷²

But the motivations of policymakers and voters may be less important than the fact that the visible changes in the legal state undertaken during the Civil Rights Era, and the war on crime that followed, had little bearing on the largely invisible carceral state which continued undeflected with the mission begun in the eugenic era. While the legal state may have undertaken to reduce visible discrimination on the basis of race and to sanction serious crime instead of race and poverty, the carceral state, now much expanded, continued its historic concentration on the black

⁶⁵ Not to mention cross-racial marriage which was criminalized in thirty states in this period, many of them outside the South. WHITMAN, *supra* note 18, at 12.

⁶⁶ VAN ZYL SMIT & SNACKEN, *supra* note 48.

⁶⁷ GARLAND, *supra* note 25; WHITMAN, *supra* note 1; FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

⁶⁸ For the most current assessment, see generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

⁶⁹ TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001).

⁷⁰ HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* (2016).

⁷¹ WESTERN, *supra* note 4.

⁷² HINTON, *supra* note 68.

communities that formed the core of abnormality (at least as frontline carceral workers and their managers had long learned to understand it).⁷³ From this perspective, changes in the administration of the penal system during the twentieth century followed from the strategic decision to expand the reach of the carceral state, not a change in its underlying philosophy. For instance, the partial abandonment of parole and rehabilitation in prison was consistent with the expanded carceral control over poor people of color whose raced and irremediable abnormality had long been normalized in the basic perceptions and procedures of the police and prisons.

Since the American and European carceral states diverged, a more fruitful comparison can now be found between the American carceral state and the rest of the administrative and, even more so, the legal state. Seen this way, a different historical trajectory comes into view. We can more easily see the traces left on the carceral state by the century-long interrupted struggle to “reconstruct” American law and society to undo the status of slavery and its afterlives. For example, it was not until the 1970s and 1980s that federal courts finally ended practices of plantation-like labor organized along racial lines in southern prison systems that reflected norms and practices consistent with those during the height of Jim Crow in the early decades of the twentieth century.⁷⁴

The Civil Rights Movement of the 1950s and 1960s not only accelerated pressure for racial equality in the administrative and legal states, but also shed visibility on the carceral state’s role in maintaining the racialized hierarchy of the status quo. The great civil rights victories of the mid-1960s were achieved in the legal state through statutes promising to end discrimination in jobs and housing.⁷⁵ Implementing these legislative achievements, especially in areas like housing, would have taken an aggressive expansion of administrative agencies aimed at enforcing them that never came. In the carceral state however, no major federal or state civil rights initiatives were forthcoming.⁷⁶ Indeed, no other segment of American government was as aggressively opposed to civil rights objectives as those institutions making up the carceral state. This was perhaps most visible in police departments, which viewed themselves as the frontline against the desegregation of jobs, schools, and housing

⁷³ *Id.*

⁷⁴ MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998).

⁷⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2014)); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

⁷⁶ FRIEDMAN, *supra* note 24, at 51 (arguing that legislatures will not legislate rules for policing).

demanded by civil rights protesters in this period.⁷⁷ The prison side of the carceral state was perhaps even more bitterly opposed to civil rights claims, especially as they arose in the context of challenges to the authority of guards and culminated in spectacular failures for the carceral state like the Attica prison uprising.⁷⁸

The national commitment to protecting equality through law in areas like employment and housing at least achieved landmark legislation.⁷⁹ When it came to addressing racism in the carceral state, however, no substantial legislation ever emerged and it took until the 1990s for concerns about police racism to make it into national crime legislation.⁸⁰ Instead, it fell to the Supreme Court to produce a body of civil rights law in the form of constitutional criminal procedure rules governing when police could stop, search, and arrest citizens. This body of law, however, focused on the reasonableness of police searches and seizures, leaving mention of race or equality to footnotes.⁸¹ Among its many flaws as a method for countering the normalization of race in the carceral state, constitutional criminal procedure was premised primarily on the power of the legal state to incentivize reform in the carceral state. In particular, the penalty of excluding evidence collected in violation of the Fourth Amendment presumes the carceral state either cares about individual legal outcomes in the courts or can be made to do so by prosecutorial influence.⁸² Everything we have discussed about the power of the carceral state—its focus on racialized notions of abnormality, and the role of prosecutors as translators between the legal state and the carceral state—suggests why this is unlikely. The focus of the carceral state is on abnormality not crime; it exercises permanent surveillance and control, not a single game of guilt or innocence. And prosecutors depend on the cooperation of police far more than the other way around.

Whatever chance criminal procedure as a system of judicial discipline over the police through the exclusionary rule might have had was soon

⁷⁷ Jonathan Simon, *Policing After Civil Rights*, in *THE SAGE HANDBOOK OF GLOBAL POLICING* 373 (Ben Bradford, Beatrice Jauregui, Ian Loader & Jonny Steinberg eds., 2016).

⁷⁸ THOMPSON, *supra* note 70; see also Dan Berger, *Mass Incarceration and Its Mystification: A Review of the 13th*, *AFR. AM. INTELL. HIST. SOC'Y BLOG* (Oct. 22, 2016), <http://www.aaihs.org/mass-incarceration-and-its-mystification-a-review-of-the-13th/> [<https://perma.cc/Y4V5-EC99>].

⁷⁹ See Civil Rights Act of 1964; Fair Housing Act.

⁸⁰ Federal funding flowed to police departments after 1968, but none of it was conditioned on improvements in police respect for the civil rights of minority citizens. See HINTON, *supra* note 68.

⁸¹ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968).

⁸² The Court has repeatedly emphasized that the primary purpose for the exclusionary rule as a remedy in Fourth Amendment violations is deterring police officers by denying the evidence use in prosecuting the defendant whose rights were violated. See *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016).

engulfed as the legislative and executive sides of the legal state entered into a war on crime in which urban police were to be the frontline soldiers.⁸³ The very kinds of aggressive confrontational policing that police were beginning to use against black citizens were embraced as best practices to be nationalized in the war on crime.⁸⁴ By the time the prison population began to rise noticeably in the late 1970s and early 1980s, the carceral state had been greatly enlarged while leaving its racialized conception of abnormality in place and normalizing its racist practices as crime control.

Critically, the eugenic weaponizing of the carceral state against racially abnormal subjects (and particularly black citizens) was never repudiated. The expansive carceral state attuned to its goals remained largely intact as the war on crime took off as a political agenda in the 1960s and 1970s. The place of biological theories of racial degeneracy or inferiority was quickly replaced by new sociological theories that provided historical and cultural explanations for the same patterns of inequality.⁸⁵ Theoretically, these ideas were more amenable to reform policies aimed at undoing the damage of history on culture. But as applied to black citizens living in concentrated districts of economic disadvantage in the post-World War II urban landscape, they lent support to an aggressive war on crime. Even the language of the most influential sociological account of “ghetto” life in the 1960s, Daniel Patrick Moynihan’s “tangle of pathologies,” invoked heightened concerns about risk and abnormality associated historically with biological racism.⁸⁶

This created a significant lag in the status of race equality between the legal state and the carceral state. Although the workforce within the carceral state underwent substantial change between the 1960s and the present, becoming far more diverse, better educated, and less likely to harbor racist, sexist, or homophobic values,⁸⁷ their mission, a ramped-up war on “abnormality,” remained inextricably bound to race (not alone, but with other factors like neighborhood, gender, and age). However, because the carceral state was now wrapped in a “war on crime” presumption of valor, high levels of confidence in the police and support for harsher prison sentences and the death penalty remained fixtures of American public opinion in the last decades of the twentieth century.

⁸³ HINTON, *supra* note 68; JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 60 (2007).

⁸⁴ HINTON, *supra* note 68.

⁸⁵ *Id.*

⁸⁶ DANIEL PATRICK MOYNIHAN, *The Tangle of Pathology, in* THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29 (1965).

⁸⁷ DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE (2008).

At moments, like the 1991 beating of a black motorist in Los Angeles captured on video, temporary gaps in this support opened.⁸⁸ But, overall, the lack of visibility of the carceral state and the normalization of a race-based war on crime rooted in the racialization of abnormality made any racial justice critique of the carceral state extremely limited in its impact. In the Supreme Court's major encounter with the question of racial discrimination in extreme punishment during the era of mass incarceration, *McCleskey v. Kemp*,⁸⁹ a closely divided Court dismissed impressive statistical evidence that racial factors (especially the whiteness of the victim, but also the bias against black defendants, especially when they killed a white victim) were driving death penalty selection. In the majority view, only direct evidence of a discriminatory intent on the part of the legal state or the carceral state, particularly prosecutors, juries, or courts, could constitute a violation of equal protection.⁹⁰ Any step toward recognizing disparate patterns of treatment as a constitutional problem would, according to this view, compromise the essential discretion of local actors in the carceral and legal states; discretion is necessary to allow abnormality, rather than crime, to be the subject of the punitive power. Not even civil rights organizations, let alone their allies in labor unions and mainstream liberal organizations, attempted to challenge prisons or police on mass incarceration and aggressive policing until quite recently. That burden fell to remnants of the social justice movements of the 1960s, many of whom helped to found Critical Resistance in Berkeley in 1999, including Angela Davis, Ruth Wilson Gilmore, and many other long-term social justice activists.⁹¹

IV. THE RETURN OF THE REPRESSED: THE CARCERAL STATE FLUNKS THE TEST OF COLOR-BLIND EQUALITY

In the decades since the great legislative victories of the Civil Rights Movement, the values of equality and freedom from racial discrimination have undergone two very significant developments. First, they have become national values, reflected in what has been called our civil religion

⁸⁸ Ironically, the Los Angeles riots that took place following the acquittal of the police officers helped reinforce the war on crime's logic, and confidence in police quickly recovered. See JORDAN CAMP, *INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE* 115 (2016).

⁸⁹ 481 U.S. 279 (1987).

⁹⁰ *Id.* at 297–98.

⁹¹ I have heard both Davis and Gilmore comment on their personal surprise at the level of response, especially from young activists; an early sign that the values clash between the carceral state and the equality principle of the legal state was becoming apparent for younger adults, an effect we will return to.

of constitutional faith, and marked by the national holiday observing the birthday of the Rev. Dr. Martin Luther King, Jr. Polling data shows that racism is now among the most discrediting attributes that can be associated with people and, thus, has become a charge vigorously contested by most people to whom it is applied.⁹²

Second, the meaning of racial equality, and antidiscrimination values in particular, reflected in legal precedent, have been narrowed to a rejection of decisionmaking based on racial animus against others, and a commitment to the social ideal sometimes described as “color blindness.”⁹³ Many legal scholars have persuasively argued that this narrow color-blind conception of equality renders the promise of equal protection and the protection of civil rights empty to the victims of historical discrimination who are consistently undermined by the hardening of generations of discriminatory conduct into structural advantages and disadvantages.⁹⁴ For example, discriminatory government preferences for whites to obtain low-cost federally guaranteed mortgages starting in the 1930s has added to the wealth gap between whites and blacks, even as official discrimination has been reduced.⁹⁵ But if this wealth gap, or harmful contemporary choices forced by it (like blacks being more vulnerable to the subprime market for mortgages) were brought to court under the “color-blind” jurisprudence favored by a majority on the Supreme Court, the claims would lose for lack of evidence of intentional discrimination.

Until the explosion of the Black Lives Matter movement, it seemed that the success of color-blind jurisprudence in the Supreme Court⁹⁶ and in

⁹² See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014).

⁹³ Color blindness as a metaphor for what government respect for the equal protection of citizens means is often traced to Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” 163 U.S. 537, 559 (1896) (Harlan, J, dissenting). Since the 1980s, the metaphor has been deployed mostly by conservatives in the name of limiting governmental efforts at redistribution aimed at ameliorating the history of official racism. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1061–62 (2010) (explaining color blindness as an ideology); see also OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2014) (discussing this critique and a fascinating empirical examination of the limits of the color-blind metaphor).

⁹⁴ HANEY LÓPEZ, *supra* note 92; OBASOGIE, *supra* note 93.

⁹⁵ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629 (2010); James Surowiecki, *The Widening Racial Wealth Divide*, NEW YORKER (Oct. 10, 2016), <http://www.newyorker.com/magazine/2016/10/10/the-widening-racial-wealth-divide> [<https://perma.cc/88Z4-UJGQ>] (describing history of federal discrimination and its contemporary consequences).

⁹⁶ For the Supreme Court’s embrace of color blindness, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down school integration programs that did not

popular legal culture had largely neutralized the rise of civil rights to the pantheon of national values as an actual tool for reform.⁹⁷ Yet over the past ten years, the carceral state's increasingly visible racial disparities—in particular its most punitive and aggressive actions—seems to have crossed a threshold of public recognition that have broken through what Haney López helpfully describes as a “shield” that has immunized racially impactful criminal justice programs from criticism.⁹⁸ In the recent past, claims of discrimination in the criminal justice system made to the courts were generally dismissed on the grounds that racially correlated statistical patterns did not prove discriminatory intent and were likely explainable by legitimate factors unaccounted for in the data.⁹⁹ While that shield may still work in court, it appears to be breaking down rapidly in popular legal consciousness. In particular, the Black Lives Matter movement has now evolved into a full-fledged multiracial social movement buttressed by a growing bipartisan national consensus that the carceral state in its present form is racially discriminatory. Color-blind jurisprudence may remain a powerful cloaking device for the racial hierarchy maintained in the private sector and in the benefit aspects of the legal and administrative states. But it seems to be losing its power for the carceral state. Indeed, given the history recounted here in which the carceral state has been organized around policing and punishing abnormality (rather than law breaking), and in which abnormality has been blackened or raced, how could the actions of the carceral state be anything like color-blind. After all, drug policing has been widely recognized in recent years to be focused on communities and young people of color; a practice which the Supreme Court implicitly accepted in the 1990s when it refused to find pretextual automobile stops unconstitutional.¹⁰⁰

remediate past intentional racial discrimination); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all government racial classifications, including affirmative programs, are subject to strict scrutiny under the Fourteenth Amendment); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down affirmative action programs for minorities in the form of government set-asides). Popular uptake of color blindness has also manifested in opposition to affirmative action programs in employment, government benefits, and education.

⁹⁷ Haney López, *supra* note 93, at 1062 (noting that color blindness can be critiqued as a sword against programs helpful to minorities but also as a shield against the recognition of discrimination in a criminal justice context).

⁹⁸ *Id.*

⁹⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting an equal protection challenge to a Georgia death sentence based on statistical showing that a person in the defendant's position as a black person convicted of killing a white victim was more likely to receive a capital sentence).

¹⁰⁰ *Whren v. United States*, 517 U.S. 806 (1996) (holding that probable cause of a traffic violation renders the resulting stop reasonable regardless of the police's actual reasons for the stop). That Justice Sonia Sotomayor recently called out the racial logic of this and other recent decisions in her dissent in *Utah v. Strieff* is another sign that the lack of color blindness now demands recognition. 136 S. Ct.

Of course this does not mean that we should now embrace color-blind jurisprudence as the proper way to understand the constitutional promise of equality under the law. We can and should argue for a more structurally cognizant approach to equality enforcement that looks beyond one-off decisions to patterns and practices, as well as to the institutionalized legacies of historic discrimination as they operate in the present distribution of risks and opportunities. Yet it is important that we do not miss the opportunity to hold the carceral state fully accountable for its visible dependence on race. The contemporary carceral state relies on racial coding for almost everything it does, from arrest through prison. While I will highlight some possible action paths to make this accountability meaningful in my Conclusion, this is a conversation that should be led by impacted communities above all. This is an important opportunity to demand an end to what amounted to a system of targeted racial recruitment for arrest, prosecution, and punishment (just the kind of preferential treatment condemned in the affirmative action cases celebrating our color-blind Constitution) and demand a carceral state that actually protects minority lives. It is telling in this regard that the Black Lives Matter movement is the first civil rights movement in U.S. history that has put the carceral state at the very center of its critique of American racism and its demands for change.¹⁰¹

V. REFORMING THE CARCERAL STATES AS IF BLACK LIVES MATTER

Of all the forces that anchor hyperpunitive policies in the U.S. carceral state, none has seemed more intractable and resistant to change than race, or rather the history of white supremacy and racial othering that we sometimes call race for short hand.¹⁰² Today however, it may be the most plastic, the most capable of transmitting forces of deep change into the heart of the carceral state. I fear that I will inevitably be labelled wildly overoptimistic, but not as much as I fear giving into a battle-hardened pessimism that sees the present institutional order as impossible to change. Two of the features of our present common sense about mass incarceration

2056, 2070 (Sotomayor, J., dissenting) (“[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.”).

¹⁰¹ Platform, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> [<https://perma.cc/WX9R-NUEQ>]. The Black Panther Party, founded in Oakland in the 1960s, targeted much of its early criticism on police and prisons but moved quickly to establish itself as liberation movement. See JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2013).

¹⁰² It is not that white supremacy has been unchangeable, but that it has reestablished itself through new mechanisms despite significant efforts at legal reform. ALEXANDER, *supra* note 4; Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001).

and race are telling in this respect. First, it is because the carceral state has for so long lagged the legal state on race that today it faces such a significant legitimacy deficit. The long war on crime provided a shelter for racial discrimination that is no longer available. Second, the very enlargement of the carceral state driven by that war on crime has made it exceptionally important to the reproduction of racialized exclusion and inequality in the present era. That fact makes concerted civil rights movements focused on the legitimacy of the carceral state—like Black Lives Matter—at once necessary, transformative, and promising.

Most importantly, that movement finds a carceral state that is running a legitimacy deficit, particularly on race. The British political theorist David Beetham has provided a helpful way to split the difference between a purely empirical approach to legitimacy (which can diagnose a crisis only after open acts of disobedience and refusal to consent to the law), and purely normative approach (in which only a moral philosopher can tell whether an institution is legitimate or not, and no one else cares).¹⁰³ For Beetham, people do (and sometimes do not) hold particular institutions (or a whole state) as being legitimate and thus ruling as a matter of right, and they have reasons for doing so. Those reasons, grounded in history and circumstance rather than philosophical first principles, are where the empirical and the philosophical meet. Through survey, ethnographic, historical, and other kinds of qualitative and quantitative research we can try to understand the substantive normative values that support legitimacy.¹⁰⁴ Through critical philosophical and interpretive analysis of those values we can begin to identify potential gaps, or in Beetham's phrase, "legitimacy deficits," which while invisible to the empiricist, may be like the termite-ridden floor, ready to give way at the first serious pressure. The critical-philosophical and the empirical ideally need to come together to discern what these values mean to people in the world as they live it.

Those looking for the results of that idealized study can stop reading now as I have not done it. Instead let me restate my contention above that the contemporary carceral state now very likely stands on top of just such a legitimacy deficit with respect to the value of equality in the narrowed form

¹⁰³ DAVID BEETHAM, *THE LEGITIMATION OF POWER* (1st ed. 1991). For a collection of writings applying Beetham's ideas to criminal justice reform, see *LEGITIMACY AND CRIMINAL JUSTICE* (Justice Tankebe & Alison Liebling eds., 2013).

¹⁰⁴ Something, notice, that the more popular procedural justice approach to legitimacy tends to acknowledge but ignores as harder to change or reach than procedurally-based perceptions of legitimacy. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

reflected in “color-blind jurisprudence.”¹⁰⁵ While those to the left of me will immediately declaim that benefit can come from color-blind jurisprudence, the carceral state may be the exception that proves their rule. Precisely because it cannot actually stop taking race into account—without abandoning its century-long mission of governing abnormality—the carceral state faces an existential crisis. Indeed, when pressed to the wall on race, as in the New York City “stop and frisk” case,¹⁰⁶ the carceral state must itself begin to construct structural arguments about race and inequality.

Elsewhere I have developed the argument for why mid-course corrections—like more “evidence based policies”—may not suffice to resolve this crisis.¹⁰⁷ Here I want to close by addressing what we should want from this moment, if it is indeed correct that transformative steps can now be justified to bring the carceral state into better alignment with the color-blind equality values of the legal state, if not an even deeper commitment to equality. Reforms aimed at addressing unconscious bias among the actors of the carceral state, while worthy, will not be enough, compared to the massive and quite conscious racialized surface of abnormality on which the carceral state routinely requires them to act. Measures aimed at improving “trust”¹⁰⁸ between communities of color and frontline workers of the carceral state will not work even in their own terms without being attached to concerted efforts to recognize and reverse the historic racing of abnormality (including the resultant normalization of race for the frontline workers of the carceral state).¹⁰⁹

¹⁰⁵ See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (showing through the use of hypothetical cases how Fourth Amendment precedent authorizes police racial profiling of the sort that clearly violates color-blind equality principles).

¹⁰⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

¹⁰⁷ Jonathan Simon, *Is the U.S. Carceral State Facing a Crisis of Legitimacy?* (Jan. 17, 2017) (unpublished manuscript) (on file with author) (arguing that a changing social experience of crime as well as the solidification of equality and dignity as national values have created legitimacy deficit for the greatly expanded version of the carceral state that took shape during the war on crime from the 1970s through the 1990s).

¹⁰⁸ PRESIDENT’S TASKFORCE ON 21ST CENTURY POLICING, FINAL REPORT IV (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/MB9U-NP37>] (defining a major goal of the taskforce as increasing trust).

¹⁰⁹ An important step in this direction occurred late last year when the head of the International Association of Chiefs of Police, the largest organization of police departments in the United States, explicitly apologized on behalf of all police for “historical mistreatment of communities of color.” Merrit Kennedy, *Head of Police Chiefs Group Apologizes for ‘Historical Mistreatment’ of Minorities*, NPR (Oct. 18, 2016, 11:15 AM), <http://www.npr.org/sections/thetwo-way/2016/10/18/498380373/head-of-police-chiefs-group-apologizes-for-historical-mistreatment-of-minorities> [<https://perma.cc/QJ4G-PK7Y>].

Perhaps peculiar twinning of the legal and the carceral state in the modern system of criminal law enforcement through incarceration and policing cannot be undone.¹¹⁰ Efforts to purify the legal nature of the penal sanction, such as the determinate sentencing movement of the 1970s and 1980s, turned out to simply deepen the hold of racial norms on the carceral state.¹¹¹ Instead, it is race-based abnormality itself that must be expunged at the capillary level where the power to punish is applied to specific bodies. Only a sustained and democratic process can achieve such an expungement.

Reconstructing the carceral state will require a democratic process that involves impacted communities first and foremost in re-norming the abnormality against which the carceral state operates. It is not for a law professor in a university chair to determine what this would look like or take. I may know more about the history of the carceral state than many of the people who come into daily contact with it, but far less about what kinds of transformations would be necessary to build or even imagine a carceral state that is viewed as legitimate by the citizens who do. What history can tell us is that powerful investments of knowledge and power in the racial nature of abnormality will not be easy to reform or remove. Like a cancer they operate at the “DNA” level of our carceral institutions.

A first practical step necessary to lay the ground work for any serious democratic discourse over how to reshape the carceral state is to suspend those activities of the carceral state most saturated with racialized abnormality: extreme punishments, aggressive policing, and revolving door probation sanctions. All of those operations of the carceral state that depend most on discretionary judgments of abnormality are the ones most deeply infected by the malignancy of race, and they must be curtailed to close the zero point.

This will raise great howls of alarm. Since the late 1960s, a whole apparatus of hybrid federal and state/local police units, proactive policing models, and special courts have grown up both to target punishment and to capture some of the few social service dollars available for zones of segregated urban poverty which have been the main theaters of the war.¹¹²

¹¹⁰ FOUCAULT, *supra* note 8.

¹¹¹ Many hoped that taking away judicial discretion in sentencing would reduce discrimination on the basis of race, but that ignored the power of police and prosecutors to selectively target on race. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 39 (2006) (discussing criticism on left and right of judicial discretion in sentencing).

¹¹² MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009) (showing that proactive police and probation practices are more effective than severe punishment); MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* 49 (2016) (noting that federal–state coordination in drug prosecutions in some courts

Rather than replacing the structures of racialized abnormality, this war on crime system has absorbed it and extended it. Any attempt to roll these back in the name of restoring a democratic discourse on the proper role of the carceral state will face the charge that such a unilateral withdrawal will lead to a catastrophic return to the era of high crime. Part of a response is to insist that actual record of success for such practices, however, outside of a very small number of examples that are rarely replicated empirically but frequently cited in policy terms, is quite unremarkable.¹¹³

Second, the frontline actors who bear the most responsibility for how the carceral state impacts communities of color—prosecutors, police, probation officers—must adopt practices calculated to make them as responsive as possible to actual community norms. For federal prosecutors, this means withdrawing support from the use of powerful federal sentencing measures against defendants defined as especially dangerous and abnormal by local police and prosecutors.¹¹⁴ For policing, this means a return to responding to 911 calls initiated by citizens.¹¹⁵ Visiting citizens who actually want police help, and delivering service, would go a long way to address mistrust and might even provide the police knowledge about more serious crimes currently blocked by no-snitching norms. If more proactive means are used, they should always be filtered through randomizing mechanisms designed to break the normalization of race for the carceral state.¹¹⁶

Probation, second only to police in its scale within the carceral state, poses a deeper problem.¹¹⁷ Perhaps no part of the carceral state is as historically associated with the supervision of abnormality than probation. Introduced at the height of the eugenic era, probation provides a finer-grained surveillance and supervision of abnormal elements in the community (mostly defined by immigration status and race). The harder edge of this flexible institution has always been aimed at youth of color and forms an important part of a “youth control complex” that shadows and

is justified as protective of the black community and even the mostly black defendants); REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* (2013) (highlighting the coercive quality of the rehabilitation offered by drug courts).

¹¹³ HINTON, *supra* note 68.

¹¹⁴ LYNCH, *supra* note 112.

¹¹⁵ See Bell, *supra* note 62, at 56 (arguing for a responsive police model).

¹¹⁶ BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007).

¹¹⁷ See HARVARD KENNEDY SCH., PROGRAM IN CRIMINAL JUSTICE POLICY & MGMT., *TOWARD AN APPROACH TO COMMUNITY CORRECTIONS FOR THE 21ST CENTURY: CONSENSUS DOCUMENT OF THE EXECUTIVE SESSION ON COMMUNITY CORRECTIONS* (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Consensus_Final2.pdf [<https://perma.cc/9AG3-K8LT>].

deforms the lives of these young people.¹¹⁸ At the same time probation is more associated with rehabilitation and reentry services delivery than any other part of the carceral state. At a time of crisis for mass incarceration, probation with its premise of supervised release in the community, and its offer of aid, is an overwhelmingly attractive compromise. Yet the power to sanction people on probation for violating administrative conditions has made it a formidable engine of incarceration.¹¹⁹

Across all of this, there must extend an effort from within the carceral state to externalize and document the knowledge of its own practices of race norming.¹²⁰ Here professors can be helpers, democratic “under-laborers” as Ian Loader and Richard Sparks would put it.¹²¹ Along with journalists, they should be immediately brought into the archives of the carceral state to help produce this history.

CONCLUSION

The United States in many ways is not exceptional. Like the European states of which we were a colonial outgrowth, we forged a new kind of criminal justice system in the nineteenth century. Linked to the ideas of national sovereignty and Enlightenment transparency, this included a legal state that incorporated the sovereign lawmaking power of parliaments and legislatures and the law applying power of courts of national or state jurisdiction. This celebrated legal state had a less visible twin: a carceral state of surveillance, control, and punishment that operated in theory as an adjunct to the legal state but actually as a sibling with its own independent sources of power and its own principles. While the legal state focused on law breaking, the carceral state hunted abnormalities defined by social and economic considerations. While the legal state is generally assumed to be superior, a long tradition of empirical studies show this to be false; it is the carceral state that has its way with the legal state.¹²²

This we share with much of the world. What sets us apart and has diminished the power of democratic institutions to control the carceral state over time, is a historic racing of the carceral state in which this project of

¹¹⁸ RIOS, *supra* note 36.

¹¹⁹ Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015 (2013) (arguing that community supervision is part of the reason for excessive incarceration and that it should be restricted rather than expanded as part of reform efforts).

¹²⁰ The recent public apology by the head of the International Association of Chiefs of Police for the role the policing profession played in racial subordination in the U.S. is a healthy example but far more needs to follow.

¹²¹ IAN LOADER & RICHARD SPARKS, *PUBLIC CRIMINOLOGY?* (2011).

¹²² This is particularly true of the police who control the flow of cases into the legal system. See SKOLNICK, *supra* note 62.

governing abnormality merged with the projects of slavery, colonialism, and their afterlives. Our globally leading national embrace of eugenics and scientific racism was especially deeply felt in criminal justice, where a racial hierarchy of criminal risk became an integral part of the expanded carceral state created during the Progressive Era (or what we should call the “eugenic” era).¹²³ Some efforts to challenge this raced abnormality in the 1960s were quickly squelched in the name of war on crime which soon led to yet another and even greater expansion of the carceral state leading to mass incarceration.¹²⁴

Historically, the less visible nature of the carceral state, and since the 1960s, its association with a wartime-like sensibility, allowed a racial lag. While the rest of the legal and administrative state had to conform to a model of formal color blindness, police and prisons, the carceral state, could be, indeed according to their own understanding of abnormality, had to be, race conscious, race sighted, and race enforcing (all the things that color-blind jurisprudence all too quickly condemns in most circumstances).

President Trump’s election notwithstanding, that era appears to be over. The clash between color-blind constitutional values and color-focused policing and punishment practices is here to stay. Under the often banal expression of criminal justice reform, the power of a largely unaccountable carceral state to act on racialized conceptions of abnormality in place for a century or more is being challenged as never before.

¹²³ MUHAMMAD, *supra* note 55.

¹²⁴ HINTON, *supra* note 68.

