Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)

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INTRODUCTION

Robert Cover, who died in 1986, did not live to see the concept of mass imprisonment become central to American law and society, but in his article, *Violence and the Word*, published the same year he died, he seemed to grasp the growing darkness gathering at the heart of American legality. Speaking to other legal scholars and judges, audiences used to thinking of law as a fabric of principles and rules, a realm of logic and reasoning, Cover insisted that law is irrevocably linked to the organized violence of the State and that those who think of themselves as working to rationalize law must work to rationalize law's violence. Intuiting that the fate of America's judiciary was increasingly tied up with the business of sending young Americans to prison, Cover's article was laden with funereal, even alarming images. "Legal interpretation," he famously began the article, "takes place in a field of pain and death." As a scholar of judges, not of punishment, and of civil procedure, not of criminal procedure, Cover may never have recognized the unprecedented nature of the carceral surge then gripping the nation, nor the politicized and racialized nature of law's violence in the United States. Reading the growing tension in the judicial apparatus over punishment as permanent, Cover's critical
intervention in calling out law's violence at a time of highly idealistic models of legal governance was tempered by his urge to make peace with law's violence at a moment when its aggressiveness was surging. Now, nearly thirty years later, as mass imprisonment seems to be losing its grip on American law and society, we need to confront the racialized fear narratives that Cover was unable to challenge or else risk prematurely making peace with law's violence in our time.

This Essay argues that, despite signs of receding, the core racialized narratives of violence that underlie mass imprisonment will help stabilize and relegitimize law's violence in an extreme state. This Essay brings Cover's analysis of law's violence into an extended dialog with the work of the late Stuart Hall, particularly his study of the rise of the "strong state" in the 1970s. Hall, a Jamaican-born, Oxford-educated academic and journal editor, who described himself as a "familiar stranger" to England and provided perhaps the most incisive political analysis of its late modern trajectory, can provide us with the critical tools of race and class analysis that complement and complete those of Cover.

Part I revisits the central arguments of Hall's classic Policing the Crisis: Mugging, the State, and Law and Order and explains how the early 1970s underscore its prescient assessment of what it names "the strong state," that is, one that uses fear of crime and expressive "law-and-order" policies to shore up its standing with vulnerable working- and middle-class voters. Although describing a British context and reaction to crime, Policing the Crisis turned out to be highly applicable to the U.S. context in the same period (and since) and has inspired much of the subsequent work on the U.S. penal state. Moreover, while it has undergone some important shifts since the 1970s, the Strong State that Hall and his colleagues presciently discerned in response to the mugging crisis of that era is, in important respects, the carceral or penal state of our own time that now finds itself in a state of crisis.


6. Among his many achievements, Hall helped establish cultural studies as a valuable toolkit for empirically oriented critical legal studies, criminology, and political sociology during his long association with Birmingham's Centre for Cultural Studies. See Colin Webster, Stuart Hall (1932–), in FIFTY KEY THINKERS IN CRIMINOLOGY 197, 197–203 (Keith Haywood et al. eds., 2010).

7. STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978). Hall directed the center at Birmingham where they all worked under his supervision, but it was a deeply collective project.

8. Id. at 304–05.
Part II examines a recent report on prison population trends, *Prisoners in 2012: Trends in Admissions and Releases 1991-2012,* from the federal government's definitive survey of state and federal prisons systems; this particular report is the most recent of a series that goes back to the beginnings of mass imprisonment itself. The report sets the latest compiled figures concerning state and federal prisoners (2011 and 2012 for some measures) in a context of three previous moments that together trace the arc of mass imprisonment (or at least its course once it was firmly established): 1991, 2001, and 2006. Read in light of Cover and Hall, *Prisoners in 2012* can begin to highlight the elements toward which we might expect the carceral domains of the Strong State to evolve in the face of the enormous strains now placed on its legitimacy.

In my conclusion, I will return with Hall to the racialized figure of violent crime which continues to animate a great deal of presumptive legitimacy for the extreme version of law's violence that the United States has experienced since the 1970s.10

I. FRIGHTENING THE NATION

*Police and thieves in the street . . .
Fighting the nation with their guns and ammunitions . . .
Scaring the Nation
With their guns and ammunition.*11

Junior Murvin's Reggae song *Police and Thieves* (1977) became an instant hit among the large Reggae fan base in London where it closely followed the summer of 1976, which saw disorders between police and young multiracial crowds at the Notting Hill Carnival.12 Afterwards, it became something of a youth anthem and was covered by the Clash on their highly successful 1977 album *The Clash.*13 In retrospect, the song, which began as a comment on the violent street culture of Kingston, Jamaica, and became a protest song in London, can serve as representation for the whole

10. For a more recent and United States-focused analysis of this problem that is largely consistent with Hall's critique of how race helped frame neoliberal policies as beneficial to white working- and middle-class voters, see IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 107–10 (2014).
conjuncture which Hall analyzed in *Policing the Crisis*. Whether police were responding to a genuine outbreak of muggings in the early 1970s or generating a moral panic about them, the message of violence in the streets came through. Frightening the nation, then, was the goal of crime politics in the 1970s. While violent crime was never a major problem in the United Kingdom and is now far lower in the United States than it was in the 1970s, the nation is still frightened and the Strong State retains considerable legitimacy.

A. Hall's Conjuncture and Ours?

*Policing the Crisis: Mugging, the State, and Law and Order,* published in 1978, sought to interpret the alarmed response by the British "control culture" (law enforcement, courts, media) during the early and middle 1970s over "muggings"—forcible but nonlethal robberies associated at that point in the British public imagination with America's race-conflicted cities. A crucial clue to their political salience was that those offenses, highlighted as muggings in the media, tended to be cross racial, black-on-white assaults.

The mugger provided the "folk devil" around which an increasingly constrained British state could legitimize a significant


15. A conjuncture is literally "a combination of events." *Conjuncture Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/conjuncture (last visited July 28, 2014). Hall helped revive conjunctural analysis, a tradition that dates back to Gramsci and Marx. In contrast with more academic analysis, whether Marxist or not, conjunctural analysis seeks to bring the politics of popular culture and everyday life into conversation with structural factors, and without subordinating one to the other as a matter of analysis. See Webster, *supra* note 6, at 199. In a late interview, Hall described his work as a life long struggle against the economism of both Marxism and neoliberalism. *Id.* at 197–202. Economics might determine things in the famed "last instance," when it is theorized that economic factors must determine things, "but when is the last instance? If you're analysing the present conjuncture, you can't start and end at the economy. It is necessary, but insufficient." Ian Cummins, *Stuart Hall*, EUR. GROUP FOR STUDY DEVIANCE & SOC. CONTROL NEWSLETTER (2014), http://www.europeangroup.org/content/stuart-hall.


17. *Id.* at vii–x.

18. *Id.*

19. The concept of "folk devil" was introduced by the late Stanley Cohen to describe deviant individuals whose misbehaviors became the subject of "moral panics," alarmed responses by government and the media that exceed any objective threat posed. See STANLEY COHEN, *FOLK DEVILS & MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 2 (3d ed. 2002). To Cohen and other criminologists, moral panics suggested that some other deeper social tension
reframing of the post-war social compact that had been shaped by the major parties of government in the 1950s and 1960s. That makeover would come to be known as Thatcherism and, more broadly, neoliberalism (a shift *Policing the Crisis* predicted and described at an astonishingly early stage), that is, a broad effort to reduce the role of the state in bolstering the power of the middle- and working-classes and shift that state toward the task of maintaining order in the face of the increasing discipline, poverty, and misery being extracted by global capitalism.20

*Policing the Crisis* interpreted the response to muggings as efforts to position the state as a “strong state” (strong in a “law-and-order” sense) and to define a new post-social compact between the state and middle- and working-class whites around coercive control of black criminals in large cities.21 In 2014, this analysis is now so familiar to us that it is easy to think we have always thought that way. Rereading *Policing the Crisis* now is to engage with a moment when that trajectory seems far from obvious or even determined.22

**B. Crime and Violence**

For the British state in the early 1970s, muggings offered a symbolically rich handle on a host of social problems associated with the transformations unleashed by the resumption of a truly global was finding a way to discharge in the response to criminal deviance. One of Hall's great contributions was to combine the critical criminology associated with moral panics, as well as labeling theory (which identified ways in which control mechanisms encourage deviance), with Marxist political sociology in the tradition of Louis Althusser and Antonio Gramsci. See Webster, supra note 6, at 197–99.


capitalist economy in the 1960s and 1970s, including (in the British context) the very uneven development of Britain's regional economies (the declining industrial north and the growing financial and technological south) and intense postcolonial immigration to London from former colonies including Pakistan, India, and the West Indies. These transformations were being materialized in urban spaces through varying changes from dying shopping districts, de-industrialized areas, and thriving but exotic market districts popping up in formerly white working-class neighborhoods.23

Muggings were far down the list of social or even crime problems facing these neighborhoods in the early 1970s, as the advanced industrial world entered a decade of more or less continuing recession and stagnation that would lead to fundamental economic restructuring and rising inequality that are only being fully addressed within the political arena today.24 But it was the singular problem that allowed a point of articulation between the


24. For the most recent and comprehensive account of this shift in political economy, see THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).
lived experience of the economic squeeze of working-class British voters and an arc of global crisis that in 1972 included numerous incidents of political violence and terrorism (e.g., Northern Ireland, Europe, Israel/Palestine) as well as economic dislocation. Mugging turned out to be productive not because it was so dangerous or injurious, but because it was so expressively violent—a crime of unambiguous and personal aggression. As such, it literally "personifies" violence, and "[v]iolence is the axis around which the public signification of the crisis turns in 1972."26

Historically, of course, violence has played a complex role in state building as both a reason for state power and a tool of that power. The Strong State, with its own police officer-like role in identifying and characterizing violence, represented a particularly supple strategy for utilizing violence in legitimating state power. Violence is "notoriously difficult to define"—it encompasses not only direct assaults leading to injuries, minor or serious, but all circumstances under which force or fear is used to accomplish some other untoward or unlawful end; and yet, at the same time, it "has the ideological value of appearing quite simple, straightforward and clear-cut."27 The ability of violence to act as a political "lowest common denominator" made it invaluable for the mobilization of support for an emerging neoliberal version of the capitalist state—one that was deeply straining its legitimacy through simultaneously adopting a more intervening role in the economy on behalf of capital (for example, using political power to squelch union militancy) and delivering fewer social benefits to voters in the middle- and lower-classes.28

As we shall explore further below, prospects of mass imprisonment restoring its legitimacy in the United States is linked to the ability of defenders to re-characterize it as a tool against violence and violent crime and to redefine prison populations as composed of violent prisoners.

C. Race

Mugging is productive not just because it links urban insecurity to ideas of global crisis, but because it does so in an already deeply racialized way (since the very crimes denominated as muggings

25. Since the terror attacks of September 11, 2001, it has become very common to see terrorism as authorizing a new kind of politics. In GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR, I argued that this began in the United States during the 1960s and 1970s (and again in the 1980s and 1990s). SIMON, supra note 22, at ch. 9. Hall and his colleagues, focusing on the British context, gave terrorism full treatment in the 1970s. HALL ET AL., supra note 7, at 297–98.
26. HALL ET AL., supra note 7, at 300.
27. Id.
28. Id. at 303.
have been separated by their cross-racial quality. As Hall and his colleagues described it, "[B]lack crime becomes the signifier of the crisis in the urban colonies."29 A strong police response to muggers then is a way to perform a Strong State response to that crisis. As Paul Gilroy described the same processes in Britain about a decade later, moral panics about black crime "provide at a visceral level contradictory, common-sense explanations, symbols and signs which render the shock of Britain's loss of status intelligible and enable it to be lived out in 'racial' terms."30

The Strong State, in short, used racialized violence and the heightened response of the culture of control as examples of that violence to win consent from white working- and middle-class voters for economic policies that undermine their security and political power.31

D. Imprisoning the Crisis

Space does not permit a more detailed discussion of similarities and differences between the United Kingdom and the United States and the ways that "law and order" acts as a hegemonic strategy for legitimizing state power under conditions associated with neoliberalism.32 But in pivoting to a discussion of the contemporary crisis of mass imprisonment, we can observe in broad strokes two key differences. First, completely consistent with the underlying analysis of Policing the Crisis, the U.S. version of the Strong State has been more sustained and more extreme than it has been in the United Kingdom.33 Second, in both countries, early investment in policing shifted (markedly in the case of the United States) toward

29. Id. at 339. "Urban colonies" is their radical term for neighborhoods of racial segregation and exploitation.
30. GILROY, supra note 23, at 75.
31. See David Garland, The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society, 36 BRIT. J. CRIMINOLOGY 445 (1996) (suggesting that states were using punishment to perform rituals of sovereignty whose twentieth century alternatives, like regulation and welfare, had been made impractical by global capitalism).
32. Fortunately the literature is already significant. See generally GARLAND, supra note 22; SCHEINGOLD, supra note 22; SIMON, supra note 22; WACQUANT, supra note 22.
33. While Prime Minister Thatcher was happy to invoke the politics of racialized crime fear, her governments tended not to depart significantly from British police and prison policies under the more moderate Conservative and even Labour governments of the 1960s and 1970s. It was under Labour Prime Minister Tony Blair that the United Kingdom took its biggest turn toward tough-on-crime policies. See generally TREVOR JONES & TIM NEWBURN, POLICY TRANSFER AND CRIMINAL JUSTICE: EXPLORING US INFLUENCE OVER BRITISH CRIME CONTROL POLICY 13 (2007). Yet, in both countries the politics of a Strong State drawing on existing racialized narratives of threat and loss played a comparable role. In this respect, David Garland was correct to see the two countries as essentially part of the same social process. GARLAND, supra note 22, at viii.
prisons. The reasons for this shift are worthy of further consideration, but it is sufficient to note here that both play the same role in allowing the state as such to appear in the imagination of the public as directly containing dangerous individuals and groups who threaten their daily security.

II. THE CRISIS OF MASS IMPRONIMENT

A. From Political Solution to Social Problem

The rise and fall of mass imprisonment is a story now entering into mainstream history and journalism in the United States. Today, there is wide agreement among opinion leaders that American penal policies are badly out of balance. According to this new consensus, the current levels of imprisonment, while trending down modestly, remain excessive, especially when it comes to punishment for nonviolent drug crimes. The prison boom is also blamed for the poor conditions in many prisons and for astounding high rates at which prisoners are returned to prison for either new crimes or parole violations.

Here, our goal is less to assess the validity of this emerging common sense (much of which is well supported in my view) than to consider whether this breakdown in support for policies that propelled mass imprisonment represents a deeper crisis of the Strong State. To begin to answer that question, we now turn to a recent report from the federal government's major research arm dedicated to criminal justice matters, the Bureau of Justice Statistics. The Bureau and its predecessors have been the major outlet for the statistics produced by the National Prison Survey ("NPS"), a series that began in 1925 and has been one of the most influential sources of public understanding of both imprisonment and crime in the United States.

This particular report, Prisoners in 2012: Trends in Admissions and Releases, 1991–2012, not only summarizes the most recent year of data available, 2011, but (unusually for this genre) sets it in a historical context by situating some of the highlighted data (a

34. G...
subset of that collected from the states) in a series of recent years beginning in the early 1990s. This selection tells a story—one broadly consistent with the narrative described above, but with a telling and important suggestion of an ending (or at least a direction).

B. 1991

The first year profiled by most of the tables in Prisoners in 2012 is 1991, approximately ten years into the era of mass imprisonment. The 1980s had already represented a staggering and unprecedented rise in imprisonment rates all over the country. The 1990s was posed to follow closely on this model. The possibility of ratcheting back on mass imprisonment was unlikely (despite having exceeded most early calls for increasing imprisonment levels) at least in part because America in 1991 was at a violent crime peak for the twentieth century that began in 1989 and would begin to fall off rapidly in 1993. The rest of the decade would see the deepest recorded crime decline in U.S. history. But that steep decline would not be visible to even experts until the end of the decade. Instead, the pattern of violence that had begun in the mid-1980s seemed to be building toward ever more horrific levels, much of it associated with a highly addictive, smokable form of cocaine known as "crack." It was the distinctive value of the crack legend that allowed the Strong State's war on violence to become a war on drugs. Violent crime (inherently rare even when rising, and difficult to solve) yields only so many candidates for imprisonment. In contrast, drug crimes, especially those tied to crack cocaine, which was being sold in easily surveilled open-air urban markets, yield almost limitless candidates for imprisonment. It was the decade between 1986, when the first federal antidrug laws aimed at the crack crisis, and 1996, when President Clinton won an election with little talk about drugs or crime, that the nation and the states passed a host of harsh laws aimed at increasing the range of offenses that attract a prison sentence, increasing the length of time served in prison for most offenses, and diminishing access to rehabilitation or education for prisoners. Crack was mugging on steroids—a "folk devil" that provided the cultural material necessary to fill the gap between a

40. See id. at 1.
43. See, e.g., William J. Bennett et al., Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs (1996) (predicting a rising tide of homicides).
44. See LóPEZ, supra note 10, at 107–11.
penal expansion legitimized on the basis of violence and prison cells filled with young men involved in the urban drug trade. Precisely like mugging, crack could form an axis linking the devastating blight afflicting most large American central cities in the 1980s and global forces of crime and violence.

By 1991, the expanded efforts to indiscriminately imprison those deemed guilty of being members of the urban criminal class—young men and sometimes women of color not actively and visibly involved in school or legal employment—were in full swing, and we can see its logic in the numbers reported. Drug crimes already constituted 28% of all prison admissions in 1991, just about five years into the renewed war on drugs. Simple drug possession, today recognized as among the least justifiable reasons for imprisoning anyone, already constituted 7% of all prison admissions and would continue to rise for another decade. This was particularly acute for African Americans. Although the overall percentage of drug admissions as a portion of total admissions did not reach its peak in the NPS report until 2006, it was already at its peak in 1991 for African Americans—nearly 40% of all African Americans who were sent to prison that year were admitted for a drug crime, compared to the 19.3% of whites who were sent to prison for the same range of offenses.

In 1991, many states were in the midst of a physical prison boom, investing in new prisons built on a scale and with a design to maximize the number of people who could be removed from the community. Now conceived as a way to reduce the pressure of crime on society, these prisons had no need to produce any particular internal effects (e.g., penitence, labor, health, rehabilitation). The political economy of the national prison boom at this point in the conjuncture has been convincingly mapped by Ruth Gilmore’s study of California’s prison boom during the 1980s and 1990s. In broad strokes, building more prisons and adding thousands of new prisoners was an equilibrium solution to a complex problem of multiple surpluses generated by the changing capitalist economy. Building new prisons could absorb excess land in mostly rural areas abandoned by primary extraction industries like lumber and mining, and doing so with bond measures could absorb excess private lending capacity at a time when political

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45. Carson & Golinel1, supra note 9, at 6.
46. Id. at 6 tbl.4.
47. Id. at 10 tbl.8.
support to borrow for other major public infrastructure, like schools, universities, or even highways, was lacking. Finally, filling those prisons with thousands of new prisoners could absorb the excess of under-educated urban males, mostly of color, created by deindustrialization of the cities. In California and other states like Florida, Arizona, and Texas, court challenges to prison conditions appear to have put even more energy into this complex—they forced state legislatures to confront the requirement of pouring millions of dollars into building new prison space anyway to satisfy constitutional standards long under enforced.

C. 2001

By 2001, violent crime had dropped for six consecutive years, the longest consecutive decline since World War II, but it had little impact on either the thinking of the control culture, which continued to promote the threat of violent crime from young, urban men of color, or the public’s perception of crime risk. Political attitudes toward the drug war, toward the death penalty, and toward mass imprisonment policies remained undimmed and largely unchallenged in the penal bureaucracy and the mainstream political field of major party competition (which remained largely maxed out around support for capital punishment and harsh prison sentences). The terror attacks of September 11 of that year would shift the attention of both the government and the public, but that still lay in the future when most of 2001’s prison admissions took place.

The prison population in 2001 looked a great deal like it did a decade earlier, only larger. Drug crime was still growing as a portion of prison admissions (at 32% of all admissions), although, because many drug sentences are shorter than those for violent crime, drug sentences were a less substantial share of the population of prisoners at any particular moment (21% in 2001, or one out of five). Intriguingly, the only category indicating change was that of African Americans imprisoned for drug crime—the

53. See, for example, Lydia Saad, U.S. Death Penalty Support Stable at 63%, GALLUP POL. (Jan. 9, 2013), http://www.gallup.com/poll/159770/deathpenalty-support-stable.aspx, for a survey of Americans’ support for the death penalty from 1936 to 2012.
54. CARSON & GOLINELLI, supra note 9, 5–6 tbls.3 & 4.
percentage of such prisoners declined slightly from 38.5% in 1991 to 36.8% in 2001.\textsuperscript{55} The reason, which we will explore more fully below, appears to be less an end of the war on drugs, but rather a shift in prosecution approach toward even more punitive crime categories for a population whose intensive criminalization and imprisonment made them eligible.

If change was coming to mass imprisonment, it was coming in challenges to the infrastructure side of the prison boom. Fiscal problems, however, brought on by major revenue drops following the recessions and slow growth at the start of the new century, were beginning to diminish enthusiasm to put states in debt by building more prisons.\textsuperscript{56} This infrastructure problem, a potential limit on the growth of incarceration, was exacerbated by two simultaneous developments, both of which were forms of resistance against law's violence in the form of mass imprisonment. The first was the emergence of an anti-prison movement, with its strongest centers in California and New York, that was mobilizing young activists against new prison construction and drawing lines between political choices to expand prisons and profits for prison related industries—"the prison-industrial-complex."\textsuperscript{57} By making the scale and racial disproportionality of the prison population the problem, the new politics of prisons escaped the trap of previous challengers of the Strong State—that is, the appearance of being for prisoners and against their victims.

Second, a new generation of prisoner law suits, motivated by the growing concentration of chronically ill people inside prisons and fueled by new legal arguments influenced by the disability rights and human rights movements,\textsuperscript{58} was attacking the manifest neglect of medical and mental health care in prisons built to maximize security and capacity.\textsuperscript{59} By 2001, California's massive prison

\textsuperscript{55} Id. at 10 tbl.8.

\textsuperscript{56} Bernard E. Harcourt, Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s, OHIO ST. J. CRIM. L. 53, 78 (2011) ("The Great Recession of 2008 has certainly put severe pressure on the 'prison bubble' . . . as many states find themselves unable to service the debt associated with prison building or carry the expenses associated with mass prison populations.")

\textsuperscript{57} Critical Resistance has been one important expression of organizing since 1997. See Angela Y. Davis, Abolition Democracy: Beyond Empire, Prisons, and Torture 7 (2005).


\textsuperscript{59} Howard B. Eisenberg, Rethinking Prisoner Civil Rights Cases and the Provision of Counsel, 17 S. ILL. U. L.J. 417, 425 (1993) (noting that "the obviously deplorable conditions of many state penal institutions opened the door to prisoners seeking legal redress").
system, the nation’s largest and a model of reckless prison growth, was undergoing simultaneous federal court cases involving both mental health and medical care in the entire system. Remarkably, despite facing billions in excess costs to build new medical and mental health infrastructure and to hire professionals, the state continued to grow its prison population for another five years.

D. 2006

This is the year national prison admissions peaked at over 747,000. California’s prison admissions peaked in the same year with 48,639 people entering California prisons. The war on drugs was reaching its maximum contribution to the U.S. prison population with nearly 10% of all prison admissions that year coming from simple drug possession. By 2006, the war on drugs was already under substantial political attack with successful initiatives in several states in favor of treatment as an alternative to jail or prison for drug crimes. The drop in prison admissions that begins after 2006 likely reflects in significant part this decline in drug-crime sentencing.

We can already see in 2006 indirect evidence of a shift toward violent crime. While violent crime as a proportion of all prison admission had declined modestly from 2001 to 2006 (perhaps a product of the real drop in violent crime), it was increasing for African Americans, rising from 28.8% to 29.0%. Not surprisingly, the portion of African American prisoners among all persons imprisoned for violent crimes grew significantly between 2001 and 2006 from 41% to 44%.

60. JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONERS IN AMERICA (forthcoming 2014).

61. Plata v. Davis, No. 3:01-cv-01351 (N.D. Cal. Apr. 5, 2001) (entering a stipulated settlement with the State of California that admits that the systemic failure to provide medical care violated the Eighth Amendment), appeal dismissed, 329 F.3d 1101 (9th Cir. 2003); Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995) (finding systemic failure to provide adequate mental health care violated the Eighth Amendment).


63. CARSON & GOLINELLI, supra note 9, at 3 tbl.1.

64. CAL. DEPT OF CORR. & REHAB., supra note 62, at 42 tbl.25.

65. CARSON & GOLINELLI, supra note 9, at 6 tbl.4.


67. Id. at 6, 10 tbls.4 & 8.

68. Id. at 11.
In California, home to the nation's largest prison system, the effects of chronic hyper-overcrowding drove Governor Arnold Schwarzenegger to declare a state of emergency in the prison system on October 4, 2006, offering a description of the state of the prisons that hardly suggested prisons were a means of public safety.69

The current severe overcrowding in 29 CDCR [California Department of Corrections and Rehabilitation] prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them.... Immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding.70

California was also in the midst of an increasing legal confrontation with the federal courts. By 2006, the state had been under court order for eleven years to fix its mental health care in prison and for four years to fix its medical delivery in prison.71 The respective courts were coming up against the enforced limits of their "deference."72 In 2005, Judge Henderson placed the entire prison medical system under a court receivership.73 A court ordered cap on the state's still-growing prison population was still three years away.

E. 2011

The front cover of Prisoners in 2012 shows an elaborate and distinctive chart with three lines.74 One represents admissions, another represents releases, and the bold line represents the total prison population. This chart depicts what appears to be an important turning point. The process began with the peaking of admissions in 2006 and gained visibility as releases surpassed admissions in 2009. In 2011, a trend existed, and in 2012, it appeared to gain momentum as the number of prison admissions dropped to the lowest figure since 1999.75

The year 2011 also marked a continuation of the rise of violent offenses and two other categories of prison admissions and a

70. Id. at 1, 3.
72. See Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate").
74. CARSON & GOLINELLI, supra note 9, at 1 fig.1.
75. Id. at 2.
continued decline in drug crime as a source of admissions. 76 Drug crime as a percentage of all admissions declined to a new low of 25.4% of all prison admissions in 2011. 77 Highlighting the degree to which this might be indicative of a broad refocus of the law enforcement (or at least the imprisonment) system away from the now-discredited war on drugs, the report notes that the number of women admitted for violent crimes rose 83% since 2006. 78

Unheralded in the report’s highlights is the rise of another category of crime as a source of prison sentences, “public order offenses,” 79 which nearly doubled during the previous twenty years from 7.8% of admissions in 1991 to 15.8% in 2011. 80 The details buried in this capacious and vacuous category show spectacular rises in certain crime categories of admissions that may be consequential for the lingering effects of mass incarceration:

Among the most common public order offenses resulting in a new court commitment to prison, weapons offenses increased 157% between 1991 and 2011, driving while under the influence grew 61%, and court offenses (including perjury, failure to appear, bond jumping, and tampering) increased 751%. 81 Obstruction of law enforcement grew 226% over the same period, and admissions of habitual offenders increased 311%. 82

With the exception of driving under the influence, all of these common public-order offenses are highly sensitive to previous incarceration. Gun offenses generally apply to felons in possession of a firearm. 83 Court offenses are far more likely to arise for people previously involved in criminal cases; the same can be said for obstruction-of-law-enforcement charges. 84 All of these grew in

76. Id. at 6 tbl.4.
77. Id.
78. Id. at 8 tbl.6.
79. Id. at 6 tbl.4. This category in the National Prison Survey includes “weapons, drunk driving, and court offenses; habitual offender sanctions; commercialized vice, morals, and decency offenses; and liquor law violations and other public order offenses.” Id. at 6 n.c. Some of these involve short prison sentences, such as drunk driving, which is a good example of a new kind of crime that did not attract prison as a sentence before this recent era of expansion but which is now viewed as highly appropriate, at least in repeated cases. Others, however, namely habitual offender laws and gun laws, can involve very long sentences.
80. Id. at 6 tbl.4.
81. Id. at 8.
82. Gregg Lee Carter, Gun Control in the United States: A Reference Handbook 90 (2006) (noting that the “most common weapons offense category is the possession of a firearm by a prohibited person (usually a convicted felon”).
83. Carson & Golinelli, supra note 9, at 8, 19 tbl.14.
triple-digit percentages over the period.\textsuperscript{84} Even if they are not deliberately targeted on racial minorities, the fact that people already criminalized, and especially those already incarcerated, are more exposed to them assures that this category, if it continues to grow, will operate as counterthrust to other forces aimed at decarceration and reducing disproportionality.

This suggests a reason to be less pleased by a third trend highlighted in the report, which is the continued decline in drug crime as a source of prison admissions for blacks—down to 24\% of all black prison admissions in 2011 from a steady 35\% to 38\% in the 1991 to 2006 period.\textsuperscript{85} The fact that the report calls this out for special attention is a nod to the government's sensitivity to racial disproportionality in the prison system and growing public rejection of incarceration as a "new Jim Crow."\textsuperscript{86} However, if this is counterbalanced by growth in admissions of blacks for a crime of violence or a "public order" crime, the result may be a prison population no less racially marked than it is today.\textsuperscript{87}

Thus, while there has been some undisputed improvement in the racialization of the prison population, it has been modest at best. While all groups categorized by the NPS data (other than mysteriously Hispanic males in their sixties) saw their imprisonment rate remain steady or decline slightly between 2011 and 2012, the disparities by race remain profound and ominously inflicted by age.\textsuperscript{88} African American men were overall six times more likely than white males to be imprisoned in 2012 (down from a high of 7.8 times in 2000), which still left nearly 3\% of all African American men locked up in a state or federal prison in 2012.\textsuperscript{89} For African American males eighteen to nineteen years old—the crucial entry bridge between a juvenile and adult criminal career—the rate of imprisonment is 9.5 times that of whites.\textsuperscript{90} Among African American men in their crucial career- and family-building years of their thirties, nearly 7\% are imprisoned.\textsuperscript{91} Only among African American...
American men over the age of sixty-five does the portion in prison drop below 1%.  

An important indicator of change in Prisoners in 2012 is several tables devoted to California whose remarkable drop in prison admissions in 2011 helped lead the steep national decline in 2012. The primary reasons for that drop were implementation of the Brown v. Plata case in May 2011 and the package of legislation known as “public safety realignment,” which came into effect in November 2011 and produced a myriad of changes in sentencing law, resulting in a rapid drop of nearly 30,000 people from the California prison population over the last two years. The law also allocates new resources to counties to address their new responsibilities.

The result is a legal and policy free-for-all. One clear result is that from 2011 to 2012, state prison admissions dropped by an eye-popping 65%, driving a national acceleration in the reduction of the prison population to an annual decline of 2%.

F. 2014

Like comparable government reports since the late 1970s, Prisoners in 2012 provides objective and accurate historical information by which trends in the nation’s prison systems can be assessed; but it also provides a narrative, or interpretation, that sets this data in its political context. In a Bureau of Justice Statistics Bulletin published in 1982, titled Prisoners 1925–81, the new Reagan Administration Justice Department, which was to promote prison population growth throughout its two terms, seemed at pains to normalize a trend of prisoner numbers growing nationwide for nine years. The opening paragraph reads as follows:

92. Id. at 25 tbl.18.
93. Id. at 19.
94. 131 S. Ct. 1910, 1944–45 (2011) (upholding the prison population cap imposed on California by a special three-judge federal trial court operating under the Prison Litigation Reform Act).
95. The Plata court set a goal of 137.5% of design capacity in order to facilitate implementation of existing court orders on mental health delivery and medical care for prisoners. Id. at 1923.
96. “Realignment” mandated that people convicted of a felony that, with the exception of a few offenses, is nonviolent, nonserious, and nonsexual be required to serve any custodial sentence in the county jail of the county in which they were convicted. The complex package of legislation also gives courts authority to split what otherwise would have been fixed prison sentences into “split” sentences with jail time followed by probation. CAL. PENAL CODE § 1170(h) (West 2014).
97. CARSON & GOLINELLI, supra note 9, at 19.
The number of persons sentenced to State and Federal correctional institutions has been recorded annually since 1925. It is therefore possible to view the rapid growth of the prison population over past 9 years against the background provided by nearly 50 years of earlier data. In general, the trend in prison population over the entire period has been one of upward growth, about half of which reflects the growth in the general population during that time...  

The emphasis on the paragraph, and in the main figure at the bottom of the front page showing a gradually ascending series of peaks with short intervals of descent in between, was on the long-term growth of the absolute number of people in prison. Recent growth, in short, rapid as it may be (an average of 7.1% during the period of 1974 to 1982, compared to 2.4% for the entire period), was just the resumption of the normal American trend toward incarcerating more of its residents. Only those reading at least to the bottom of the first page would learn that, when considered as a rate with population held constant, the incarceration rate of 153 per 100,000 for 1981 was the highest ever recorded in the series. Only when they reached the third page of the report would the readers see a chart of the prison population rate (prisoners as a portion of the total population) in which it was strikingly obvious already that the United States was passing a peak last seen at the height of the Great Depression and in the aftermath of Prohibition and entering uncharted territory. It would more than double again before even entering the years charted by Prisoners in 2012.  

We can read here the beginnings of a new narrative about the carceral state with the following central elements. Mass imprisonment was a mistake, especially the concentration on drug crimes and parole violations, and states should take steps to wean themselves of reliance on incarceration for these offenses. Mass imprisonment, however, disguised a healthy trend that should be continued, producing a far more uniform and serious approach to imprisoning people convicted of violent or repeated crimes. States and the federal government should continue to maintain or even increase this aspect of punitiveness.

The first theme is one of abandoning mass imprisonment by identifying it with excessive incarceration of people convicted of drug crimes or returned to prison on parole violations without strong evidence of actual criminality. The second theme is that the

99. Id. at 1.
100. Id.
101. Id.
102. Id. at 1, 3 fig.2.
new and only somewhat smaller prison population is increasingly composed of prisoners serving both short and long sentences for violent or repeated crimes and is therefore truly justified by the contemporary consensus in late modern societies against tolerating interpersonal violence or persistent criminality (even at the cost of great state violence).

The opening section of *Prisoners in 2012* is worth quoting at length for the way in which it seems to mark a break with mass imprisonment and the policies that drove it:

Between 1978 and 2009, the number of prisoners held in federal and state facilities in the United States increased almost 430%, from 294,400 on December 31, 1978, to 1,555,600 on December 31, 2009. This growth occurred because the number of prison admissions exceeded the number of releases from state prisons each year. However, in 2009, prison releases exceeded admissions for the first time in more than 31 years, beginning the decline in the total yearend prison population. Admissions to state and federal prisons declined by 118,900 offenders (down 16.3%) between 2009 and 2012. In 2012, the number of admissions (609,800) was the lowest since 1999, representing a 9.2% decline (down 61,800 offenders) from 2011.104

Emphasized here is the fact that a dramatic pattern of prison population growth through successive years of admissions outstripping releases has ended and that 2012 was the third straight year of absolute population declines and a drop in admissions—a decline of more than 9% in one year between 2011 and 2012 represented not just a marginal decline but a drop to the levels of the end of the previous century. Left until later in this introductory section, the report authors point out that much of this overall decrease in admissions comes from California where the realignment plan discussed above has resulted in dramatic drops in population, but only under the most aggressive pressure from the courts and against considerable resistance from the Governor.105 There is very little reason to be confident that California's admissions will stay low. Indeed, recent state reports show that the California prison population is beginning to rise again.106

104. CARSON & GOLINELLI, supra note 9, at 1.
105. See id. at 2.
106. After steep declines in 2012 and 2013, the prison custody population is actually growing in 2014 by 1.6% according to the latest population report from the State, which the State is managing through the use of private prisons, out-of-state prisons, and county jails. CAL. DEPT OF CORR. & REHAB., DATA ANALYSIS UNIT, MONTHLY REPORT OF POPULATION (2014), available at http://www.cdc.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOPIA/TPOPIAd1404.pdf. The Governor's 2014–15 budget projects that the prison population will grow by approximately 10,000 by 2019
The second theme of the report, providing another point of departure that is deeper and more substantive than the simple numbers of admissions and releases, is the shift from drug to violent crime, and relatedly the decline of parole violations. The report suggests that violent crime always gave the system more legitimacy than perhaps the triumphant critics of mass imprisonment now may have acknowledged; the headline of a subsection of the report reads, “Violent offenders accounted for a larger proportion of the state prison population between 1991 and 2011,” with an accompanying chart showing an increase from 44.6% in 1991 to 53.5% in 2011.107 The details underscore that these are not drug offenses: “While robbery was the most common offense across the 20-year period, the proportion of violent offenders convicted for murder or any sexual assault increased over time.”108 But, as with much of the report, the excesses of mass imprisonment are defined against peaks, which normalize a great deal. One would have to plow deeply into the available reports from the early 1980s to learn that as recently as 1979, prisoners serving sentences for violent offenses made up 57% of state prisoners,109 and that was on lower sentences for violent crime (which means it is likely that violent crimes accounted for an even larger portion of admissions), while the percentage of prisoners serving sentences for drug offenses, which remains at 16.6% for state prisons, made up only 7% in 1979.110

The statistically oriented and highly professional reports prepared by the Bureau of Justice Statistics are obviously not the place to look for the rhetoric or the particular moral panics with which the Strong State is likely to reconstitute itself, but I want to suggest we can find here the core “facts” around which that restabilization is going to take shape. Mass imprisonment is being replaced by a new commitment by the culture of control to draw on scientific and technical resources to reduce violent and repeated crime. This new appeal to evidence and research signals the discrediting of populist elements in recent penal policy, but it also reaches out to claim a large portion of the current correctional population as requiring supervision, surveillance, and programming to reduce “recidivism,” the high rates of which in recent years are

107. CARSON & GOLINELLI, supra note 9, at 5.
108. Id. Later they acknowledge that longer sentences for murder and sexual offenses, rather than more emphasis on law enforcement, explains that rise. Id. at 14–16.
110. Id.; CARSON & GOLINELLI, supra note 9, at 5.
routinely taken to indicate the criminality of this population (rather than carceral aggressiveness of the control culture).

CONCLUSION

It does not take the political-economic acumen of Stuart Hall to say that neoliberalism has been in crisis since the banking-led financial crash of 2008 and the subsequent period of recession and slow growth throughout the world capitalist economy. At the same time, the political landscape so brilliantly described in *Policing the Crisis*, which was remarkably unchanged when I published *Governing through Crime* nearly thirty years later, seems to be undergoing some profound shifts. On the left we see the reemergence of a regulatory-welfare state type of governance, albeit in a still tepid form, through the Consumer Protection Act\(^{111}\) and the Affordable Care Act\(^{112}\) enacted at the height of the financial crisis during President Obama’s first term. Among younger voters, the appeal of a more active government or even openly socialist politics is growing stronger.\(^{113}\) On the right, the growing strength of libertarian ideology within the Tea Party wing of the Republican Party is increasingly critical of mass imprisonment. The carceral state, it turns out, can also be criticized as a form of big government.\(^{114}\)

It is easy to see how within this political-economic horizon, mass imprisonment policies have come to seem burdensome and indefensible. In some sectors, the change offers the potential for truly significant steps away from the larger politics of the Strong State and its emphasis on expressively punitive targeting of racialized individuals and groups. For example, the growing legal momentum, most recently in the Supreme Court’s *Brown v. Plata* decision, are challenges to chronic overcrowding and the resulting medical and mental health effects on prisoners as incompatible with constitutional values like human dignity.\(^{115}\) Expanding health care

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114. Right on Crime is the hub for a growing body of conservative opinion directed against the policies of mass imprisonment. See Bauer, supra note 36.
115. The Court went considerably further than it ever has in recognizing that the constitutional violation lies against all prisoners exposed to the risk of medical failure by the lack of adequate staffing and infrastructure, not just those who actually fall victim to a degree of harm sufficient to make out a traditional claim under the Eighth Amendment. *Brown v. Plata*, 131 S. Ct. 1910, 1940 (2011).
coverage for the poor, which will include vast swaths of the current correctional population, whether in or out of custody, also opens up the potential for more of the formerly criminalized and incarcerated population to escape from routine management by law enforcement and corrections. In a very real sense, these would be changes that could transform the current nature of law's violence and the expanded form it has taken in the Strong State since the 1970s. I have addressed these more optimistic scenarios in a forthcoming book.\textsuperscript{116} Here, in line with Stuart Hall's favored paraphrase from Gramsci, "pessimism of the intellect, optimism of the spirit,"\textsuperscript{117} I offer a more pessimistic reading of the present. The more likely possibility is that the Strong State is being reshaped and realigned to address many of the weaknesses of mass imprisonment, while repositioning itself to optimize the ability of residual racialized fear-based narratives to drag down support for expanding state action on behalf of the poor and the middle classes.\textsuperscript{118}

We can already see the Strong State moving to new sites of performance. One is the border, where an unprecedented build up of border-patrol forces and deportation processing capacity has led to astronomical growth in the number of people detained and removed from our country, designated as unauthorized to reside or visit in the United States, to levels that are approaching those of imprisonment rates at the height of mass imprisonment.\textsuperscript{119} A second is a move back to policing, where the action was in Hall's day and where it may return. Recent, impressive crime reductions in New York and Los Angeles have given leaders new confidence that larger, better-managed police forces can reduce crime and violence without driving up prison populations.\textsuperscript{120} However, as the recent legal and political battle over stop-and-frisk tactics in New York showed, this may be a matter of replacing literal imprisonment with harassment on a massive and racially profiled basis.\textsuperscript{121} Finally, as

\begin{itemize}
  \item \textsuperscript{116} Simon, supra note 60, at 150, 153–54.
  \item \textsuperscript{118} See López, supra note 10, at 108–09.
  \item \textsuperscript{121} Floyd v. City of New York, 959 F. Supp. 2d 540, 627–28, 633 (S.D.N.Y. 2013) (holding that police officers violated the Fourth Amendment by
California exhibits, the incarceration of Americans may be shifting away from prisons and towards jails, county-level detention facilities that traditionally were limited to pretrial and short-term prisoners but may now see people serving multiyear sentences under realignment.122

We are also likely to see a new version of the Strong State as the carceral state emerges from the current crisis of mass imprisonment. This new version of the carceral state will take some steps to recognize and repudiate the racial disproportionality produced by mass imprisonment, particularly the war on drugs. Recent steps taken by the Justice Department to encourage review of sentences in the cases of federal prisoners sentenced for “nonviolent” drug crimes123 is one small step in that direction. Full legalization of recreational use of cannabis in two states and legalization of medical cannabis in others is another front on which the war on drugs is visibly eroding.124 However, it would be a real mistake to assume that this will result in an end to imprisonment for persons sentenced for drug crimes. Drug crimes still account for 16% of state prison admissions and a much greater portion of federal prison admissions.125 Nor are drug sentences necessarily short. Almost 15% of drug-sentenced state prisoners in 2011 were facing over ten years of imprisonment.126

This leaner carceral core of the Strong State, perhaps two-thirds the size of the current prison population, will reaffirm its foundations in the repression of criminal violence. The shift in the prison population toward a higher percentage of people sentenced

frisking an individual without any objective basis for suspecting that he was armed and dangerous and holding that, because the officers stopped him due to his race, his Fourth Amendment rights and his Fourteenth Amendment equal protection rights were violated where the only description of the suspect was “black male” and the street on which the individual was walking was racially stratified). Judge Scheindlin’s decision was stayed pending an appeal in the Second Circuit, but the case was settled when Bill DeBlasio was elected largely on a campaign to end excessive policing. The issue as a political and legal matter remains far from settled.

122. MAGNUS LOFSTROM & STEVEN RAPHAEL, IMPACT OF REALIGNMENT ON COUNTY JAIL POPULATIONS 2 (2013), available at http://www.ppic.org/content/pubs/report/R_613MLR.pdf (finding a 12% increase in county jail populations statewide after the first year of realignment).


126. CARSON & GOLINELLI, supra note 9, at 13 tbl.10.
for crimes denominated as violent will, as suggested above, disguise lots of interlarding of clearly nonviolent crime (like the public-order offenses). But serious violent crimes like homicide and robbery attract far longer sentences than they did before.127 This lengthening of sentences was an integral part of building mass incarceration along with prison sentences for drugs and less serious property crimes, but so far there is little evidence of an erosion in public support for these policies. As Hall and his colleagues taught us years ago, violence generates powerful support for state power (law's violence), it is an inherently vague concept that can mean different things in different contexts, and it is easily worked into racialized narratives about social decline and interpersonal aggression. More recently, a significant body of empirical psychological work has demonstrated cognitive bias associating racialized persons with violence and weapons.128

As the data reported in Prisoners in 2012 suggests, a prison population that is becoming more concentrated on sentences for violent crime is still likely to be deeply racially marked. The reduction in the ratio between white and black incarceration rates from nearly 9:1 to 6:1 is an improvement, but it may not be enough to alter the power of the criminal justice system to define racial meaning in our time, and it may be temporary. As the control culture refines its tactics and image away from the war on drugs and reaffirms its role in preventing violence, it will not necessarily or even likely be moving away from its concentration on racialized communities. Indeed, the focus on violence may appear to justify even deeper concentration and focus on these very communities. Even the war-on-drugs tactics that are most under pressure, such as aggressive use of stop-and-frisk practices, are in the process of being re-justified as antiviolence techniques.129

In the end, if we are to avoid the stabilization of law's violence in the Strong State as a smarter version of mass imprisonment, critics of the law-and-order state and the carceral state must take up the problem identified by Hall and his colleagues nearly forty years ago—the infusion of violence and race in the racialized construction of "violent crime." In the post–civil rights era, politicians and legal elites no longer directly invoke the specter of "black" or "Latino" crime, but they no longer need to, partially due to a fantastic increase of racial disproportionality in the prison population—crime now means race and race now means crime.

As recent historical work has shown, the concept of black crime did not descend unmediated from the mythology of slavery but was

127. Id. at 12.
129. This was essentially the City's argument in Floyd. See Floyd v. City of New York, 959 F. Supp. 2d 540, 585–86 (S.D.N.Y. 2013).
importantly and significantly invested with meaning by progressive criminology in the early decades of the twentieth century.\textsuperscript{130} The advocates of this view were often liberals seeking to reform the system in part by highlighting the reformability of the foreign-born offenders who were often the focus of crime demonization at the turn of the century.\textsuperscript{131} Contrasting the redeemable immigrant offender with the potentially less or irredeemable black criminal, progressive criminology helped define black crime as the core threat to urban security. The \textit{Uniform Crime Reports}, the leading federal crime series, contributed to this when they ceased collecting statistics on the foreign- or native-born status of prisoners but continued to distinguish criminal statistics on the basis of race, framing the black crime figure as the alarming threat now demonstrated by the statistical evidence of disproportionality.\textsuperscript{132}

The rising crime rates of the 1960s and 1970s, coming closely on the heels of triumphs for the civil rights movement and new demonstration of black political activism in northern cities, reinvigorated the focus on black crime even as it erased the explicit reference to race. Crime would thereafter be treated as a scourge, whether black or white, but the high levels of serious crime in black neighborhoods would justify concentrating the energized culture of control on these neighborhoods. Even the now much discredited war on drugs was originally justified by the severe damage drugs were doing through generating violence in racialized communities.\textsuperscript{133} And even as the control culture is retreating from the war on drugs, they are busy re-justifying it as a scientifically validated strategy to prevent violence.

If we are to avoid this fate, we need to join calls coming from elites for reforming prisons and sentencing laws with calls to replace the post–civil rights era’s glorification (perhaps “horrification” would be a better word) of violent crime—in which we have come to see our metropolitan challenges and national identity through the lens of racialized strangers. This “war on violence” has led to the situation we saw this summer in Ferguson, Missouri—a situation in which neighborhoods, schools, parks, and sometimes whole cities are marked for extreme helpings of law’s violence in the form of aggressive policing, punitive prosecutions, and degrading (in every sense) spells of incarceration or forced separation from parents,


\textsuperscript{131} Id. at 98–100, 103.

\textsuperscript{132} Id. at 270–71.

\textsuperscript{133} See Peter Reuter, \textit{Why Has US Drug Policy Changed So Little over 30 Years?}, 42 CRIME & JUST. 75, 125 (2013).
loved ones, and communities.\textsuperscript{134} Human dignity, which the Supreme Court reminds us in \textit{Brown v. Plata} is not lost to prisoners upon entering prison,\textsuperscript{135} is also not to be lost to those among us who must live in the presence and aftermath of violence. Indeed, the best research now seems to suggest that enhancing the dignity and social-organizational capacity of communities is the most effective way to prevent violence of all kinds.\textsuperscript{136}

Robert Cover, in one of the most powerful themes in \textit{Violence and the Word}, urged judges to accept their role in law’s violence and take responsibility for it.\textsuperscript{137} Cover cited with approval the sentencing decision of Judge Herbert Stern in 1979, who sat as a sentencing judge in an unusual case involving two skyjackers whom the German government refused to try, but whom the American government, as occupation authority still in Berlin, did.\textsuperscript{138} Judge Stern, appointed to sit as a temporary occupation judge, refused to apply the relevant German laws requiring imprisonment for the crime on the grounds that, as a judge in a temporary jurisdiction, he could not assure that the constitutional rights of the sentenced prisoner would be protected once relegated to the German authorities for extended custody.\textsuperscript{139} Cover thought that law could temper and balance the forms of organized violence to which it was wed. The course of mass incarceration defied that notion. Had he lived, Cover might have questioned whether sentencing judges in state courts in the United States should continue to issue prison sentences under sustained unconstitutional conditions. In our time, we must call on state and federal judges to question the constitutionality of sentencing laws, policing, or immigration policies that result in routinely degrading treatment of persons during arrest and detention regardless of the legal authority or due process that precedes it.

Courts are limited to refusing their cooperation with the legal pretenses associated with all forms of the Strong State. If we are to make the most of the present conjuncture, we must follow Hall in


\footnotesize{\textsuperscript{135} Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).}

\footnotesize{\textsuperscript{136} A growing body of knowledge, much of it in the hands of residents of high-violence neighborhoods and the formerly incarcerated, exists through which violence can be effectively reduced without relying on any version of the Strong State and its performative need to enhance law’s violence. For the best-in-social-science versions of that knowledge, see the material on violence in Robert J. Sampson, \textit{Great American City: Chicago and the Enduring Neighborhood Effect} 19–20, 248–49 (2012) (showing that some neighborhoods have low rates of violence despite high rates of poverty, possibly because of strong forms of local social organization).}

\footnotesize{\textsuperscript{137} See Cover, supra note 1, at 1618–21, 1626–27.}

\footnotesize{\textsuperscript{138} Id. at 1619–21.}

\footnotesize{\textsuperscript{139} Id. at 1620–21.}
questioning the deepest myth of the Strong State—that stable urban communities are threatened by racialized violence instead of economic disinvestment and political disempowerment. Rather than debating which flavor of the Strong State we prefer, policing or carceral, domestic or immigration oriented, we need to challenge the heart of its claim of legitimacy to protect communities from violence by identifying its contempt for legality, its violation of community autonomy and social well-being, and its investment in race as an instrument of knowledge and power.