

“All Eyez on Me”:¹
America’s War on Drugs and
the Prison-Industrial Complex

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I. INTRODUCTION

“[T]he deprivation of liberty has become an extremely profitable enterprise.”²

In 1971, President Richard Nixon named drug abuse “public enemy number one” in the United States.³ Since that time, an explicit “War on Drugs” has dominated the political imagination of the United States.⁴ Since

1. TUPAC SHAKUR, *All Eyez on Me*, on ALL EYEZ ON ME (Death Row Records/Interscope Records 1996) (“The Feds is watchin’, n****z plottin’ to get me; Will I survive, will I die?, Come on, let’s picture the possibility; Givin’ me charges, lawyers makin’ a grip; I told the judge I was raised wrong, and that’s why I blaze shit.”).

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2. Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 80 FEMINIST REV. 162, 163 (2005), available at <http://www.palgrave-journals.com/fr/journal/v80/n1/pdf/9400215a.pdf>.

3. *Timeline: America’s War on Drugs*, NPR (Apr. 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

4. See Mike Gray, *Last Act for the War on Drugs*, WASH. POST, Apr. 12, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/04/10/AR2009041001288.html?sid=S T2009102003110> (“After decades of trying to stem the influx of illegal narcotics into the United States, it’s clear that the drug war, like Prohibition, has led us into a gruesome blind alley.”); see

declaring a War on Drugs, domestic incarceration rates have exploded, particularly in the African-American and Latino populations.⁵ Politicians such as Nixon, Barry Goldwater, and Nelson Rockefeller advocated for harsh drug laws and severe criminal sanctions because they argued that a strong correlation existed between drug addiction and crime.⁶ These claims have dominated legislative enactments since the 1970s, virtually ignoring those who argue that drug addiction should be viewed as a public health issue rather than a criminal enterprise.⁷ When President Ronald Reagan signed the Anti-Drug Abuse Act in 1986,⁸ he effectively criminalized drug addiction; this led to the mass and disproportionate incarceration of primarily non-violent drug offenders from disadvantaged minority populations—over sixty-five percent of whom are African-American and Latino.⁹ Since declaring this War on Drugs, U.S. taxpayers have paid more than \$2.5 trillion to fund this “war.”¹⁰

Curiously, despite the escalation of mass incarceration rates of minorities for soft drug crimes since the 1970s,¹¹ violent crime rates have

also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 46–57 (2011). “The War on Drugs, cloaked in race-neutral language, offered whites opposed to racial reform a unique opportunity to express their hostility toward blacks and black progress, without being exposed to the charge of racism.” *Id.* at 53.

5. *See generally* VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENIUM* (2000), available at http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_AC.pdf (documenting the significant spike in the number of inmates during the 1980s and 1990s and noting the disproportionate impact of this spike in the incarceration rate among minorities).

6. *See* Lisa M. Hammond, *Drug War Policy and the Prison Industrial Complex*, ADDICTION WEB SITE OF TERENCE T. GORSKI, <http://www.tgorski.com/articles/Drug%20War%20%20The%20Industrial%20Complex.htm> (last visited Apr. 9, 2012).

7. *See* Carlos Dobkin & Nancy Nicosia, *The War on Drugs: Methamphetamine, Public Health, and Crime*, 99 AM. ECON. REV. 324–32 (2009).

8. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

9. *See* MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, *UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1–5* (2007), available at http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf; *see also* Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (SUPPLEMENT) 87S, 94S (2011), available at <http://sentencingproject.org/doc/publications/Prison%20Journal%20-%20racial%20disparity.pdf> (“African Americans and Latinos constitut[ed] 65% of drug offenders in state prisons in 2008”) (citations omitted).

10. Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887488,00.html> (“[W]ithin the past 40 years, the U.S. government has spent over \$2.5 trillion dollars fighting the War on Drugs.”).

11. MAUER, *supra* note 9, at 94S–95S; Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355, 361 (2011) (highlighting that, in 2000, the incarceration rate of Latino drug offenders was twenty-two times higher than that in 1983, and the incarceration rate of African-Americans increased twenty-six times

steadily decreased in the United States over the past several decades.¹² No country in the world incarcerates more of its citizens than the United States does.¹³ The “tough on crime” political posturing and War on Drugs rhetoric have further led to an eruption in prison profiteering, in what has come to be known, per Angela Davis, Cornel West, and Talib Kweli, as the “prison-industrial complex.”¹⁴

“[T]he prison-industrial complex [describes] an interweaving of private business and government interests” in connection with incarcerating U.S. citizens.¹⁵ This self-perpetuating machine extracts vast profits from free or

in the same period—a striking correlation to the “War on Drugs”); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 589–91 (2010) (observing that, in the last thirty years when politicians have undertaken their “tough on crime” rhetoric, minority incarceration rates have escalated, thus making prisons a rare place where minorities are over-represented as compared to the general population); Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, 26 CRIME & JUST. 1, 9–10 (1999) (stating that, since the late 1970s, drug policies that focused on drug dealers have substantially increased minority prison populations); Emily Bazelon, *With No Sentencing Leeway, What's Left to Judge?*, WASH. POST, May 4, 2003, at B4 available through LEXIS, NEWS & BUS. (recognizing that the federal prison population spiked from 33,000 in 1987 to 128,000 in 2002, with a majority of the prisoners being African-Americans incarcerated for non-violent drug offenses).

12. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 422–23 (1999), available at <http://www.uakron.edu/centers/conflict/docs/Tonry.pdf>; Editorial, *Why Are Violent Crime Rates Falling?*, WASH. POST, Jan. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101829.html>.

13. See generally PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE (2010); Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, <http://www.nytimes.com/2008/04/23/world/americas/23iht23prison.12253738.html?pagewanted=all> (“The United States has . . . 2.3 million criminals behind bars, more than any other nation. . . . China, which is four times more populous than the United States, is a distant second, with 1.6 million people in prison.”).

14. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–87 (2003); CORNEL WEST, HOPE ON A TIGHTROPE: WORDS AND WISDOM 45 (2008) (“We have to recognize that there is a radical continuity between the killing fields of the plantations, the bodies hanging from the trees, police brutality, the prison-industrial complex, and the Superdome in New Orleans after Hurricane Katrina.”); Cornel West, Address at the 2002/2003 Readings and Conversations Series of the Lannan Foundation (June 25, 2003), <http://www.lannan.org/images/cf/cornel-west-030625-trans-read.pdf> (providing a transcript), <http://blip.tv/play/hcATgebRQA%2Em4v> (providing an audio recording) (“Black politicians won’t mention one word about the prison industrial complex. We have a whole presidential campaign, an election. There’s no talk about the connection between the criminal justice system and the prison industrial complex, because they’ve all agreed to be *hard on crime*.”); Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, Sept. 10, 1998, available at http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html [hereinafter Davis, *Masked Racism*] (“[T]he expanding penal system can now be characterized as a ‘prison industrial complex.’”); KOOL G RAP, LORD JAMAR & TALIB KWELI, *Oz Theme 2000*, on OZ SOUNDTRACK (Avatar Records 2001) (“In the prison industrial complex; You got taxes, politics, jobs, death; Gross stun it, cold blooded, dark and heartless; From the pyramids down to the projects.”).

15. Eve Goldberg & Linda Evans, *The Prison-Industrial Complex and the Global Economy*,

cheap prison labor and from lucrative private and public prison contracts.¹⁶ Prisons “play a direct role in capital accumulation since their operation generates profit for corporations engaged in building, equipping and operating them as well as those employing prisoners as cheap labour.”¹⁷ The perceived political benefits of reduced unemployment rates, additional police funding, and tough rhetoric from elected politicians, judges, and prosecutors—ultimately leading to skewed policies—ensure an “endless supply” of criminal justice “clients.”¹⁸ When combining the potential for enormous corporate profit with a politician’s need to be reelected, a toxic foundation is laid that portends legislative initiatives sponsored by representatives who use “tough on crime” campaign rhetoric, while simultaneously accepting lucrative contributions from a private prison lobby intent on increasing the stream of U.S. prisoners. From this toxic mix emerges a client stream of disproportionately African-American and Latino drug offenders.

With prisons literally teeming with minority prisoners, some have argued that current U.S. incarceration practices are similar to the impact of slavery upon early American society, as the “focused machinery of the ‘war on drugs’” and its disparate impact on African-American prisoners “fracture[] families[,] . . . destroy[] individual lives[,] and destabilize[] whole communities.”¹⁹ To wit, “current drug policies and regulations have

CENTRE FOR RES. ON GLOBALIZATION (Oct. 18, 2011), <http://www.globalresearch.ca/articles/EVA110A.html>.

16. See Editorial, *Criminal InJustice Kos: Resisting the Prison Industrial Complex*, DAILY KOS (June 30, 2010, 4:03 PM), <http://www.dailykos.com/story/2010/06/30/880039/-Criminal-InJustice-Kos:-Resisting-the-Prison-Industrial-Complex>; see also Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES, Mar. 14, 2012, <http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-forcontracts.html?pagewanted=all> (“Federal Prison Industries, also known as Unicor, does not have to worry much about its overhead. It uses prisoners for labor, paying them 23 cents to \$1.15 an hour.”).

17. Sudbury, *supra* note 2, at 177 (“Increasingly, black women and women of colour are the raw material that fuel the prison industrial complex: as scapegoats of tough-on-crime rhetoric; targets of drug busting operations that generate millions for police, customs and military budgets; or workers sewing and assembling electronics in prison workshops.”); see Cardwell, *supra* note 16.

18. Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 AM. BEHAV. SCIENTIST 625, 637 (2008), available at [http://minerva.stkate.edu/people/nsf/files/mina-82v5bl/\\$file/625.pdf](http://minerva.stkate.edu/people/nsf/files/mina-82v5bl/$file/625.pdf).

19. See *The U.S. War on Drugs: Political Economics of a New Slavery*, DRUG POL’Y ALLIANCE (Aug. 2001), http://web.archive.org/web/2011041364123/http://www.drugpolicy.org/about/position/race_paper_econ.cfm [hereinafter *The U.S. War on Drugs*]; see also PUBLIC ENEMY, *Black Steel in the Hour of Chaos*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam Records 1988) (“They got me rottin’ in the time that I’m servin’; Tellin’ you what happened the same time they’re throwin’; Four of us packed in a cell like slaves—oh well; The same motherfucker got us livin’ in his hell; You have to realize—what it’s a form of slavery organized; Under a swarm of devils, straight up—word ‘em up on the level; The reasons are several, most of

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direct and devastating impacts on family structure and particularly impact women and children.”²⁰ While the impact of the prison-industrial complex on urban communities has yet to be fully quantitatively assessed, there are obvious detrimental effects including difficult economic burdens, structural poverty, and lack of consistent familial structure—all of which can lead to a host of negative consequences on minority communities. “In this way, the prison system is a means of violence that serves to oppress and punish an ever-increasing number of African American women, and the ‘war on drugs’ remains a war on the black community, family and the female body.”²¹

Despite the prison-industrial complex’s devastating impact on communities of color, the increasing number of imprisoned Americans energizes corporate interests. For example, one prison profiteer recently claimed that the consistent yearly increase in the prison population, “from a business model perspective, [is] clearly good news.”²² Corporate benefits of the prison-industrial complex are manifest because “[g]overnment contracts to build prisons have bolstered the construction industry.”²³ Additionally, “[p]rison construction bonds are one of the many sources of profitable investment for leading financiers such as Merrill Lynch” and Wall Street investment firms.²⁴ These same Wall Street firms are often characterized as divorced from the U.S. punishment regime; however, they profit significantly from prison-construction bonds and by providing financing services at inflated prices.²⁵ Estimates of the sale of tax-exempt bonds to underwrite U.S. prison construction exceed \$2.3 billion annually.²⁶ Further, corporations that produce products that U.S. citizens consume view prison labor as a profitable enterprise, similar to “third world labor power exploited

them federal.”).

20. Brittny Mazza, *Women and Prison Industrial Complex: The Criminalization of Gender, Race and Class in the “War on Drugs,”* 5 *DIALOGUES@RU* 79, 85 (2006), available at http://dialogues.rutgers.edu/about-the-journal/student-research-papers/cat_view/12-volume-v.

21. *Id.* at 89.

22. *Lock Up Profits — in Prison Stocks: Analyst*, CNBC (Nov. 1, 2010), http://www.cnbc.com/id/39949086/Lock_Up_Profits_in_Prison_Stocks_Analyst (“You’ve seen prison populations pretty consistently over the last three decades move up a couple percent a year . . . and from a business model perspective [for the private operators], it’s clearly good news”) (quoting Signal Hill analyst T.C. Robillard).

23. Davis, *Masked Racism*, *supra* note 14.

24. *Id.*

25. *Id.* For example, “MCI charges prisoners and their families outrageous prices for the precious telephone calls which are often the only contact prisoners have with the free world.” *Id.*

26. *The U.S. War on Drugs*, *supra* note 19 (citing Davis, *Masked Racism*, *supra* note 14).

by U.S.-based global corporations.”²⁷ Notable multi-national corporations that use prison labor are IBM, Compaq, Microsoft, and Boeing, as well as non-high-tech industrial leaders such as J.C. Penney and Victoria’s Secret.²⁸ Corporate use of prison labor makes business sense for these enterprises because they can compensate prisoners at a rate far below that of minimum wage and can therefore be extremely profitable.²⁹ Some studies indicate that prisoners’ compensation ranges from \$0 to \$1.50 per hour, with the average rate at \$.40 per hour.³⁰

The political will to normalize criminal sanctions in the United States by bringing incarceration rates back into line with appropriate violent behavior appears to be non-existent because the War on Drugs has become an entrenched piece of the criminal fabric in the United States, and the prison-industrial complex relies upon an ever-increasing stream of “criminals” to maximize profit flow. Perhaps this weak political will persists because, as research indicates, global governments that seek to free their capital markets from regulation and oversight also contemporaneously imprison their poor and disenfranchised at massive rates.³¹ In seeking to “free” market organization, policy-makers marry harsh incarceration policies with free market fundamentalism in ways that are politically expedient to both politicians and the wealthy elite.³²

This Article will first trace the shocking explosion in the incarceration of U.S. citizens for non-violent drug crimes during a period in which violent crime diminished steadily. Next, this Article will explore the motivating factors that led to this explosion in prison population when crimes that are typically associated with prison time are dropping precipitously: namely, corporate prison profiteering and political expediency. This Article will then

27. Davis, *Masked Racism*, *supra* note 14; *see also* Cardwell, *supra* note 16; Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION, Aug. 1, 2011, <http://www.the-nation.com/article/162478/hidden-history-alec-and-prison-labor> (The breaded chicken patty your child bites into at school may have been made by a worker earning twenty cents an hour, not in a faraway country, but by a member of an invisible American workforce: prisoners.”).

28. stuartbramhall, *The Prison Industrial Complex – Part II*, MOST REVOLUTIONARY ACT (Nov. 6, 2010), <http://stuartbramhall.aegauthorblogs.com/2010/11/06/the-prison-industrial-complex-part-ii/>.

29. Davis, *Masked Racism*, *supra* note 14; Cardwell, *supra* note 16.

30. stuartbramhall, *supra* note 28; *see also* Cardwell, *supra* note 16 (“Federal Prison Industries, also known as Unicor. . . uses prisoners for labor, paying them 23 cents to \$1.15 an hour.”); Kelly Patricia O’Meara, *Prison Labor Is a Growth Industry*, FINDARTICLES (May 24, 1999), http://findarticles.com/p/articles/mi_m1571/is_19_15/ai_54736555/.

31. *See* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 6–12 (2011).

32. *See id.* at 191–208.

conclude with suggestions for imagining a safer, saner, and more humane prison regime in the United States.

II. MASS INCARCERATION IN THE UNITED STATES

Since 1980, the rate of incarcerated Americans has skyrocketed.³³ As indicated in the chart below,³⁴ the United States has increased its incarceration rate in the last thirty years by more than an astonishing 335%.³⁵ The United States now imprisons more of its citizens than any other nation on Earth.³⁶ Despite its relatively small population size

33. See ALEXANDER, *supra* note 4, at 6–8; see also SCHIRALDI & ZIEDENBERG, *supra* note 5; Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 53 (2008) (highlighting that, in 2005, the rate of incarceration was 738 inmates per 100,000 people, more than doubling the 313 inmates per 100,000 in 1985); Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standard on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1424 (2010) (remarking that, since 1981, the “population explosion in prison and jails” has been the most significant change in American corrections); Vicki Wayne & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT’L & COMP. L. 335, 373 (2010) (noting that the incarceration rate has increased nearly seven-fold since the “War on Drugs,” and drug offense incarcerations have increased 1200% since 1980); *Key Facts at a Glance: Adult Correctional Populations, 1980-2009*, U.S. DEP’T JUST. (last visited May 1, 2012), <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm> [hereinafter U.S. DEP’T JUST.] (showing a prison population of 501,886 people in 1980, as compared to 2,284,913 inmates in 2009); Bryan Stevenson, *Why Are Millions of Americans Locked Up?*, CNN (Mar. 11, 2012), <http://www.cnn.com/2012/03/11/opinion/stevenson-justice-prison/index.html> (“In 1970 there were roughly 350,000 people in our jails and prisons. Today there are more than 2.2 million. That’s not counting the nearly 5 million people who are on probation or parole. One in every 31 Americans is subject to some form of correctional control. This policy of mass incarceration did not come out of nowhere. It was born out of a politics of fear and anger based on now discredited theories.”).

34. See also SCHIRALDI & ZIEDENBERG, *supra* note 5.

35. See *id.* at 1; see also AMANDA PETERUTI ET AL., JUSTICE POLICY INST., PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY 3, 8 (2009), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/09_05_rep_pruningprisons_ac_ps.pdf.

36. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (2009), available at http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf (emphasizing that the United States, with 2,293,157 prisoners, ranks first in the world above China’s 1,565,771 sentenced prisoners); THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2011), available at http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jan2012.pdf (showing that the United States, in 2010, with 731 inmates per 100,000, has the highest incarceration rate in the world); *World Prison Brief, Entire - Prison Population Totals*, INT’L CTR. FOR PRISON STUD., http://www.prisonstudies.org/info/worldbrief/wpb_stats.php (last visited Apr. 9, 2012) (select “Entire World” in first pull-down box, then select “Prison population totals” in the second pull-down box, and then follow the “Go” hyperlink) (ranking the United States first in the world with 2,266,832 prisoners, 616,832 more than second-ranked China); cf. Robert D. Crutchfield & David Pettinicchio, “Cultures of Inequality”: Ethnicity, Immigration, Social Welfare, and Imprisonment, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 140, 141 (2009) (showing that in a limited study of fifteen nations, the United States incarcerates almost 60% more minorities than

compared to other nations, Americans are imprisoned at rates that far exceed any other country.³⁷ “The United States has less than 5% of the world’s population. But, it has almost 25% of the world’s prisoners.”³⁸

Figure 1: Incarcerated Americans, 1920-2006



The vast majority of the prisoner increase in the United States has come from African-American and Latino citizen drug arrests.³⁹ “The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.”⁴⁰ Given the explosion in incarceration rates as indicated above, one might believe that a simultaneous upsurge in violent crime rates must have also occurred, particularly in urban communities, but this is not so. While the U.S. prison population has

any other nation); Fareed Zakaria, *Incarceration Nation*, CNN (Mar. 30, 2012), http://globalpublicsquare.blogs.cnn.com/2012/03/30/zakaria-incarceration-nation-2/?hpt=hp_c1.

37. See *supra* note 36. Somewhat shockingly, China, Russia, and Iran, nations with highly repressive governments, imprison their citizens at rates that are significantly lower than the United States, while other Western countries imprison at rates dramatically lower than the United States. ALEXANDER, *supra* note 4, at 6. The United States imprisons more of its citizens than known communist and other hard-line regimes. *Id.* “Although crime rates in the United States have not been markedly higher than those of other Western countries, the rate of incarceration has soared in the United States while it has remained stable or declined in other countries.” *Id.* at 7.

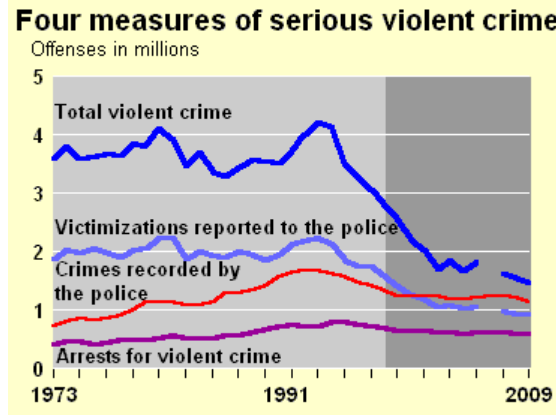
38. Liptak, *supra* note 13.

39. See ALEXANDER, *supra* note 4, at 5–6; Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2043, 2043–44 (2004), available at <http://www.sciencedirect.com/science/article/pii/S0047272703000203> (“Public policy towards drug offenders has undergone a dramatic transformation in the United States over the last two decades. In 1980, approximately 24 000 inmates in US prisons (state and federal combined) had drug crimes as their most serious offense. Twenty years later, that number is estimated to be near 400 000. Drug offenders now make up over 30% of all inmates in state and federal prisons, compared to less than 8% in 1980. The enormous increase in incarcerated drug offenders has come at a time when US drug use, as measured by self-report surveys is relatively flat or even falling.”) (internal citations omitted); Gwen Sharp, *Black/White Disparities in Prison Sentences*, SOC’Y PAGES (Aug. 2, 2008), <http://thesocietypages.org/socimages/2008/08/02/blackwhite-disparities-in-prison-sentences/> (“While blacks are more likely to be sentenced for all the offenses shown, clearly drug offenses stand out as the area with the biggest racial disparity in prison sentences.”).

40. See ALEXANDER, *supra* note 4, at 6.

increased remarkably in the last three decades, the violent crime rates in the United States over approximately the same period have decreased, and in some cases dramatically.⁴¹ As shown in the chart below,⁴² violent crime rates in the United States have decreased markedly since 1990.⁴³ Serious violent crimes dramatically decreased, while arrests for violent crimes remained static for nearly twenty-five years.⁴⁴

Figure 2: Four Measures of Serious Violent Crime



This distortion, incarceration increasing in the face of decreasing violent crime, begs a fundamental question: what underlies this seeming anomaly? Professor Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, endeavors to answer this

41. Fox Butterfield, *Decline of Violent Crimes Is Linked to Crack Market*, N.Y. TIMES, Dec. 28, 1998, <http://www.nytimes.com/1998/12/28/us/decline-of-violent-crimes-is-linked-to-crack-market.html> (explaining that after an explosion of violent crime in the 1980s, violent crimes rates began to drop in the 1990s, including a seventeen percent decrease in robberies in 1997); Mona Charen, Op-Ed., *Poverty Is Up, Crime Is Down. Is That Possible?*, BISMARCK TRIB., Sept. 29, 2010, http://bismarcktribune.com/news/columnists/article_2ff6008c-cb28-11df-bfbc-001cc4c03286.html (remarking that from 1991 to 2004 violent crime in New York City plummeted 75%); Michelle Mittelstadt, *Jackson Lee Says Strict Sentencing Costs Society*, HOUS. CHRON., Feb. 3, 2008, <http://www.chron.com/news/nation-world/article/Jackson-Lee-says-strict-sentencing-costs-society-1776537.php> (underscoring that violent crime rates decreased dramatically from 1990 to 2005, going from 729 crimes per 100,000 people to 469 crimes during this period); Eric Holder, Attorney Gen., U.S. Dep't of Justice, Address to New York Police Department Black History Month Celebration (Feb. 24, 2011), available at <http://www.justice.gov/iso/opa/ag/iso/opa/ag/speeches/2011/ag-speech-110224.html> (providing a transcript) (drawing attention to the declining violent crime rates not only across the United States, but also a remarkable 40% drop in New York City).

42. U.S. DEP'T JUST., *supra* note 33, at <http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm>.

43. *Id.*

44. *Id.*

question by examining America's continuing subordination of its black and brown citizens.⁴⁵ Alexander boldly traces the "Southern Strategy" of the President Nixon Era to the racial coding⁴⁶ of the President Reagan and President George H. W. Bush Era, through President Bill Clinton's "New Democrat" Era, and concludes that these eras of divisive racial politics and "tough on crime" rhetoric led to a new era of subordination just as nefarious as slavery and Jim Crow.⁴⁷ The War on Drugs allows for racial subordination without explicitly naming race: The New Jim Crow. Mass incarceration of African-Americans and Latinos based almost entirely upon drug crimes allows the United States to deprive minority citizens—men in particular—of their constitutional and God-given rights, while appearing race neutral.⁴⁸

When President Reagan successfully federalized drug crime, through incentivizing local and state pursuit of the War on Drugs with federal funding and military-style weaponry made available to local law enforcement,⁴⁹ a genuine "war" was unleashed upon the public, in particular upon the United States's inner cities.⁵⁰ Local urban law enforcement evolved into paramilitary style units that began using battering rams, tank-like vehicles, and Special Weapons and Tactics (SWAT) teams in our inner-

45. See ALEXANDER, *supra* note 4, at 11–15. "A human rights nightmare is occurring on our watch." *Id.* at 15.

46. See *infra* note 133 and accompanying text describing "racial coding."

47. See ALEXANDER, *supra* note 4, at 40–56.

48. *Id.* at 56–59. "Ninety percent of those admitted to prison for drug offenses in many states were black or Latino, yet the mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and demands of the current political climate." *Id.* at 57.

49. See *id.* at 48–49, 71–77.

50. See *id.* at 103–05, 120–24. In describing how the War on Drugs was explicitly declared in and on urban communities, Professor Alexander explains:

From the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses. SWAT teams could have rappelled from helicopters in gated suburban communities and raided the homes of high school lacrosse players known for hosting coke and ecstasy parties after their games. The police could have seized televisions, furniture, and cash from fraternity houses based on an anonymous tip that a few joints or a stash of cocaine could be found hidden in someone's dresser drawer. Suburban homemakers could have been placed under surveillance and subjected to undercover operations designed to catch them violating laws regulating the use and sale of prescription "uppers." All of this could have happened as a matter of routine in white communities, but it did not.

Instead, when police go looking for drugs, they look in the 'hood. Tactics that would be political suicide in an upscale, white suburb are not even newsworthy in poor black and brown communities.

Id. at 121.

city communities, while adopting a military mentality toward drug users and sellers.⁵¹ Thus, the underrecognized connection between politicians tasked with establishing prison-sentencing policy entering into tacit partnerships with newly militarized local police became a War on Drugs that was to be waged in urban communities and against poor people of color. The following description of local-level law enforcements' "siege mentality" and subsequent Jordan Miles narrative illustrate the real-world implications and devastating consequences visited upon regular citizens when an internal, focused "war" is declared, resulting in mass incarceration.

*A. Siege Mentality*⁵²

The traditional form of police operations is known as the "professional" model. The purpose of this model is to develop a paramilitary team of officers able to respond with speed and force to quell criminal disturbances in the community. The philosophy behind this type of policing is simply to put away the bad guys.⁵³

This traditional type of policing model, which is employed in Los Angeles, Philadelphia, and many other cities nationwide, develops a "siege mentality" in its officers.⁵⁴ This "siege mentality" exists on an "us versus them"⁵⁵ plane and incubates a dehumanizing idea toward criminals or "the

51. *Id.* at 73–77.

52. Part II.A. of this Article first appeared in substantial form in andré douglas pond cummings, Comment, *Just Another Gang: "When The Cops are Crooks Who Can You Trust?,"* 41 HOW. L.J. 383, 407 (1998) [hereinafter cummings, *Just Another Gang*]. This reprinting is used here because it remains highly relevant fifteen years later. Citations have been updated to exemplify the continued relevancy and to highlight recent scholarship.

53. See Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 726 (1994) (citations omitted).

54. *Id.* at 727.

55. See David Crump, *The Social Psychology of Evil: Can the Law Prevent Groups from Making Good People Go Bad?*, 2008 BYU L. REV. 1441, 1442 (2008) (highlighting former LAPD officer Rafael Perez's comments at his sentencing for stealing cocaine). Perez said tearfully, "The lines between right and wrong became fuzzy and indistinct. . . . The 'us against them' ethos of the overzealous cop began to consume me. . . . My job became an intoxicant that I lusted after. I can only say I succumbed to the seductress of power." *Id.*; see also Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 555 (2006) (explaining that the police personality is "[t]he culture . . . with its own set of rules and expectations distinct from those of the broader society"). Taslitz further describes the demarcation between police culture and the community: "It is the culture of 'us'—the brave warriors—against 'them'—the rabble of the street." *Id.* at 555 (citing MICHAEL L. MIDDLETON, COP: A TRUE STORY 67–105 (rev. ed. 2000) (detailing a former officer's account of siege mentality)). "It was 'us against them' Them not only encompassed the criminal element, but also included law-abiding citizens who wanted equality and justice." *Id.* at 555 n.256 (quoting

enemy.”⁵⁶ It is far easier to violate an individual when he or she is dehumanized in the mind of the violator. This “siege” model focuses an officer’s attention on crime control rather than crime prevention, and it isolates the police from the people and the communities in which they serve.⁵⁷

The Christopher Commission employed in Los Angeles to evaluate the L.A. riots found that “the police culture created by the professional model was responsible, in part, for the Los Angeles Police Department’s systemic racism and rising brutality.”⁵⁸ Further, the Commission determined that the “siege mentality” of the officers was grounded in military-style thinking. This is a kind of thinking that allows officers armed with military weaponry to debase citizens based on assumptions and profiles.

Therefore, a significant cause of police abuse and brutality in the United States is directly attributable to the militarization of police forces.⁵⁹ The LAPD, for example, began “emphasizing military-style tactics in waging the war on drugs, gangs, and crime. From battering rams to massive displays of force in street sweeps in South Central Los Angeles, the police

MIDDLETON, *supra*, at 85).

56. Riordan, *supra* note 53, at 726–27.

57. *Id.* at 727; Taslitz, *supra* note 54 (illuminating how police view themselves as “under siege” from their communities and consider everyone else as outsiders); *see also The Wire: Season 3* (HBO television broadcasts 2007) (portraying the siege mentality of the Baltimore Police Department and several officers including Major Colvin and Sergeant Carver rejecting that military model in favor of crime prevention through community policing, rather than violent crime control).

58. *See* Riordan, *supra* note 53, at 771–72.

59. *See* Paul Hoffman, *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1472 (1993); *see also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493–514 (2004) (exploring the organizational structure of police brutality); Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 LOY. L.A. L. REV. 681, 687 (2001) (describing police mimicking military tactics by using maximum force in minor situations, including “heavy, sophisticated gear and equipment, [and] a threatening and hostile demeanor toward the public”); *Shifts in Police Tactics To Handle Crowds*, NPR (Nov. 29, 2011), <http://www.npr.org/2011/11/29/142903638/shifts-in-police-tactics-to-handle-crowds> (reporting on the paramilitary tactics as excessive and counterproductive in light of Occupy Wall Street); Norm Stamper, *Paramilitary Policing from Seattle to Occupy Wall Street*, NATION, Nov. 28, 2011, <http://www.thenation.com/article/164501/paramilitary-policing-seattle-occupy-wall-street> (supporting the argument by former Seattle Police Chief Stamper that the military model permeates police culture). Stamper writes:

[Y]oung people, poor people and people of color will forever experience the institution as an abusive, militaristic force—not just during demonstrations but every day, in neighborhoods across the country. . . . [T]he problem is rooted in a rigid command-and-control hierarchy based on the military model. American police forces are beholden to archaic internal systems of authority whose rules emphasize bureaucratic regulations over conduct on the streets.

Id.

have relied on paramilitary tactics to police the streets of Los Angeles.”⁶⁰ Even the lingo, “War on Drugs,” “War on Gangs,” and “War on Crime,” suggests this siege/paramilitary model of policing. Presidents Reagan and Bush, Sr. pervasively initiated the militarized “War on Drugs” at the federal level.⁶¹ In fact, during the Reagan-Bush era, “[p]olice brutality became . . . an acceptable cost of the ‘wars’ against crime, drugs, and gangs in urban America.”⁶²

Furthering this siege mentality, many of the individuals who apply, and eventually become, law enforcement agents have served in a branch of the U.S. Armed Forces.⁶³ These officers can easily visualize the enemy being the “bad” citizens who must be stopped no matter what the cost. When the victims of this ideology have become dehumanized, and war is what the officers are engaged in, it is not difficult to conceptualize how law enforcement officers deprive U.S. citizens of their basic human rights daily, often acting like “gangster cops.”⁶⁴ One such example occurred on a winter night in Pittsburgh as a slight, symphony student left his mother’s house to visit his grandmother, with nothing more than a soda in his pocket.

60. Hoffman, *supra* note 58. *But see* Robert Koehler, *Saying No to Militarism*, CHI. TRIB., Feb. 23, 2012, www.chicagotribune.com/news/columnists/sns-201202221600--tms--Rkoehler.ctmbk-a20120223feb23,0,5098775.column (reporting that the town of Keene, N.H. (population 23,000) resisted a grant for an eight-ton Bearcat armored personnel vehicle tank for its police department because residents rejected such paramilitary weaponry, stating that they do not “want a militarized police force in Keene”).

61. *See* ALEXANDER, *supra* note 4, at 71–74 (describing the federalization of the War on Drugs and the incentivizing of it by offering federal money and weapons to state law enforcement agencies that would take up the War on Drugs).

62. *See* Hoffman, *supra* note 59, at 1490; *see also* Benson, *supra* note 58 (referencing Joseph McNamara, *Testimony to the Los Angeles Citizens’ Commission on U.S. Drug Policy*, in INST. FOR POLICY STUDIES, *THE WAR ON DRUGS: ADDICTED TO FAILURE: RECOMMENDATIONS OF THE LOS ANGELES CITIZENS’ COMMISSION ON U.S. DRUG POLICY* 32–35 (Robert W. Benson et al. eds., 2000). Benson explains that U.S. police culture produces “gangster cops” who corrupt rank and file cops so much that police “have forgotten what their mission is. They are not soldiers in a war . . .” *Id.*

63. *See* ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER’S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* 68–69 (1990).

64. *See id.* at 67–71; *see also* Benson, *supra* note 59 (explaining that police departments utilize military-style hierarchies and develop a “siege mentality in which the police dehumanize the citizens into enemies in a war which must be won at all costs,” often incentivizing police officers to act like “gangster cops”).

*B. Jordan Miles*⁶⁵

When young Jordan Miles, a highly accomplished African-American teen violist enrolled at Pittsburgh's prestigious Creative and Performing Arts High School, stepped out of his mother's house on his way to visit his grandmother on the evening of January 12, 2010,⁶⁶ little did he realize that he was about to learn in no uncertain terms what it means to be a young black man in the United States.⁶⁷ Moments after he began the routine walk to his grandmother's home, Jordan, who stood 5'6" and weighed 150 pounds, was startled to see three white men, dressed in plain clothes, leap from a dark, unmarked car, and sprint toward him.⁶⁸ Jordan, in a panic and thinking the men were about to assault him, ran.⁶⁹ Without identifying themselves as undercover police officers, the three white men chased Jordan down, and when he fell on the icy sidewalk, they pounced upon the slight teenager, tased him,⁷⁰ beat him with closed fists, kneed him in the face, and tore several dreadlocks from his scalp.⁷¹ Fearing for his life, Jordan attempted to utter the Lord's Prayer during the beating, but the officers repeatedly told him to shut his mouth, shoved his face into the snow and ice on the sidewalk, and asked him over and over where he had stashed his gun, drugs, and money.⁷²

65. The Jordan Miles narrative, as described here, first appeared in andré douglas pond cummings, *Post Racism?*, 14 J. GENDER RACE & JUST. 601, 626–28 (2011) [hereinafter cummings, *Post Racism?*].

66. *Brutality Charged as Pittsburgh Police Defend 'Fist Strikes' on Teen*, CNN (Jan. 22, 2010), <http://www.cnn.com/2010/CRIME/01/22/pennsylvania.arrest.dispute/index.html> [hereinafter *Brutality*]; *Teen Violinist Says Police Beat Him and Tore Off Dreadlock*, NEWSONE FOR BLACK AMERICA (Jan. 22, 2010), <http://newsone.com/nation/associated-press/teen-violinist-says-police-beat-him-and-tore-off-dreadlock/>.

67. See andré douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 562–64 (2010) (describing Talib Kweli's quandary in trying to teach his young son that as a black man in America, society will always view him as a threat and that his life, no matter how cleanly he lives it, will always be in danger at the hands of U.S. law enforcement).

68. *Brutality*, *supra* note 66; *Teen Violinist Says Police Beat Him and Tore Off Dreadlock*, *supra* note 65.

69. *Brutality*, *supra* note 66.

70. Christian Morrow, *B-PEP, CAPA Youths Rally for Jordan Miles*, NEW PITTSBURGH COURIER (Jan. 27, 2010), http://www.newpittsburghcourieronline.com/index.php?option=com_content&view=article&id=1319:b-pep-capa-youths-rally-forjordanmiles&catid=38:metro&Itemid=27.

71. *Brutality*, *supra* note 66; *Teen Violinist Says Police Beat Him and Tore Off Dreadlock*, *supra* note 65.

72. Paula Reed Ward & Sadie Gurman, *Teen Sues City, 3 Suspended Officers*, PITTSBURGH POST-GAZETTE, Aug. 31, 2010, <http://www.post-gazette.com/pg/10243/1083859-53.stm>.

Jordan Miles' white assailants were undercover police officers Michael Saldutte, David Sisak, and Richard Ewing.⁷³ Following the brutal beatdown of Jordan, these three men stated in an affidavit that they believed Jordan had been carrying a gun underneath his winter parka.⁷⁴ Jordan, who had no criminal history and not a single arrest on his record,⁷⁵ and who in fact lived a very carefully monitored and sheltered life that included daily viola practice, had actually carried a Mountain Dew soda in his pocket, which the officers claimed they believed was a gun.⁷⁶ Jordan still suffers from facial nerve damage and night terrors, as a result of the profiling and savage beating officers Saldutte, Sisak, and Ewing administered.⁷⁷ The Pittsburgh Police Department demoted the three officers from undercover work and reassigned them to uniform patrol, but this occurred only after public outcry and protests forced the hand of the Pittsburgh Police Department's brass.⁷⁸

While many might argue that police brutality and racial profiling are relics of a distant past, the Jordan Miles experience offers stark rebuttal. When law enforcement agents—charged with serving the public and protecting the innocents—see an innocent child, a young teenager with a quiet manner and a talent for orchestral instruments, solely as a gangster drug dealer merely because of his race and class coupled with their police training, then our nation's racial disconnect must be as chasm-like as it has ever been. At bottom, these officers were motivated, even incentivized, to destroy young Jordan, based on their training, their War on Drugs, their preconceived biases, and the suspicion that this young orchestra student was carrying or trafficking drugs. Further, the savagery of the beating that the officers inflicted upon Miles indicates a racial hatred that continues to permeate law enforcement in the United States.⁷⁹ When three large white men easily subdue a 5'6" boy, with a Mountain Dew in his pocket, and the boy shows up at the police station having been tasered, kned in the face, beaten with closed fists repeatedly, and with dreadlocks ripped from his

73. Sadie Gurman, *Pittsburgh Cops Put on Paid Leave During Beating Investigation*, PITTSBURGH POST-GAZETTE.COM, Feb. 1, 2010, <http://www.post-gazette.com/pg/10032/1032662-100.stm>.

74. Ramit Plushnick-Masti, *Jordan Miles, Teen Violinist: Beat by Police over Mt. Dew Bottle*, HUFFINGTON POST (Jan. 22, 2010), http://www.huffingtonpost.com/2010/01/24/jordan-miles-teen-violini_n_434772.html.

75. *Brutality*, *supra* note 66.

76. *Id.*

77. Ward & Gurman, *supra* note 72; Plushnick-Masti, *supra* note 74.

78. Gurman, *supra* note 73.

79. *See generally* Cummings, *Just Another Gang*, *supra* note 52 (describing the "siege mentality" that infects many major metropolitan police forces).

scalp, this signals more than simply subduing a suspected criminal. It represents a drug war gone awry and a deep-seated animosity that belies the most avid post-racial sensibility.

Although the Jordan Miles affair may seem shocking to the uninitiated, the truth is that scenarios like this occur routinely throughout the United States.⁸⁰ The War on Drugs has woven into the American fabric a police presence and culture of police abuse that our nation's founders not only never imagined, but also summarily attempted to protect against.⁸¹ The Jordan Miles experience is just one of thousands of urban injustices that law enforcement officers perpetrate consistently upon minority U.S. citizens in the name of the War on Drugs.⁸²

C. Twisted Conflicts

As the Jordan Miles affair demonstrates, the War on Drugs literally endangers the lives of innocent minority citizens living in urban communities. With ample evidence that violent crime has diminished nationwide, the paramilitary presence of police in U.S. city centers has not concomitantly diminished.⁸³ In fact, U.S. government officials have never

80. See Farai Chideya, Editorial, *Pervasive Racism Is Tipping the Scales to the Thugs' Advantage*, SAINT PAUL PIONEER PRESS, Mar. 23, 2000, at 15A, available at 2000 WLNR 2232614 (arguing that an undercover officer's killing of Patrick Dorismond, a young, black man aggravated by the officer's request for drugs, occurred based on officers' pursuit in the War on Drugs); Brenda Goodman, *Police Kill Woman, 92, in Shootout at Her Home*, N.Y. TIMES, Nov. 23, 2006, <http://www.nytimes.com/2006/11/23/us/23atlanta.html?fta=y>; Christopher Maag, *Police Shooting of Mother and Infant Exposes a City's Racial Tension*, N.Y. TIMES, Jan. 30, 2008, <http://www.nytimes.com/2008/01/30/us/30lima.html>; Robert F. Worth, *Blacks Are Searched by Police at a Higher Rate, Data Show*, N.Y. TIMES, June 18, 2003, <http://www.nytimes.com/2003/06/18/nyregion/blacks-are-searched-by-police-at-a-higher-rate-data-show.html>.

81. See ALEXANDER, *supra* note 4, at 60–74 (describing the evisceration of Fourth Amendment protections by the U.S. Supreme Court all in the name of supporting the illegitimate War on Drugs initiated by Presidents Nixon and Reagan and continued by Presidents Bush, Clinton, and Bush).

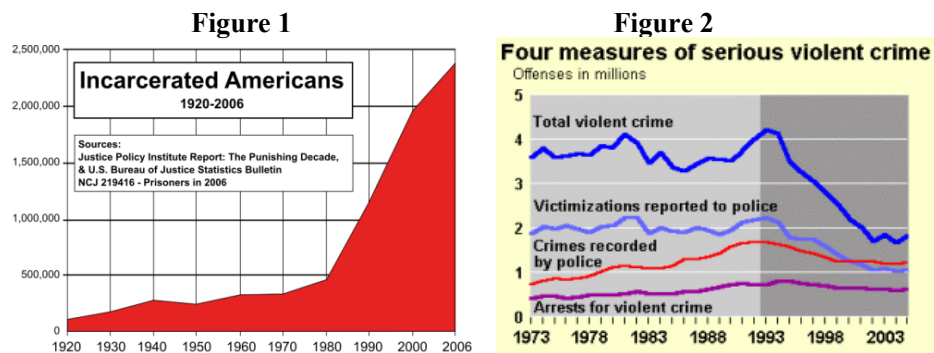
82. ALEXANDER, *supra* note 4, at Ch.2; andré douglas pond cummings, Grutter v. Bollinger, Clarence Thomas, *Affirmative Action, and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1 app. A (2005) (describing rabid law enforcement officers seeking drugs in an illegal search of author's vehicle on Grand Avenue in the West Side of Chicago); Donald F. Tibbs, *Who Killed Oscar Grant?: A Legal-Eulogy of the Cultural Logic of Black Hyper-Policing in the Post-Civil Rights Era*, 1 S.U. J. RACE GENDER & POVERTY 1, 2–6 (2011) (describing the events that the BART police, when faced with little corroboration of an apparent crime, shot and killed a non-threatening Oscar Grant, a young black man, in a grand display of police brutality).

83. See Daniel Filler, *Policing's "New Normal" Doesn't Work with White Folks*, DAVIS ENTERPRISE, Dec. 2, 2011, <http://www.davisenterprise.com/opinion/opinion-columns/policings-new-normal-doesnt-work-with-white-folks/>; Tibbs, *supra* note 82.

intended for this paramilitary presence to ever diminish.⁸⁴

Siege mentality and police abuse are both a byproduct of and a necessary prerequisite to the prison-industrial complex. The same political powers that manage the police and concurrently encourage and enable the burgeoning prison system also sanction paramilitary policing.⁸⁵ As will be demonstrated below, the prison-industrial complex as a system is dependent on nefarious political conflicts of interest. Politicians who set prison and sentencing policy also incentivize and manage federal, state, and local law enforcement through the federalized War on Drugs. Simultaneously, these politicians accept campaign contributions and take regular counsel from private corporations that lobby the politicians aggressively while profiting greatly from the very prison system these conflicted politicians manufacture.⁸⁶

When the graphs used above are viewed side-by-side, as below, they clearly demonstrate the explosion in imprisoned Americans versus dropping violent crime rates; this comparison highlights a stunning disparity that U.S. citizens seem to accept willingly. U.S. politicians and police forces, motivated by corporate profiteers, have incarcerated many more of our citizens for non-violent drug crimes in an era where evidence indicates that our society has become safer and less violent. Why?



III. MOTIVATING FACTORS BEHIND THE PRISON-INDUSTRIAL COMPLEX

To answer the “Why?” question regarding the motivations behind the massive increase in incarcerated Americans, while crime rates are dropping

84. See ALEXANDER, *supra* note 4, at 95–136.

85. See *id.* at 95–128.

86. See *infra* Part III.A.

precipitously, one must examine the underlying policies, structures, conflicts, and institutions that support the prison system in the United States. This analysis suggests that several constituencies benefit significantly from mass incarceration. One constituency consists of those who profit handsomely from an increase in American imprisonment. Another constituency includes those who gain power or electoral advantage from massively incarcerating Americans. This section reviews corporate profiteers and political expediency as motivations underlying the prison-industrial complex.

A. Corporate Profiteering

The foundational tenet in U.S. corporate law is that a corporation exists to maximize the profits of its shareholders.⁸⁷ Leaders of a corporation who fail to effectively enrich its shareholders can be held to violate management duties and responsibilities, and they may be court-ordered to increase profit payout to stakeholders.⁸⁸

A corporation is viewed as a fictional person under the law and as such, has the right to sue and be sued Of course, as a fictional person, the corporation cannot function without human management, so corporate law provides a management mechanism of shareholder ownership of a corporation with voting rights, an elected Board of Directors oversight regime where shareholders elect board members, and day-to-day business management by executives selected by the overseeing board. The CEO is the primary leader of the corporation and is tasked with managing the daily operations and also typically sits on the Board of Directors.⁸⁹

The Board of Directors, along with the day-to-day executives of the corporation, is responsible for achieving the corporation's ultimate objective—maximizing shareholder profit. With this basic principle in mind, it is critical to acknowledge that what was once a purely public responsibility, the incarceration of criminals in the United States, has given way to the corporatization and privatization trend of the U.S. prison

87. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 681 (Mich. 1919); see also andré douglas pond cummings, *Procurring "Justice"?: Citizens United, Caperton v. Massey, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 103 (2010), <http://www.uiowa.edu/~ilr/bulletin.shtml#95> (follow the link "View Response") [hereinafter cummings, *Procurring "Justice"?*] (describing the current-day corporate purpose).

88. See *Dodge*, 170 N.W. at 681; cummings, *Procurring "Justice"?*, *supra* note 87.

89. See cummings, *Procurring "Justice"?*, *supra* note 87.

regime.⁹⁰ Privatizing imprisonment has proven to be enormously problematic in several “under-the-radar” ways.

First, the Board of Directors of a prison-building corporation is duty-bound to seek ways to increase its profit streams. One of the ways that a prison construction company can increase its profits is to win government contracts to build more and more prisons. Increasing incarceration rates in the United States have therefore become a corporate profit objective through the privatization of the prison system.⁹¹ In a recent annual filing, a publicly traded prison company, the Corrections Corporation of America (CCA) unabashedly described the climate and outlook for prison business going forward and provided a blueprint for increasing shareholder profit:

The significant expansion of the prison population in the United States has led to overcrowding in the federal and state prison systems, providing us with opportunities for growth We believe the long-term growth opportunities of our business remain very attractive as insufficient bed development by our customers should result in a return to the supply and demand imbalance that has been benefiting the private prison industry.⁹²

90. See Matt Kennard, *U.S. States Seek To Privatise Prisons*, FIN. TIMES (London), Sept. 19, 2011, <http://www.ft.com/intl/cms/s/0/6ba2792e-d00b-11e0-81e2-00144feabdc0.html#axzz1YTZa1x8N> (“U.S. states are set to privatise scores of prisons as they try to close gaping budget deficits, creating significant new markets for the industry’s biggest private contractors.”).

91. See Katie Stallcup, *Just the Beginning*, NATCHEZ DEMOCRAT (Natchez Cnty., Miss.), Aug. 24, 2007, available at http://www.cca.com/static/assets/08-24-07_Just_the_beginning.pdf. In explaining the reason for constructing the prison without a contract, Louise Grant, who is the CCA marketing and communications vice president, noted that the company was confident in receiving a contract because “[w]e don’t know exactly when or what, but we know the demand is out there.” *Id.* (emphasis added); see also Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik (“[A] growing number of American prisons are now contracted out as for-profit businesses to for-profit companies. The companies are paid by the state, and their profit depends on spending as little as possible on the prisoners and the prisons. It’s hard to imagine any greater disconnect between public good and private profit: the interest of private prisons lies not in the obvious social good of having the minimum necessary number of inmates but in having as many as possible, housed as cheaply as possible.”); Press Release, The GEO Group, The GEO Group Signs Contract for the Continued Management of the Aurora ICE Processing Center in Colorado (Sept. 19, 2011), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=RssLanding&cat=news&id=1607911> (In an announcement of its renewed contract, George C. Zoley, Chairman and Chief Executive Officer of GEO, stated that the corporation appreciated the confidence in the contract award, and he recognized that the detention center “plays a key role in helping meet the need for federal detention bed space.”).

92. Corrs. Corp. of Am., Annual Report 36 (Form 10-K) (Feb. 24, 2010), available at <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=iroIsectext&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5NTAxMjMtMTAMDE2MzA5L3htbA%3d%3d> (providing required disclosures to the Securities and Exchange Commission).

This CCA forward-looking projection came from management, who filed the annual statement with the Securities and Exchange Commission and then delivered it to shareholders.⁹³ Seeing forward-looking profit statements in annual reports to shareholders from public companies that manufacture products or provide consumer services is a straightforward proposition. However, reading profit statements to shareholders from private prison construction and management companies like the one above, which must necessarily base their entire potential profit regime on a steady stream of “clients” (i.e., U.S. citizens sentenced to hard prison time), is an altogether different construction. The law requires private prison company management to maximize profits for shareholders,⁹⁴ and a private prison corporation’s most direct way to increase shareholder profit is to ensure that “demand” for its services (prison beds) increases. To expand profit, corporate management of private prison companies must hope for, even work for, an increase in the number of human beings incarcerated in the United States.⁹⁵ Indeed, this work has been handsomely rewarded in recent

93. *See id.*

94. *See sources cited supra* note 87.

95. *See* Corrs. Corp. of Am., *supra* note 92, at 23. CCA explicitly recognizes that any “relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or . . . decriminalization of certain activities. . . [will] potentially reduc[e] demand” for its services, and “reductions in crime rates could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.” *Id.*; *see also* ALEXANDER, *supra* note 4, at 218 (explaining how the prison complex is “deeply interested in expanding the market—increasing the supply of prisoners”); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 533 (2005) (explaining that it is not just the prison officials with a “desire, and perhaps financial wherewithal, to seek to influence sentencing policies in ways consistent with their financial interests[,]” but all the companies that provide for the industry). These service providers include food service, personnel management systems, construction contractors, security systems, textiles, and waste management companies. *Id.* (citing J. Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 CRIME & DELINQ. 150, 154–55 (1993)); Gopnik, *supra* note 91; Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT’L LAW. GUILD REV. 70, 75 (2009) (remarking that private prison companies, like the CCA, are “building prisons on spec, with no contract to build and no prisoners to house”). These prison companies are banking on desperate governments sending their inmates to these spec prisons to relieve their respective prison overcrowding. *Id.* Ted Strickland, *Private Prisons: The Bottom Line*, WASH. POST, June 13, 1999, at B1, *available through* LEXIS, NEWS & BUS. (In explaining that private prisons adopt lobbying efforts to “keep their beds filled, their profits flowing and their investors happy,” former House Representative Strickland says that “[i]t sickens me to think that individuals sit in corporate boardrooms talking about increasing their bottom line when the commodity they are dealing with is captive human lives.”). Furthermore, prison personnel have a large influence on prisoners’ internal records and their subsequent ability to get released. *Id.*; *see also* Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 987 (2007) (explaining that investors keep a close eye on private prisons and the increases in crime). These private prisons and investors look at this as a fortunate circumstance because “criminals are never in short supply and there aren’t enough bars to put them behind.” *Id.* (citing Amanda Schupak, *The Best of the Best*, FORBES, Jan. 8, 2007, at 96); Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 75–76

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years; 2011 reports indicate that the two largest private prison companies, CCA and GEO Group (formerly Wackenhut Corrections Corporation), together profited more than \$2.9 billion in 2010.⁹⁶ The question then becomes, how exactly do private prison corporations work for an increase in the number of persons incarcerated in the United States?

To increase profits at the rate indicated, private prison corporations hire lobbyists to increase prison populations and prison construction.⁹⁷ The thought that the boards of directors of prison companies are hiring lobbying firms to assist them in privatizing public prisons and increasing prisoner populations is a terribly disturbing conceptualization. Lobbying to increase the stream of prisoners and lobbying for untethered, harsher sentencing regimes is not just unseemly, but inhumane, which leads to another hidden problem of prison privatization. Second, for the CEO who heads a private prison company, one seemingly appropriate action to increase profit for shareholders is to lobby state and federal legislatures to increase prison construction and, by implication, increase the flow of clients—prisoners—into the prison system.⁹⁸ The amount of private prison company money

(2005). Because the government can speculate on the prison population by analyzing its legislation, prison corporations, like CCA and GEO, are able to rely not only on the government forecasting, but also on the government's ability to "actually generate, a never-ending supply of 'customers,'" and the prison corporations are able to channel their respective marketing campaigns to increase their profit. *Id.*

96. Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying To Put More People in Jail*, THINK PROGRESS BLOG (June 23, 2011, 12:00 PM), <http://thinkprogress.org/justice/2011/06/23/251363/cca-geogroup-prison-industry/>.

97. *Ohio 1st in US To Sell Prison to Private Company*, TRIB TODAY.COM (Warren, Ohio) (Sept. 2, 2011), <http://www.tribune-chronicle.com/page/content.detail/id/145808/Ohio-1st-in-US-to-sell-prison-to-private-company-.html?isap=1&nav=5031>; Lee Fang, *Prison Industry Funnels Donations to State Lawmakers Introducing SB1070-Like Bills Around the Country*, THINK PROGRESS BLOG (Sept. 16, 2010, 5:20 PM), <http://thinkprogress.org/politics/2010/09/16/117661/sb1070-prison-lobby/>.

98. PAUL ASHTON & AMANDA PETERUTI, JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 22 (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf (explaining that private prison companies like CCA, GEO, and Cornell Corrections have hired thirty lobbyists, in Florida alone, to promote their prison interests). Furthermore, CCA has given over \$900,000 annually to federal candidates since 2003, and the prison companies have given more than \$16 million to state and federal legislators since 2000, evidence that states are some of the private prison companies' most important clients. *Id.* at 22, 24. As a member of the Judiciary Committee, Senator Tim Eichenberg (D-NM), sponsored two bills that would have lengthened prison sentences, while CCA's principal lobbyist donated almost one-third of his contributions to Senator Eichenberg. *Id.* at 26; Lee Hall, *Nomads Under the Tent of Blue: Migrants Fuel the U.S. Prison Industry*, 6 RUTGERS RACE & L. REV. 265, 308 (2004) (explaining how private prison lobbyists exercise influence at the Oklahoma capitol); Clifford J. Levy, *Prison Company Faces Fine on Gaps in Lobbying Records*, N.Y. TIMES, Feb. 6, 2003, <http://www.nytimes.com/2003/02/06/nyregion/prison-company-faces-fine-on-gaps-in-lobbying-records.html>; Lawrence Messina, *A New W.Va. Prison Means Politics, Lawmakers Told*, HOUS.

spent on lobbying efforts has become dizzying.⁹⁹ CCA spent more than \$3 million on federal lobbying in 2005.¹⁰⁰ The largest U.S. private prison companies together have spent dozens of millions of dollars lobbying both state and federal legislators since the origin of the U.S. private prison corporation.¹⁰¹

Private prison lobbyists advocate on behalf of harsh legislative initiatives that would increase the number of individuals sentenced to prison.¹⁰² Because “private prisons make money from putting people behind bars, their lobbying efforts focus on bills that affect incarceration and law enforcement, such as appropriations for corrections and detention.”¹⁰³ In addition, prison lobbyists battle for greater appropriations in expenditures in law enforcement and Homeland Security (border patrol), stricter immigration laws, and increased immigration detention.¹⁰⁴ They also peddle

CHRON. Sept. 13, 2011, <http://www.inthepublicinterest.org/article/new-wva-prison-means-politics-lawmakers-told>; Bob Ortega, *Arizona Prison Businesses Are Big Political Contributors*, ARIZ. REPUBLIC, Sept. 4, 2011, <http://www.azcentral.com/news/articles/2011/09/04/20110904arizona-prison-business-politics.html> (highlighting that CCA has spent about \$18 million lobbying Congress and other federal agencies in the last decade); Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741> (describing how CCA hired lobbyists to influence the Arizona legislature).

99. See ASHTON & PETTERUTI, *supra* note 98, at 24 (showing that, in state campaign contributions from 2003 to 2010, CCA has spent over \$1.5 million in twenty-seven states, GEO has spent \$2.4 million in twenty-three states, and from 2006 to 2009, Cornell Companies has spent \$72,000 in six states); AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 38 (2011), available at http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf; Bob Libal, *Top Private Prison Lobbyists in Texas*, TEX. PRISON BID'NESS BLOG (Feb. 22, 2008, 10:28 AM), <http://www.texasprisonbidness.org/top-private-prison-lobbyists-texas> (describing that, in Texas, the private prison lobbying expenditures topped \$1.1 million in 2007).

100. ASHTON & PETTERUTI, *supra* note 98, at 24.

101. *Id.* at 22–24.

102. See *id.* The private prison companies promote and advocate for “three-strikes” and “truth-in-sentencing” legislation because this creates more business. *Id.* at 3. Some of the bills that these companies have lobbied for include the Private Prison Information Act of 2009; Safe Prison Communications Act of 2009; and Commerce, Justice, Science, and Related Agencies Appropriations Act, 2001. *Id.* at 23. The American Legislative Exchange Council (ALEC) is an association that links the private business sector, including CCA and GEO, with lawmakers. *Id.* at 28. One of ALEC’s task forces facilitates legislation to “hold criminals accountable . . . and provide swift and certain punishment . . .” *Id.* at 28–29.

103. *Id.* at 15–22.

104. Sullivan, *supra* note 98; Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?* 9–10 (2012) (unpublished manuscript) (on file with author) (“The current source of profit, or earnings, for prisons (and the source of growth for the criminal justice system) is the war on drugs. The rate of incarceration of blacks and brown people as a result of drug possession has reached its optimal state. In other words, there is no growth potential in this area. Prison companies cannot justify building new prisons on the basis of drug convictions. However, prison companies can justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the ‘Mexican.’”).

influence with lawmakers who will implement draconian incarceration policies like the recent Arizona immigration legislation, titled "The Support Our Law Enforcement and Safe Neighborhoods Act" (SB 1070).¹⁰⁵ Emerging reports indicate that private prison lobbyists literally drafted the legislation that became SB 1070, as the legislation introduced into the Arizona legislature was identical to the proposed bill language that emerged from prison lobby meetings with Arizona elected representatives.¹⁰⁶

Further, private corporations are free to make campaign contributions, and the private prison lobby contributes generously.¹⁰⁷ In light of *Citizens United v. Federal Election Commission*,¹⁰⁸ the private prison corporation's campaign contributions can now be made directly and in an unfettered manner, straight from the private prison company coffers into the hands of the federal and state legislators whom they hope to influence.¹⁰⁹ The private prison companies allocate millions of dollars in campaign contributions to mostly incumbent politicians, seeking to garner influence in the legislative process, to continue privatizing the prison regime in the United States, and to receive favorable contracts for private prison construction.¹¹⁰

Third, Wall Street banks and investors profit dramatically from the

105. See ASHTON & PETTERUTI, *supra* note 98, at 30; *How Corporate Interests Got SB 1070 Passed*, NPR (Nov. 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=131191523>; see also Maurice Belanger, *Arizona's SB 1070 and the Prison Lobby*, NAT'L IMMIGR. F., (Oct. 28, 2010), <http://www.immigrationforum.org/blog/display/arizonas-sb-1070-and-the-prison-lobby/>; Lee Fang, *Prison Industry Funnels Donations to State Lawmakers Introducing SB1070-Like Bills Around the Country*, THINK PROGRESS (Sept. 16, 2010), <http://thinkprogress.org/politics/2010/09/16/117661/sb1070-prison-lobby/>; Beau Hodai, *Ties That Bind: Arizona Politicians and the Private Prison Industry*, IN THESE TIMES, (Jun. 21, 2010), http://www.inthesetimes.com/article/6085/ties_that_bind_arizona_politicians_and_the_private_prison_industry/. But see Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008) (positing that it is inefficient for the private prison lobby to advocate for harsher prison sentences, rather private prisons free-ride off of the advocacy expenditures of the public sector actors committed to increasing incarceration); Sasha Volokh, *Private Prison Lobbying and SB 1070*, VOLOKH CONSPIRACY (Nov. 10, 2010), <http://volokh.com/2010/11/10/private-prison-lobbying-and-arizonas-sb-1070/> (contesting arguments and evidence that the private prison lobby actually engages in lobbying for harsher sentencing regimes and greater incarceration rates, rather than simply lobbying for the privatization of prisons).

106. See Sullivan, *supra* note 98; *How Corporate Interests Got SB 1070 Passed*, *supra* note 105.

107. ASHTON & PETTERUTI, *supra* note 98.

108. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

109. See cummings, *Procuring "Justice"?*, *supra* note 87, at 98. See generally Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717 (2011) (describing the potential nefarious consequences of *Citizens United*).

110. See ASHTON & PETTERUTI, *supra* note 98, at 15–22; AM. CIVIL LIBERTIES UNION, *supra* note 99, at 39.

prison-industrial complex.¹¹¹ Prison-construction bonds, often offered as revenue bonds, are one of the many sources of profitable investment for leading Wall Street financiers such as Merrill Lynch and Goldman Sachs.¹¹² Tax-exempt bonds sold to underwrite new prison construction bring more than \$2.3 billion in profit to Wall Street investment banks.¹¹³ “Investment firms such as Morgan Stanley and Goldman Sachs form syndicates to buy the [prison] bonds at a discount, then resell them. Retailers market the bonds as safe long-term investments to consumers.”¹¹⁴ *Forbes* magazine touts prison bonds as a smart and safe investment for investors looking for long-term financial security and excellent profit potential.¹¹⁵

The corporatization of the prison system in the United States has perversely incentivized public corporations and Wall Street to work *for* mass incarceration and *against* prison reform and rehabilitation. The prison-industrial complex has simply become a cash cow for private prison corporations and Wall Street investment banks. Investors have a new stream of income opportunity by either purchasing public shares in a private prison

111. See, e.g., Jim Balow, *EDA Approves Second Round of Jail Bonds*, CHARLESTON GAZETTE, July 19, 2002, at 14A, available at 2002 WLNR 1064643; Eric Bates, *Private Prisons*, NATION, Jan. 5, 1998, at 11, 16, available at 1998 WLNR 7674949 (stating that with backing from Lehman Brothers and PaineWebber, Corrections Corporation of America formed C.C.A. Prison Realty Trust, and the subsequent stock offering raised almost \$400 million, allowing the Trust to invest in prison property); Derrick A. Carter, *Reflections of the Proposed Federal Crime Bill*, NBA NAT’L B. ASS’N MAG., May/June 1994, at 23, 25 (commenting on a report from *The Wall Street Journal* that examines that large investment firms like Goldman Sachs & Co., Prudential Insurance Co. of America, Smith Barney Shearson Inc., and Merrill Lynch & Co. are key players in underwriting tax-exempt bonds for prison construction); Joe Hallinan, *Town Profits from Prison*, PLAIN DEALER (Cleveland), May 25, 1995, at 5A, available at 1995 WLNR 5026030 (telling how a small town, Hinton, Oklahoma, worked with American Express to secure \$19 million out of the \$24 million needed for a prison project); Gordon Lafer, *Captive Labor: America’s Prisoners as Corporate Workforce*, AM. PROSPECT, Sept. 1, 1999, http://prospect.org/cs/articles?article=captive_labor (“Such respected money managers as Allstate, Merrill Lynch, and Shearson Lehman have all invested in private prisons.”); Dan Morain, *Long-Term Investments: ‘Three Strikes’ Law Will Boost Wall Street Firms That Sell Bonds to Finance Construction*, L.A. TIMES, Oct. 16, 1994, available at 1994 WLNR 4243869 (showing that, from 1984 to 1995, Morgan Stanley and Goldman Sachs bought bonds, which were used to finance prison construction at a discount and resold them, making \$35 million); Christina Nuckols, *Developers Propose Prison Plan for Virginia*, VIRGINIAN-PILOT, Apr. 17, 2003, at D1, available at 2003 WLNR 3260215; cf. Bates, *supra*, at 12. CCA increased in stock value from \$50 million in 1986 to over \$3.5 billion in 1997 because, as PaineWebber describes, “Crime pays.” *Id.*

112. Davis, *Masked Racism*, *supra* note 14, at 16; see also Alex Anderson, *Hiding Out in Prison Bonds*, FORBES.COM (Oct. 22, 2008), http://www.forbes.com/2008/10/22/prison-correctional-bonds-pf-ii-in_aa_1022fixedincome_inl.html (“On the plus side for investors, prisons are a growth industry and the lease revenue bonds to construct correctional facilities are exempt from state income tax.”).

113. *The U.S. War on Drugs*, *supra* note 19.

114. Morain, *supra* note 111.

115. See Anderson, *supra* note 112.

company or by purchasing bonds through Wall Street banks with little risk of default based on the funky lease-back strategy¹¹⁶ employed by states financing prison construction through prison bonds. Thirty years ago, investing in private prison companies was not an option.¹¹⁷ Additionally, Wall Street banks were not in a position to profit massively from prison construction. In the intervening decades, imprisoning U.S. citizens has morphed into a significant growth industry and profit stream.

Beyond the growth industry and profit stream, Professors Alexander, Richard Wilkinson, and Kate Pickett interrogate darker forces at work in the prison-industrial complex.¹¹⁸ The U.S. prison-industrial complex is reliant first and foremost on political decisions to address drug abuse from a criminal sanctions perspective rather than a health and addiction perspective.¹¹⁹ In order to control political and economic power, legislators turn drug use and abuse in the United States into an oligarchy of labor power wherein whites (corporate executives and shareholders) gain wealth while the system not only marginalizes minorities, but also indentures them as prison labor.¹²⁰ As Alexander so deftly notes in *The New Jim Crow*, even when African-American and Latino inmates are released from prison, they are so far removed from the “legitimate” labor market that they are almost driven back into the drug markets or “illegitimate” labor markets and returned nearly inevitably to prison, through parole violations or new drug

116. See *id.* According to Forbes, a lease-back strategy includes the sale of lease-revenue bonds to fund prison construction:

[A] lease revenue bond is actually a loan made to the state by the bond holders that is repaid by income (revenue) generated by the project. Lease[-]revenue bonds are most commonly used for revenue-generating projects such as toll roads, bridges, hospitals, parking facilities, recreational projects, telephone systems and colleges. Voters don't have to approve LRBs because they are supposed to be self-sustaining from the lease revenue they generate and don't take money from the general fund.

Id.

117. See CCA, <http://www.cca.com/> (last visited Apr. 10, 2012) (“Welcome to CCA, the nation’s leading provider of correctional solutions to federal, state and local government. Our company – the first of its kind – was founded in 1983.”); *Prison Privatization*, CORRECTIONS, http://www.correctionsproject.com/corrections/pris_priv.htm#pb (last visited Apr. 10, 2012) (“[I]n 1984, a number of Tennessee investors with close friends in the legislature recognized a business opportunity and formed CORRECTIONS CORPORATION OF AMERICA (CCA). Their plan was to use venture capital to build a new prison and -- like a hotel -- lease their beds to the state in a profit-making endeavor.”).

118. See ALEXANDER, *supra* note 4, at 40–57; RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 145–56 (2009).

119. Michael Specter, *Getting a Fix: Portugal Decriminalized Drugs a Decade Ago. What Have We Learned?*, *NEW YORKER*, Oct. 17, 2011, at 36, 44–45.

120. See ALEXANDER, *supra* note 4, at 92–94; see also *supra* notes 16, 27–30 and accompanying text.

crimes.¹²¹ Our current prison regime in the United States therefore maintains political and economic control by keeping black and brown men powerless while simultaneously allowing prison corporations to maintain a steady “client” base and consequently to increase profit margins.

B. Political Expediency

Professor Bernard Harcourt, in his *The Illusion of Free Markets: Punishment and the Myth of Natural Order*, elegantly describes the political expediency in massively incarcerating poor individuals and the subtle connection between free-market advocacy and mass incarceration.¹²² Extrapolating from Harcourt, the War on Drugs is nothing more than a policy that fits seamlessly into a long global tradition of governments harshly imprisoning individuals while simultaneously freeing economic markets from regulation.¹²³ Harcourt’s *The Illusion of Free Markets* disabuses the notion that markets are “free,” as he demonstrates that capital markets require a significant degree of state and federal assistance¹²⁴—a fact that free-market fundamentalists conveniently ignore.¹²⁵ Historically, across the world, nations that have emphasized unfettered markets, through working to preserve them or free them from regulation and oversight, have concurrently imposed upon their citizens harsh punishment regimes that

121. *Id.* at 137–60.

122. HARCOURT, *supra* note 31, at 41–44, 73–77.

123. *See id.* at 6–12, 41–44. Harcourt writes:

[N]eoliberal penalty naturalizes the market and thereby obscures the actual regulation of the marketplace. By obscuring the rules and making the outcomes seem natural and deserved, neoliberal penalty makes it easier for certain market players to reorganize economic exchanges in such a way as to maximize their take, a move that ultimately increases social inequality; and there is strong evidence of sharply increased inequality in the United States since the 1970s. Increased social inequality, in turn, has its own dynamic that tends to produce heightened punitive repression to maintain social order.

Id. at 41–42.

124. *See id.* at 47–48, 185–90; *see, e.g., id.* at 179–85. No markets are truly free because

[i]n all markets, the state is present. Naturally, it is present when it fixes the price of a commodity such as wheat or bread. But it is also present when it subsidizes the cultivation or production of wheat, when it grants a charter to the Chicago Board of Trade, when it permits trading of an instrument like a futures contract, when it protects the property interests of wheat wholesalers, when it facilitates the river transport of wheat, when it criminalizes the coordination of prices, when it allows the merger of grain companies, when it polices the timing of trades, and so on.

Id. at 47.

125. *See id.* at 6–12, 191–95.

increase imprisonment rates exponentially.¹²⁶ It is as if the governing elite acknowledge that unfettered markets work to enrich the entrenched,¹²⁷ while government-imposed incarceration both imprisons the society drag, and at the same time diverts the public attention away from the enriched entrenched and focuses it upon the incarcerated masses.¹²⁸

Harcourt's thesis is that governing elites rely upon notions of natural order in advocating for free markets while concurrently using the construct of natural order to propound mass incarceration.¹²⁹ If this is accurate, then the U.S. electoral and drug policy that began in the 1970s fits perfectly into this thesis Alexander described in *The New Jim Crow*. As incarceration rates exploded over the past two decades, politicians vigorously pursued efforts to deregulate the U.S. capital markets.¹³⁰

In the 1970s, Richard Nixon and his staff settled upon the "Southern Strategy" as an avenue to win elections and to perpetuate the United States's "sordid racial past," including slavery and Jim Crow.¹³¹ By politically

126. *See id.* at 191–208.

127. *See* STEVEN RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* ch. 5 (forthcoming 2012) (manuscript on file with author).

128. *See* ALEXANDER, *supra* note 4, at 51–57; *see also* HARCOURT, *supra* note 31, at 233–39.

129. *See* HARCOURT, *supra* note 31, at 42 ("Modern penal outcomes in the United States bear this out, especially from 1973 to 2008—a period of massive expansion of the carceral sphere during which free-market ideas and privatizations flourished. During this thirty-five year span, the United States experienced skyrocketing rates of incarceration and exorbitant institutionalization costs."). Harcourt further explains that:

"This modern vision rests on a simple but devastating illusion. Superimposing the political categories of 'freedom' or 'discipline' on forms of market organization has the unfortunate effect of obscuring rather than enlightening. It obscures by making both the free market and the prison system seem natural and necessary. In the process, it facilitated the birth of the penitentiary system in the nineteenth century and its ultimate culmination into mass incarceration today."

Id. at inside front cover of book jacket.

130. *Id.* at 41 ("The punitive society we now live in has been made possible—not caused by, but made possible by—this belief that there is a categorical difference between the free market, where intervention is inappropriate, and the penal sphere, where it is necessary and legitimate. This way of thinking makes it easier both to resist government intervention in the marketplace, as well as to embrace criminalization and punishment of any 'disorder.'"). *See generally* andré douglas pond cummings, "Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets, 83 NEB. L. REV. 979 (2005) (describing deregulatory legislation adopted during the Clinton Administration); andré douglas pond cummings, *Still "Ain't No Glory in Pain": How the Telecommunications Act of 1996 and Other 1990s Deregulation Facilitated the Market Crash of 2002*, 12 FORDHAM J. CORP. & FIN. L. 467 (2007) (describing deregulatory legislation adopted in the 1990s).

131. *See* cummings, *Post Racialism?*, *supra* note 65, at 601; *see also* ALEXANDER, *supra* note 4, at 43–47.

dividing blacks and poor southern whites purposely, Nixon began to forge a new Republican strategy that perseveres today. The division, coming upon the heels of the Civil Rights Act of 1964, began to use racial coding to subordinate African-American interests rather than the racist construction used in the Jim Crow era.¹³²

Racial coding has a long tradition in the United States. That it persists in the purportedly post-racial Obama era belies the very positioning of post-racialism and post-racialists. Racial coding entails engaging issues “such as crime and welfare are now widely viewed as ‘coded’ issues” that play upon race—or more centrally, upon white Americans’ negative views of black Americans—without explicitly raising the race card. By embracing coded issues, politicians and pundits are able to exploit white American’s racial animosity and resentment toward minority Americans while diminishing the appearance of race hatred or race baiting.¹³³

Thus, in this new era of racial coding, politicians continue to paint African-Americans as undeserving recipients of welfare (the “welfare queen”),¹³⁴ undeserving of mercy (Willie Horton ad),¹³⁵ undeserving of education (backlash against affirmative action),¹³⁶ undeserving of the right to vote (felon disenfranchisement and voting discrimination against the poor),¹³⁷ and *more* deserving of prison than freedom (the crack epidemic and

132. ALEXANDER, *supra* note 4, at 40–57.

133. andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 217 (2011) [hereinafter cummings, *Racial Coding*]; see also THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 198–214 (1992) (describing the emergence of coded language during the Reagan Administration); Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 AM. POL. SCI. REV. 593, 593 (1996); *Tim Wise: Imagine if the Tea Party Was Black*, EXAMINER.COM (Apr. 25, 2010), <http://www.examiner.com/civil-rights-in-washington-dc/tim-wise-imagine-if-the-tea-party-was-black> (describing the American racial double standard in connection with racial animosity and racial exploitations).

134. See cummings, *Racial Coding*, *supra* note 133 (describing President Reagan’s favorite concept: “welfare queen”); see also ALEXANDER, *supra* note 4, at 48 (“[O]ne of Reagan’s favorite and most-often-repeated anecdotes was the story of a Chicago ‘welfare queen’ with ‘80 names, 30 addresses, 12 Social Security cards,’ whose ‘tax-free income alone is over \$150,000.’”).

135. See cummings, *Racial Coding*, *supra* note 133, at 217–18 (describing President Bush Sr.’s use of Willie Horton in an anti-Michael Dukakis campaign commercial).

136. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198 (2010).

137. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1024 (2009); Matthew Vadum, *Registering the Poor To Vote Is Un-American*, AMERICAN THINKER (Sept. 1, 2011), http://www.americanthinker.com/2011/09/registering_the_poor_to_vote_is_un-american.html.

mandatory sentencing).¹³⁸ This racial coding captured America's imagination and became the dominant political fascination of the country.¹³⁹ Political figureheads primarily perpetuated these nefarious concepts, particularly Presidents Reagan, Bush, Sr., and Clinton,¹⁴⁰ each of whom were intent on winning elections and simultaneously freeing the capital markets.¹⁴¹

Fitting exactly into Harcourt's thesis and dating back to when legislatures punished crack cocaine offenses one hundred times more than powder cocaine, U.S. politicians have scrambled to "win" the title of "toughest on crime."¹⁴² Meanwhile, these politicians voted often and repeatedly to deregulate the U.S. capital markets.¹⁴³ When political power and entrenchment become intertwined with mass incarceration, the outcome is an increasing stream of prisoners, with little consideration given to reform or rehabilitation.

Conflict theory, or more accurately, conflict criminology as expanded in the 1970s by sociologists Austin Turk and William Chambliss among others, provides context for Harcourt's historical observations. Turk and Chambliss argue that those in power work diligently to maintain and increase their power by creating laws and policies that criminalize the powerless in order to ensure that the disaffected are unable to gain power.¹⁴⁴ Alexander theorizes that the federalization and criminalization of the drug war was simply an instinctive response from the powerfully entrenched to the political gains that people of color made through the Civil Rights

138. Planet Rock: The Story of Hip Hop and the Crack Generation, (VH1 television broadcast Sept. 18, 2011) [hereinafter VH1] (describing the media frenzy surrounding crack cocaine as perpetuated by politicians, including President Bush, Sr., who in an address to the nation claimed to possess crack cocaine purchased just outside the White House (later proven to be a fabrication)).

139. ALEXANDER, *supra* note 4, at 40–57.

140. *Id.*

141. RAMIREZ, *supra* note 127, at ch. 3; Timothy A. Canova, *Legacy of the Clinton Bubble*, DISSENT (Summer 2008), available at www.dissentmagazine.org/article/?article=1129.

142. VH1, *supra* note 138 (describing the impact of crack cocaine on American popular culture). Professor Paul Butler describes the legislative frenzy that led to crack cocaine being punished at a rate of 100 to 1 over powder cocaine. *Id.*

143. See sources cited *supra* note 130.

144. See generally WILLIAM CHAMBLISS & ROBERT SEIDMAN, *LAW, ORDER AND POWER* (1971) (extrapolating conflict theory into the criminal context detailing how the powerful elite often criminalize behaviors in the powerless in order to allow the powerful and entrenched to maintain and even augment their power); AUSTIN TURK, *CRIMINALITY AND LEGAL ORDER* (1969) (describing the motives of the powerful in maintaining their power by criminalizing and imprisoning the less powerful to ensure that the powerless never gain power).

Movement in the 1960s.¹⁴⁵ Harcourt theorizes that when elites in power work to maintain their influence and wealth (through rigged capital markets), the instinctive corollary is to develop ways to criminalize the powerless, all in order to maintain wealth, influence, and position.¹⁴⁶ Simply stated, the War on Drugs perpetuates subordination of minority Americans, while it simultaneously enriches and protects the power of the elite.

IV. CONCLUSION

With the deeply entrenched profit-driven corporatization of the prison system in the United States now secure, it is difficult to imagine the political will emerging to unravel the mass incarceration regime of American citizens. Prison reform, needed desperately in the United States, would require the dismantling of a carefully orchestrated privatization and the increasingly lucrative business of warehousing American criminals. “Unless the number of people who are labeled felons is dramatically reduced, and unless the laws and policies that keep ex-offenders marginalized from mainstream society and economy are eliminated, the system will continue to create and maintain an enormous underclass.”¹⁴⁷

Alexander names mass incarceration “the new Jim Crow.” Harcourt identifies that the harsh periods of incarceration for the disaffected always accompanies the “freeing” of capital markets. Will the United States sit idly by while a system of continued racial subordination is perpetuated against the minority poor in our country? The first step in defeating the War on Drugs and mass incarceration must be recognizing the perverse set of incentives and outcomes that this war perpetuates.¹⁴⁸ Once recognized, the

145. See generally ALEXANDER, *supra* note 4.

146. See generally HARCOURT, *supra* note 31.

147. ALEXANDER, *supra* note 4, at 94.

148. Examples of perverse incentives motivating profit-driven private prison corporations includes CCA’s 2012 offer to forty-eight cash-strapped states to purchase state-owned prisons from them so long as the state contracts to keep the prison occupied at 90% and pays CCA to warehouse its criminals for the next twenty years. See Associated Press, *Cash for Prisons? Private Corrections Company Offers to Buy Facilities From States*, WASH. POST, Mar. 9, 2012, http://www.washingtonpost.com/business/cash-for-prisons-private-corrections-company-offers-to-buy-facilities-from-states/2012/03/09/gIQAWK4PIR_story.html?wpisrc; see also Kevin Johnson, *Private Purchasing of Prisons Locks in Occupancy Rates*, USA TODAY, Mar. 7, 2012, <http://www.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1> (“At a time when states are struggling to reduce bloated prison populations and tight budgets, a private prison management company is offering to buy prisons in exchange for various considerations, including a controversial guarantee that the governments maintain a 90% occupancy rate for at least 20 years.”). Further, in the infamous “kids for cash” scandal in Pennsylvania, two elected state juvenile judges pleaded guilty and were sentenced to more than six years in federal prison for accepting bribes from private juvenile detention facilities for sending thousands of often undeserving children to the

second step in reversing mass incarceration requires eliminating these perverse incentives that literally motivate corporate players to seek increased incarceration rates of American citizens.

While a profound corporate backlash would likely occur, the United States could seriously contemplate Portugal's experiment with eliminating most prison time for all drug use.¹⁴⁹ After all, hope in ending the drug war

private detention facilities in exchange for more than \$2.6 million in kickbacks. See Stephanie Chen, *Pennsylvania Rocked by 'Jailing Kids For Cash' Scandal*, CNN (Feb. 23, 2009), http://articles.cnn.com/2009-02-23/justice/pennsylvania.corrupt.judges_1_detention-judges-number-of-juvenile-offenders?_s=PM:CRIME ("As scandals from Wall Street to Washington roil the public trust, the justice system in Luzerne County, in the heart of Pennsylvania's struggling coal country, has also fallen prey to corruption. The county has been rocked by a kickback scandal involving two elected judges who essentially jailed kids for cash. Many of the children had appeared before judges without a lawyer."); Thomas Frank, *Lock 'Em Up*, WALL ST. J., Apr. 1, 2009, <http://online.wsj.com/article/SB123854010220075533.html>; Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES, Mar. 27, 2009, <http://www.nytimes.com/2009/03/28/us/28judges.html?pagewanted=all> ("[T]he law caught up with Judge Mark A. Ciavarella Jr., 58, who ran that juvenile court for 12 years, and Judge Michael T. Conahan, 56, a colleague on the county's Court of Common Pleas. In what authorities are calling the biggest legal scandal in state history, the two judges pleaded guilty to tax evasion and wire fraud in a scheme that involved sending thousands of juveniles to two private detention centers in exchange for \$2.6 million in kickbacks."). However, one positive development in connection with addressing the prison-industrial complex's stream of "clients" is the 2010 bill passed by Congress and signed by President Obama that significantly reduced the crack versus cocaine sentencing disparity. Peter Baker, *Obama Signs Law Narrowing Cocaine Sentencing Disparities*, CAUCUS: POL. & GOV'T BLOG, N.Y. TIMES (Aug. 3, 2010, 12:55 PM), <http://thecaucus.blogs.nytimes.com/2010/08/03/obama-signs-law-narrowing-cocaine-sentencing-disparities/>. Additionally, some conservative politicians are recognizing the foreboding costs of mass incarceration and are beginning to argue that balancing budgets might be more important than warehousing Americans in the nation's prisons. See Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States To Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> ("We urge conservative legislators to lead the way in addressing an issue often considered off-limits to reform: prisons. Several states have recently shown that they can save on costs without compromising public safety by intelligently reducing their prison populations.").

149. Specter, *supra* note 119. It is important to note that Portugal has not legalized drugs, but since the 1990s, Portugal has treated drug abuse as a public-health issue rather than as a crime. *Id.* at 36. In *The New Yorker*, Specter describes:

"We were out of options," João Goulão [said] Goulão is president of the Institute on Drugs and Drug Addiction, a department of the Ministry of Health that oversees Portuguese drug laws and policy. "We were spending millions and getting nowhere." For people caught with no more than a ten-day supply of marijuana, heroin, ecstasy, cocaine, or crystal methamphetamine—anything, really—there would be no arrests, no prosecutions, no prison sentences. Dealers are still sent to prison, or fined, or both, but, for the past decade, Portugal has treated drug abuse solely as a public-health issue.

That doesn't mean drugs are legal in Portugal. When caught, people are summoned before an administrative body called the Commission for the Dissuasion of Drug Addiction. Each panel consists of three members—usually a lawyer or a judge, a doctor, and a psychologist or a social worker. The commissioners have three options: recommend treatment, levy a small fine, or do nothing. Counseling is the most common approach

in the United States exists in that recent “data showing that the war on drugs has failed are not in dispute; Obama Administration officials do not even use the phrase.”¹⁵⁰ Further, the Fair Sentencing Act was adopted in July 2010 bringing the crack/powder cocaine sentencing disparity from the previous 100-to-1 disparity to a more tenable 18-to-1.¹⁵¹ Still, “[i]t is common in the U.S. to judge drug addiction morally rather than medically, and most policy flows from that approach.”¹⁵²

Dismantling the prison-industrial complex seems a moral imperative.¹⁵³ However, if we as a nation are going to make significant strides in ending the racially biased sentencing regime in the United States, we must face down corporate profiteers who have come to rely on the current perverse prison system for incredible profits and the conflicted politicians that enable the perversion.

Id. at 36. Specter continues “In most respects, the law seems to have worked: serious drug use is down significantly, particularly among young people; the burden on the criminal-justice system has eased; the number of people seeking treatment has grown; and the rates of drug-related deaths and cases of infectious diseases have fallen.” *Id.* For those who fear that decriminalizing drug use will make a state or territory a haven for drug abuse, Specter reports: “Initial fears that Portugal would become a haven for ‘drug tourism’ have proved groundless. Surprisingly, political opposition has been tepid and there has never been a concerted repeal effort.” *Id.* Full analysis of decriminalizing most drug use in the United States is beyond the scope of this Article.

150. *Id.* at 45.

151. andré douglas pond cummings, *President Obama Signs Bill Lowering Crack-Powder Cocaine Sentencing Disparity*, SALT L. BLOG (Sept. 22, 2010), <http://www.saltlaw.org/blog/2010/09/22/president-obama-signs-bill-lowering-crack-powder-cocaine-sentencing-disparity/>.

152. Specter, *supra* note 119, at 45.

153. Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> (“‘What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn’t we bring the whole system to a halt just like that?’” (providing questions raised by Susan Burton in a discussion with Michelle Alexander)). Some churches are beginning to embrace the moral imperative of ending mass incarceration and are divesting themselves of investments in the private prison industry. See Heather Hahn, *Board Screens Out Private-Prison Stocks*, UMC.ORG, (Jan. 5, 2012), <http://www.umc.org/site/apps/nlnet/content3.aspx?c=1wL4KnN1Lh&b=5259669&ct=11576217> (“Private prison companies are big business. But, is it moral for United Methodists to make a profit from the incarceration of people? The United Methodist Church’s pension agency has pondered that question since May. The Board of Pension and Health Benefits announced Jan. 3[, 2012] its decision to prohibit investments in companies that derive more than 10 percent of their revenue from the management and operation of prison facilities. ‘It came down to that profiting from the incarceration of others was just not consistent with our view of what the (denomination’s) Social Principles ask for,’ said David Zellner, the board’s chief investment officer.”).