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**Crime Pays:  
How Black Americans Became Central to the Carceral State**

by

Will Brooks

Honors Thesis

in Leadership Studies

University of Richmond

Richmond, VA

April 29, 2022

Advisor: Dr. Julian Maxwell Hayter

Abstract

***Crime Pays:  
How Black Americans Became Central to the Carceral State***

Will Brooks

**Committee members:** *Dr. Julian Maxwell Hayter, Dr. Thad Williamson, Dr. Pippa Holloway*

Over the course of American history, Black Americans have been intentionally criminalized at moments of ostensible social progress. This legacy of intentional criminalization of minority communities has both created the perception that African Americans are innately criminal and given rise to a prison-industrial complex that now depends on Black bodies. Now, predictive policing technology reinforces perceptions of Black criminality necessary for the justification of the carceral state and the survival and expansion of the prison-industrial complex.

Signature Page for Leadership Studies Honors Thesis

***Crime Pays: How Black Americans  
Became Central to the Carceral State***

Thesis presented

by

*Will Brooks*

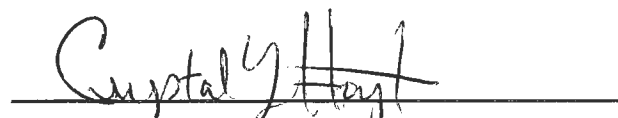
This is to certify that the thesis prepared by *Will Brooks* has been approved by his/her committee as satisfactory completion of the thesis requirement to earn honors in leadership studies.

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## Introduction

*Every system of control depends for its survival on the tangible and intangible benefits that are provided to those who are responsible for the system's maintenance and administration.<sup>1</sup>*

- Michelle Alexander

*Centuries of discriminatory laws, policies, and practices designed to privilege White people and disadvantage people of color have resulted in institutions that produce unequal outcomes even apart from the prejudiced decisions of individual state agents.<sup>2</sup>*

- Dorothy Roberts

The preamble to the Constitution of the United States establishes not merely America's devotion to justice, but it also agrees to defend the general welfare of the American people. It promises to "secure the blessing of Liberty" to the living and those yet unborn. Yet, of the ostensibly free countries around the world, the United States has disproportionately higher incarceration rates. More bluntly, the United States imprisons more people than any other country in the free world. Although the U.S. only makes up about 5 percent of the world's population, that population comprises nearly 25 percent of the world's prisoners.<sup>3</sup> In thinking about the rise of the carceral state in the United States, it turns out that history matters.

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<sup>1</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New York Press, 2012), 71.

<sup>2</sup> Dorothy Roberts, "Digitizing the Carceral State." Review of *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*, by Virginia Eubanks. *Harvard Law Review* 132, no. 1695 (April 10, 2019): 1708. Accessed October 3, 2021. [https://harvardlawreview.org/wp-content/uploads/2019/04/1695-1728\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2019/04/1695-1728_Online.pdf)

<sup>3</sup> Alec Karakatsanis, "The Punishment Bureaucracy: How to Think About 'Criminal Justice Reform'", *The Yale Law Journal* 128, (March 28, 2019), Accessed October 4, 2021. <https://www.yalelawjournal.org/forum/the-punishment-bureaucracy>.

Today, more than two million people in the U.S. are behind bars—the equivalent of about 639 out of every 100,000 people.<sup>4</sup> In recent years, according to experts, the American penal system has transformed into “a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need.”<sup>5</sup> This system has only recently expanded—with dreadful results. In 1973, overwhelming evidence led the National Advisory Commission on Criminal Justice Standards and Goals to conclude that “the prison, the reformatory and the jail have achieved only a shocking record of failure.”<sup>6</sup> That failure? The United States resolved to imprison more people in lieu of mitigating crime. The results are even more clear. There are upwards of seven-thousand prison or jail facilities in the United States and a growing number of private, for-profit prisons.<sup>7</sup> American incarceration does not stop at these facilities. The Bureau of Justice Statistics estimates that more than four million people are currently under government control in the form of parole or probation.<sup>8</sup>

No group of Americans has felt the effects of incarceration more than African Americans—particularly Black men from impoverished communities. Across the United States, Black men are six times more likely to be incarcerated compared to their White male counterparts.<sup>9</sup> Although African Americans make up only about 13 percent of the U.S. population, they make up almost 40

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<sup>4</sup> “Countries with the Most Prisoners 2021,” *Statista*, 2021, Accessed October 4, 2021.

<https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/>.

“Ranking: Most Prisoners per Capita by Country 2021,” *Statista*, 2021, Accessed October 4, 2021.

<https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/>.

<sup>5</sup> Donna Selman and Paul Leighton, *Punishment for Sale: Private Prisons, Big Business, and the Incarceration Binge*, Issues in Crime & Justice. (MD: Rowman & Littlefield Publishers, 2010), 79.

<sup>6</sup> Alexander, *The New Jim Crow*, 8.

<sup>7</sup> Peter Wagner and Wendy Sawyer, “Mass Incarceration: The Whole Pie 2020,” *Prison Policy Initiative*, March 24, 2020, Accessed October 4, 2021. <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>8</sup> “Key Statistics: Total Correctional Population,” Bureau of Justice Statistics, May 11, 2021, Accessed October 4, 2021. <https://bjs.ojp.gov/data/key-statistics>.

<sup>9</sup> “Criminal Justice Facts,” *The Sentencing Project*, 2022, Accessed October 4, 2021. <https://www.sentencingproject.org/criminal-justice-facts/>.

percent of federal and state inmate populations.<sup>10</sup> There is overwhelming evidence that these institutions are deeply flawed in their ability to either prevent or reduce crime.<sup>11</sup> Today, about two-thirds of those released from prison are rearrested within three years of release.<sup>12</sup>

The disproportionate rate of African American imprisonment has historical implications rooted not entirely in Black criminality, but American racism—namely, policing tactics. The state, history demonstrates, has reorganized itself to arrest, try, convict, and jail Black people at disproportionately higher rates than any demographic group in the United States. This process, we know now, starts with policing. For instance, in New York in 2011, 51 percent of individuals stopped as part of the city’s ‘stop-and-frisk’ program were African American, while only 9 percent were White: despite the fact that African Americans made up only 23 percent of the population, while Whites made up 48 percent.<sup>13</sup> Police tactics and criminal justice outcomes shape our perceptions of the people within the criminal justice system more generally. Criminal justice expert, Bernard E. Harcourt, argues, “social reality aligns with our carceral and police practices.”<sup>14</sup> In other words, the disproportionate targeting of African Americans has led to a more general belief in Black criminality. In fact, police tactics have given rise to far-reaching views that Black people are not just dangerous, but inherently criminal. In reality, however, Black criminality is not pathological—instead, criminality is rooted in historically racist social and economic structures

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<sup>10</sup> Rebecca C. Hetey and Jennifer L. Eberhardt, “The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System,” *Current Directions in Psychological Science*, 2018, Accessed October 4, 2021. <https://journals.sagepub.com/doi/10.1177/0963721418763931>.

<sup>11</sup> Alexander, *The New Jim Crow*, 8.

<sup>12</sup> “Prisoners and Prisoner Re-Entry,” United States Department of Justice, 2021, Accessed October 9, 2021. [https://www.justice.gov/archive/fbci/progmenu\\_reentry.html](https://www.justice.gov/archive/fbci/progmenu_reentry.html).

<sup>13</sup> “Stop and frisk” is the practice of stopping an individual on the street based on ‘reasonable suspicion’ that the individual is partaking in criminal activity. This practice came to fruition through the 1968 *Terry v. Ohio* decision. “2011 NYPD Stop and Frisk Statistics,” *Center for Constitutional Rights*, Accessed October 9, 2021. <https://ccrjustice.org/files/CCR-Stop-and-Frisk-Fact-Sheet-2011.pdf>

Alexander, *The New Jim Crow*, 62.

<sup>14</sup> Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007), 192.

that have been designed (and redesigned) to put African Americans at a disadvantage, and to support the interests of those in power. What if Black Americans commit crimes like any other group of Americans but are disproportionately targeted and demonized for engaging the same behavior?

Old habits do not die easily—new policing technologies have simply reinforced old beliefs about the relationship between criminality and people of color. Many police forces now rely on proactive methods of policing, including hot-spot analysis and person-based predictive algorithms. Hot-spot analysis refers to the use of historical crime data to predict areas where crime is most likely to occur. Areas deemed to be crime hot-spots face heightened law enforcement presence as a result of their designation as a high-risk for crime.<sup>15</sup> Person-based predictive algorithms, on the other hand, are distinguished by their reliance on data related to *who* is likely to commit a crime. Data fed into these algorithms include factors such as an individual’s education, income, family history, and, most importantly, prior criminal history.<sup>16</sup> Theoretically, predictive tactics in policing are thought to be able to identify objective patterns in criminal activity and prevent crime through tactical intervention.<sup>17</sup> In the public eye, hot-spot policing and person-based predictive algorithms are a progressive development in law enforcement that, ostensibly, are designed to improve efficiency in crime intervention, and eliminate bias in law enforcement operations.<sup>18</sup> In reality, however, these new tactics are merely an extension of longstanding racist criminal justice procedures. These predictive methods rely on historically racist criminal justice data to determine

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<sup>15</sup> Walter L. Perry, Brian McInnis, Carter C. Price, Susan C. Smith, and John S. Hollywood, “Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations”, RAND Corporation research support series, RAND Corporation, 2013, 19 – 27.

<sup>16</sup> Harcourt, *Against Prediction*, 39 – 109.

<sup>17</sup> Perry, et. al., “Predictive Policing,” 4.

<sup>18</sup> Brian Jordan Jefferson, “Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race,” *Annals of the American Association of Geographers*, January 2, 2018, Accessed October 4, 2021. <https://doi.org/10.1080/24694452.2017.1293500>.



where police should patrol and who local law enforcement agencies should target. Instead of limiting racial bias in law enforcement, these new technological predictive tactics have legitimized it as an essential aspect of combatting crime.<sup>19</sup> Ultimately, this is part of a larger trend whereby people believe that technological advancements will compensate for and correct human error, when, in reality, they often reflect human biases.

The result: the United States has transformed into a neoliberal punishment bureaucracy. Today, police forces are financially incentivized to make arrests and new technologies reinforce old habits. Over the last several decades, Americans have witnessed multinational corporations invest billions of dollars into private prisons, police technology and various other parts of the system.<sup>20</sup> Politicians' curry voters' favor by demonstrating that they are cracking down on crime. In reality, the data demonstrates that elected officials are merely ensuring a steady flow of revenue streams toward the country's penal system. In the end, this process all but ensures that a continuous supply of Americans end up behind bars each year.<sup>21</sup> Millions of jobs across the country have come to depend on this system.<sup>22</sup>

As the prison-industrial complex has grown, it is no secret that African Americans have been—and continue to be—disproportionately affected by this process.<sup>23</sup> While some Americans continue to believe Black criminality is a matter of Black pathology (i.e., African Americans are innately more prone to poverty and crime), experts hold that rates of African American incarceration not merely have historical implications, but those implications are a manifestation of

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<sup>19</sup> Ibid.

<sup>20</sup> Selman and Leighton, *Punishment for Sale*, 77 – 105.

<sup>21</sup> Alexander, *The New Jim Crow*, 1 – 20.

<sup>22</sup> Karakatsanis, “The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’.”

<sup>23</sup> “BOP Statistics: Inmate Statistics,” Federal Bureau of Prisons, 2021, Accessed October 4, 2021. [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp).

a ‘broken’ system.<sup>24</sup> Recently, scholars have come to the conclusion that African American crime is a function of rules and regulations that date back decades, but have grave contemporary implications. Nowhere is the relationship between Black criminality and people’s perceptions of it truer than in policing tactics. In fact, the criminal justice system is an industry that, while hidden to the untrained eye, is a highly efficient system that relies on the criminality of Black and Brown people to meet its bottom line. In other words, at the same time Americans demonize people of color for being prone to criminality, they devised a system that cannot, quite ironically, thrive without criminals.

The historical legacy of incarceration has led to a situation where the industry relies on Black criminality particularly. The ‘War on Drugs’ intensified perceptions of Black criminality and has had major economic implications for the prison-industrial complex. Black and Brown bodies have become increasingly intertwined with the economic interests of those with a stake in the prison-industrial complex. This is made worse still by new predictive policing strategies that reinforce not only disproportionate over policing of Black communities, but also the number of African Americans that end up in prison. By reinforcing biases of African Americans as criminal through the use of discriminatory tactics, police forces have become justified in providing the Black and Brown bodies necessary for the perpetuity of our prison-industrial complex. In the end, Americans have struggled to negotiate the relationship between Black criminality and a system designed to manufacture it.

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<sup>24</sup> Karakatsanis, “The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’.”

This study seeks to contribute to literature focused on perceptions of minority criminalization in relation to the interests of the prison-industrial complex.<sup>25</sup> Specifically, it questions how police tactics function to uphold the existing structure of the prison-industrial complex through the systematic criminalization of African Americans. In answering this question, this study first integrates theories of racial threat to delineate the history of African American criminalization and the rise of the carceral state during the Jim Crow and civil rights eras, as well as its intensification during the War on Drugs.<sup>26</sup> Next, it goes on to demonstrate how the carceral state has given rise to economies that now depend on mass incarceration. Finally, this study describes the role of predictive policing methods in exacerbating perceptions of African American criminality and reinforcing the economies that rely on it. While scholars have written extensively on these subjects, there remains a gap in scholarship connecting predictive policing tactics to the expansion of the prison-industrial complex through intentional minority criminalization.<sup>27</sup> This study attempts to bridge that gap.

Several bodies of work have explored the history of African American criminality and the rise of the carceral state. While mass incarceration is a relatively new phenomenon, the systematic criminalization of African Americans is an age-old practice. At various junctures in U.S. history,

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<sup>25</sup> Karakatsanis, “The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’.”

Alexander, *The New Jim Crow*, 1 – 249.

Harcourt, *Against Prediction*, 1 – 215.

Selman and Leighton, *Punishment for Sale*, 1 – 105.

<sup>26</sup> Racial threat theories hold that when a minority group poses a threat to a dominant group’s political or economic influence, dominant groups respond by expanding criminal law to suppress the political and economic power of the minority.

Scott W. Duxbury, “Who Controls Criminal Law? Racial Threat and the Adoption of State Sentencing Law, 1975 to 2012,” *American Sociological Review* 86, no. 1, February 1, 2021, Accessed October 5, 2021.

<https://doi.org/10.1177/0003122420967647>.

<sup>27</sup> Alexander, *The New Jim Crow*, 20 – 273.

Harcourt, *Against Prediction*, 109 – 193.

Selman and Leighton, *Punishment for Sale*, 1 – 105.

Jefferson, “Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race.”

“Proactive Policing: Effects on Crime and Communities,” Consensus Study Reports, Washington, DC: The National Academies of Sciences, Engineering, and Medicine, 2018, 18. <https://doi.org/10.17226/24928>.

African Americans have seen ostensible progress. That progress, however, has often been met with fierce opposition from Whites.<sup>28</sup> Indeed, many scholars have found that supposedly objective criminal laws have been intentionally levied against communities and people of color.<sup>29</sup> Not only is the intentional criminalization of African Americans a recurring theme, but it has also been found to follow a similar pattern. As described in the documentary *The House I Live In*, criminalization of African Americans can be understood as a chain of events. First, they are identified as a cause for a problem in society. As a result, they become ostracized, making it harder for them to survive and prosper. In the late 19<sup>th</sup> century, for example, White Southerners viewed newly freed Blacks as a threat to the existing economic order, as well as a threat to “rise up and attack them or rape their women.”<sup>30</sup> In other words, they were a problem. As a result, states—particularly Southern states—adopted ‘Black codes’ as a means to control Blacks through excessive provision and segregation, making it harder for them to make meaningful progress. With the help of laws and law enforcement, recently emancipated Black Americans were stripped of their civil liberties, and were subsequently far more likely to be punished, specifically by imprisonment (i.e., vagrancy laws that allowed police to send African Americans to jail for not working).<sup>31</sup> This recurring sequence naturally serves to disrupt and destroy African American communities. At no time in our history has this process been clearer or had a larger impact than during the War on Drugs.

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<sup>28</sup> Joseph E. Lowndes, Julie Novkov, and Dorian Tod Warner, *Race and American Political Development*. (New York: Routledge, 2008).

<sup>29</sup> For example, during the Jim Crow era, police in several states selectively enforced vagrancy laws against African Americans, making it a criminal offense not to work (but only if you were Black!). Once arrested, African Americans could again be used as forced labor to fill the pockets of rich White men.

Alexander, *The New Jim Crow*, 31, 95 – 137.

Abiodun Raufu, “Racial Threat Theory and Minorities in the American Criminal Justice System,” *European Journal of Social Sciences Studies* 4, no. 6, February 28, 2020, Accessed October 5, 2021.

<https://oapub.org/soc/index.php/EJSSS/article/view/744>.

<sup>30</sup> *Ibid.*, 28.

<sup>31</sup> Eugene Jarecki, *The House I Live In* (United States: Abramorama, 2012).

Ultimately, this study incorporates and builds on historical research by examining how the practice of intentionally criminalizing African Americans has given rise to a prison-industrial complex that now depends on criminality for its own perpetuity. Recently, a growing body of work has explored the economic function of the prison-industrial complex.<sup>32</sup> As incarceration boomed in the late 20<sup>th</sup> century, private interests became increasingly at odds with justice and the public good. During the War on Drugs, the government outsourced several functions of criminal justice affairs, most notably prison contracts.<sup>33</sup> As a result, today, incarceration and corrections are a multibillion-dollar industry. Several businesses invested in the criminal justice system are publicly traded companies, including the two largest private prison companies, GEO Group and Corrections Corporation of America (known today as CoreCivic).<sup>34</sup> As Donna Selman and Paul Leighton contend, “for the businesses involved, the goal is profit; basic free market principles dictate that companies with shares traded on a stock exchange have the duty to make money for shareholders.”<sup>35</sup> In other words, the criminal justice system has been found to operate as a business rather than a system to promote the public good. This study explains how private interests of those involved in the prison-industrial complex have come to rely on Black criminality and perceptions of it. Through the systematic criminalization of people of color, the prison-industrial complex has grown so large that it has essentially become an economy in its own right.<sup>36</sup> In turn, this economy now relies Black and Brown bodies to sustain itself. African Americans have become a currency in a capitalist market dependent on crime and punishment.

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<sup>32</sup> Selman and Leighton, *Punishment for Sale*, 1 – 105.

Bernadette Rabuy, Peter Wagner, “Following the Money of Mass Incarceration,” *Prison Policy Initiative*, January 25, 2017, Accessed October 5, 2021. <https://www.prisonpolicy.org/reports/money.html>.

<sup>33</sup> Selman and Leighton, *Punishment for Sale*, 47 – 77.

<sup>34</sup> *Ibid.*, 77 – 105.

<sup>35</sup> *Ibid.*, 79.

<sup>36</sup> Rabuy and Wagner, “Following the Money of Mass Incarceration.”

As the ‘front line’ of the criminal justice system, so to speak, police forces play a pivotal role in reinforcing the private interests of the prison-industrial complex. In fact, police forces have financial interests in the expansion of the prison-industrial complex. For example, civil forfeiture laws allow police to take property on the mere suspicion that someone is involved in criminal activity. In the past twenty years alone, police have raked in over sixty-eight billion dollars in revenue from this practice.<sup>37</sup> Scholars have also noted that police forces have nearly unabated discretion in how they operate.<sup>38</sup> Black communities have borne the burden of these tactics. While many scholars agree that police practices have been impacted by racial bias in the past, there is much debate over whether or not these biases are still relevant in policing tactics today.<sup>39</sup> Some scholars contend that modern policing methods—namely predictive methods—have done away with personal bias in policing.<sup>40</sup> Hot-spot methods, which use historical crime data to predict areas where crime is likely to occur, are thought to have shifted police intervention away from certain groups of people and towards precise locations.<sup>41</sup> Furthermore, person-based predictive algorithms rely on ‘race neutral’ data such as income, education and criminal history to make decisions about who should be monitored closely for police intervention.<sup>42</sup> The data collective inherent to predictive policing, we know now, does in fact rely on the longstanding practice of over policing African American communities. What is more, the data simply gives rise to even more

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<sup>37</sup> “Policing for Profit: The Abuse of Civil Asset Forfeiture 3<sup>rd</sup> Edition,” *Institute for Justice*, 2020, Accessed October 10, 2021. <https://ij.org/report/policing-for-profit-3/>.

Rabuy and Wagner, “Following the Money of Mass Incarceration.”

<sup>38</sup> Alexander, *The New Jim Crow*, 58 – 95.

<sup>39</sup> “Proactive Policing: Effects on Crime and Communities,” 251 – 303.

<sup>40</sup> Jefferson, “Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race.”

Perry et. al., “Predictive Policing.”

<sup>41</sup> Perry et. al., “Predictive Policing,” 1 – 6.

Jefferson, “Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race.”

<sup>42</sup> Roberts, “Digitizing the Carceral State.”

Harcourt, *Against Prediction*, 39 – 109.

disproportionate rates of arrest in poor communities of color.<sup>43</sup> More bluntly, the data used in generating predictive methods has been found to be structured by existing racial inequality. This inequality is then perpetuated through the use of these methods, while being protected by the myth that data and computer algorithms are innately impartial.<sup>44</sup>

In the end, this study seeks to demonstrate that history continues to shape the present. As long as new-fangled strategies like predictive policing rely on old data and the criminal justice system continues to rely on bodies of color to meet its bottom-line, there is little incentive to change. Even more ominously, we must begin to question the differences between our stated democratic claims and actual practices. Are we, this study asks, a truly democratic society that upholds constitutional principles, or a country that hides behind the promise of democracy but behaves like a business?

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<sup>43</sup> Jefferson, “Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race.” “Proactive Policing: Effects on Crime and Communities,” 251 – 303.

<sup>44</sup> Harcourt, *Against Prediction*, 109 – 193.

## Chapter I:

### A Brief History of African American Criminalization and the Rise of the Carceral State

*The slave went free; stood a brief moment in the sun; then moved back again toward slavery.*<sup>45</sup>

- W.E.B Du Bois

At various junctions in United States history, African American communities were on the verge of (and have initiated) tangible equality—most notably, perhaps, during the post-Civil War Reconstruction and mid-twentieth century civil rights eras.<sup>46</sup> No two examples, arguably, better epitomize the promise of real racial progress in America and the backlash against permissiveness. Despite the potential of these periods to promote a more egalitarian, democratic society, White Americans fiercely opposed political, social, and economic efforts to improve the lives of African Americans. Of the countless mechanisms White Americans used to systematically divest African Americans of their civil liberties, nothing proved more long-lasting the systemic criminalization of Blackness—by 1890, African Americans represented 12 percent of the U.S. population, but 30 percent of its prisoners.<sup>47</sup> This recurring process is one that might be best understood through the lens of racial threat theories.

Racial threat theory holds that when minority groups pose a threat to dominant groups' political or economic influence, dominant groups respond by finding ways to suppress the political and economic power of minorities. This, the theorists hold, is frequently accomplished by

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<sup>45</sup> William E. B. Du Bois, *Black Reconstruction in America: 1860 – 1880*, 1. ed. (New York, NY: The Free Press, 1998).

<sup>46</sup> Alexander, *The New Jim Crow*, 26 – 48.

<sup>47</sup> Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass: Harvard University Press, 2010), 4.



expanding or altering criminal law to benefit majority groups. Furthermore, minority groups may pose a threat to dominant groups by growing in size (or social visibility) and scope, or by the prospect of increasing their social capital at the expense of dominant groups.<sup>48</sup> The process by which Whites have systematically criminalized African Americans during times of perceived threat has followed a very similar pattern throughout history. These threats are fundamentally endeavors into zero-sum politics. Throughout the American South after the Civil War (and beyond the region, in fact), Whites almost always viewed gains for African Americans as losses for Whites more broadly. The use of Jim Crow laws to criminalize Black people had grave consequences—namely, Americans came to associate Blackness with criminality, and, in time, they used law enforcement to help reorganize the Black labor force. For nearly one-hundred years, Americans refashioned the legal system to criminalize Black Americans, and Jim Crow laws helped set the stage for more ominous national trends.

### **Part I: Reconstruction and the Rise of Black Criminality**

Following the American Civil War, the United States entered into what is commonly referred to as the ‘Reconstruction era.’<sup>49</sup> From the beginning, a good number of the enslaved (especially in places such as Virginia) began to simply walk away from their plantations, undermining the Confederate labor cause in the process. Southern states quickly came to realize that their economy and the war effort could no longer function without slave labor.<sup>50</sup> By 1863, the enslaved not merely forced Union officials to think intently about emancipation, but many of them had transformed

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<sup>48</sup> Ibid.

<sup>49</sup> Alexander, *The New Jim Crow*, 29-30.

<sup>50</sup> Ibid., 28.

into a revolutionary insurgency and this insurgency inspired the nature of Radical Republicanism after the war. In fact, in the years that followed, Republican officials passed the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments, extending civil and legal protections to newly emancipated Blacks.<sup>51</sup> Each one of these Amendments set out to break the proverbial shackles of slavery by making recently emancipated people full-fledged citizens of the United States (by birthright) with voting power. These amendments met firm resistance.

White Southerners were determined to roll back the gains made by Radical Republicans and return to some semblance of the Antebellum South. On the one hand, the South made tremendous progress during Reconstruction: The Freedmen’s Bureau and recently emancipated people established schools, African Americans forged neighborhoods, and within some of those spaces, they elected officials to governing bodies throughout the South. These gains, we know now, were not followed by political will and broad-based support outside of the South. During reconciliation, as Union troops pulled out of the South and Northern attentions shifted elsewhere, it became increasingly difficult for Republicans to retain power and enforce Reconstruction. Southern “Redeemers” used political (i.e., the Democratic Party) and extra-political (e.g., vigilante violence and terrorism) tactics to reassert control over the region. Groups such as the Ku Klux Klan, the White League, and the Red Shirts formed and terrorized pro-Reconstruction politicians and emancipated Blacks.<sup>52</sup> The institutionalization of White supremacy, the historical record

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<sup>51</sup> The 13<sup>th</sup> Amendment formally abolished slavery.

The 14<sup>th</sup> Amendment granted citizenship to “all persons born or naturalized in the United States”, including former enslaved persons, and provided all citizens with “equal protection under the laws.”

The 15<sup>th</sup> Amendment prohibited states from disenfranchising voters “on account of race, color, or previous condition of servitude.

“Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments.” United States Senate. Accessed October 19, 2021. <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm>.

<sup>52</sup> “Reconstruction vs. Redemption.” The National Endowment for the Humanities, February 11, 2014. Accessed November 12, 2021. <https://www.neh.gov/news/reconstruction-vs-redemption>.

“Reconstruction in America: Racial Violence after the Civil War, 1865-1876” Equal Justice Initiative, 2020. Accessed November 12, 2021. <https://eji.org/report/reconstruction-in-america/>

demonstrates, gained significant momentum in the twilight of the nineteenth century. Many White Southerners, who had all of a sudden found themselves on a relatively equal playing field with their Black counterparts (i.e., competing for the same jobs and economic opportunities), set out to build a new, legal racial order.<sup>53</sup> When the last federal troops officially withdrew from the South on April 24, 1877, it ignited an already burgeoning resurgence of democratic rule and White supremacy.<sup>54</sup>

In time, ‘Jim Crow’ laws began to dot Southern landscapes over the course of the late nineteenth century. Of these policies, perhaps the most effective at controlling Black bodies were vagrancy laws and convict leasing programs. Following the Civil War, several states adopted vagrancy laws that essentially made it illegal for individuals to be unemployed or move about freely without proof of employment.<sup>55</sup> Once arrested, these individuals could be leased out to corporations and business owners as ostensibly free labor—a practice that was beyond the protections afforded by the 13<sup>th</sup> amendment, which had abolished slavery and involuntary servitude *except* as punishment for crimes.<sup>56</sup> Moreover, unlike slaves, convicts did not need to be treated as a capital investment, as there was always prisoners readily available for work. In fact, Douglas A. Blackmon, the author of the book *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, is quoted as saying: “It’s impossible to determine the precise numbers, but in Alabama at least 200,000 African-American men were

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<sup>53</sup> Alexander, *The New Jim Crow*, 28.

<sup>54</sup> “Reconstruction in America: Racial Violence after the Civil War, 1865-1876,” Equal Justice Initiative, 2020. Accessed November 12, 2021. <https://eji.org/report/reconstruction-in-america/>

<sup>55</sup> Risa L. Goluboff and Adam Sorensen. "United States Vagrancy Laws." *Oxford Research Encyclopedia of American History*. 20 Dec. 2018; Accessed 14 Nov. 2021. <https://oxfordre.com/americanhistorical/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-259>.

<sup>56</sup> Ruth Delaney, Ram Subramanian, Alison Shames, and Nicholas Turner, “American History, Race, and Prison.” Vera Institute of Justice. Vera. Accessed November 12, 2021. <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>.

subjected to the most systematic form of neo slavery, the convict-leasing system. There were tens of millions of African-Americans that over this 80-year period either one way or another were forced to live on a farm or in a lumber camp or were forced into convict leasing by the perverted justice system.”<sup>57</sup> Convicts in this system faced dehumanizing conditions, while rich Whites once again profited from forced African American labor.<sup>58</sup> The profitability of this system created an exceptionally strong demand for a continued supply of prisoners. In a manner that seems eerily reminiscent of War on Drugs and predictive policing nearly a century later, Americans reorganized the law to manufacture criminals, and the manufacturing of criminals for labor gave rise to beliefs about innate Black criminality.<sup>59</sup>

In time, experts brought their racial biases to bear on this system. Not only did the overtly racist targeting of African Americans contribute to a wildly disproportionate number of Black people in the prison system, but it also served to justify Blacks as naturally predisposed to criminality.<sup>60</sup> Contemporary scholars, including Nathaniel Southgate Shaler and Frederick L. Hoffman, were fascinated with the “Negro problem” that arose with the end of slavery.<sup>61</sup> These men, and other scholars like them, began to use data from trumped up laws to rationalize the growth of the carceral state. Put another way, Southerners reimagined their legal systems and its enforcements mechanisms to reorganize the Black labor force after emancipation. Using statistical analysis of census data created in the years following the Civil War, Hoffman and Shaler argued that Blacks were undoubtedly more prone to crime than Whites, and made the case that the

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<sup>57</sup> Newsweek Staff, “Book: American Slavery Continued Until 1941,” Newsweek, July 13, 2008. Accessed November 16, 2021. <https://www.newsweek.com/book-american-slavery-continued-until-1941-93231>.

<sup>58</sup> Selman and Leighton, *Punishment for Sale*, 8 – 9.

<sup>59</sup> Jarecki, *The House I Live In*.

<sup>60</sup> Muhammad, *The Condemnation of Blackness*.

<sup>61</sup> The “Negro Problem” refers broadly to the idea that African Americans posed a major threat to American civilization.

Muhammad, *The Condemnation of Blackness*, 15.

discrepancies were due strictly to a type of Black pathology—disregarding the influence of social conditions or bias among police and society at large.<sup>62</sup> According to Khalil Gibran Muhammad, “Out of the new methods and data sources, Black criminality would emerge... as a fundamental measure of Black inferiority.”<sup>63</sup> Crime statistics reinforced White-supremacist narratives that inherent criminality was an essential aspect of the Black race.<sup>64</sup> The irony, of course, is that the historical record demonstrates none of this language prior to the American Civil War—what we see, in fact, is that the criminalization of Black people rose in conjunction with an economic system that needed Black people to survive.

American law and American racism, as with slavery, was often a reflection of economic demands. Hoffman in particular went as far as to compare Black crime statistics to those of White immigrants (who faced similar economic conditions) to prove the point that there was something pathologically wrong with Blackness.<sup>65</sup> He concluded, Blackness, rather than poverty, gave rise to increased levels of criminality. These carefully devised narratives worked in terms of connecting Blackness with criminality.<sup>66</sup> By the early twentieth century, more than 26 thousand African Americans had been incarcerated, and the proportion of African Americans among the prison population had noticeably increased.<sup>67</sup> These statistics reinforced views that free Blacks were a threat to civil society, and justified punitive policies aimed at controlling them.

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid., 20.

<sup>64</sup> Ibid., 50.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., 48-51.

<sup>67</sup> “Prisoners and Juvenile Delinquents in Institutions 1904.” Special Report. Washington D.C.: Bureau of the Census, 1907, 15 – 17.

Despite the incredible profitability of convict leasing programs, convict leasing officially ended in the United States when Alabama became the final state to outlaw the system in 1928.<sup>68</sup> The beliefs used to justify this system outlived contract leasing itself, however. Yet, the forces of restriction found newfangled ways to manufacture free labor, namely through debt peonage and informal acts of coercion—tactics that went largely unpunished by the criminal justice system. In 1941, however, Attorney General Francis Biddle issued Circular No. 3591, which directed prosecutors to stop ignoring reports of slavery and involuntary servitude, and to punish those who failed to abide through criminal procedure.<sup>69</sup> In 1948 and 1951, Congress further clarified the law to leave no doubt that any form of involuntary servitude or slavery was a criminal offense and in violation of the Thirteenth Amendment.<sup>70</sup> While legislation of this nature extended new legal protections to African Americans who had been victims of economic coercion, history shows that the practice of intentionally criminalizing Black bodies outlived the law.

## **Part II: Black Criminality and the Rise of the War on Drugs**

African Americans eventually met the challenges of segregation by organizing their communities to change Jim Crow laws. Following World War II, again, Blacks Americans re-activated their communities—who had been organizing against racism since the demise of Reconstruction—toward civil disobedience and direct-action protest. Through protest and activism, African Americans and their allies pressured Washington to pass the 1964 Civil Rights Act, the 1965

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<sup>68</sup> Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. (New York: Anchor Books, 2009).

<sup>69</sup> Douglas A. Blackmon, “The World War II Effect,” *Wall Street Journal*, March 29, 2008, Accessed November 13, 2021. <https://www.wsj.com/articles/SB120674498432473091>.

Blackmon, *Slavery by Another Name*.

<sup>70</sup> *Ibid.*

Voting Rights Act, and the 1968 Fair Housing Act.<sup>71</sup> The 1964 Civil Rights Act, more broadly, officially prohibited discrimination on the basis of race, color, religion, sex, or nationality.<sup>72</sup> The 1965 Voting Rights Act outlawed several discriminatory voting practices that made it difficult for African Americans to vote—most notably literacy tests that were used as a prerequisite to vote.<sup>73</sup> The 1968 Fair Housing Act extended existing legislation related to housing discrimination by officially prohibiting discrimination regarding the sale, rental, or financing of housing based on race, color, religion, sex, or nationality.<sup>74</sup> This monumental legislation sought to make up for lost time by lessening the distinctions between America’s stated democratic claims and its actual racist practices.

In addition to this legislation, Whites and Blacks became increasingly aligned in their calls for economic reform in the United States—prompting then President Lyndon B. Johnson to declare a “War on Poverty” in 1964.<sup>75</sup> Naturally, Johnson’s War on Poverty was focused on predominantly Black urban communities where the issues of poverty was most dire.<sup>76</sup> However, instead of focusing on the structural issues that caused poverty, the War on Poverty was aimed at correcting pathological causes of poverty and crime. According to former U.S. Secretary of Labor Daniel Patrick Moynihan, poor African American families were trapped in a “tangle of pathology”—arguing that issues faced by poor Blacks—particularly crime and poverty—were the result of

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<sup>71</sup> Alexander, *The New Jim Crow*, 38.

<sup>72</sup> U.S. Equal Employment Opportunity Commission. “Title VII of the Civil Rights Act of 1964.” Accessed November 12, 2021. <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>.

<sup>73</sup> “History Of Federal Voting Rights Laws.” The United States Department of Justice, July 28, 2017. Accessed November 11, 2021. <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

<sup>74</sup> U.S. Department of Housing and Urban Development. “History of Fair Housing.” U.S. Department of Housing and Urban Development. Accessed November 12, 2021. [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history)

<sup>75</sup> Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*. (Cambridge, Massachusetts: Harvard University Press, 2016), 50.

<sup>76</sup> *Ibid.*, 49.

unstable Black families and the psychological effects of racism dating back to slavery.<sup>77</sup> This well-intentioned yet woefully uninformed way of thinking led the Johnson administration to direct programs towards correcting Black pathology, while simultaneously avoiding accountability for underlying structural issues.<sup>78</sup>

At first glance, the rights revolution of the 1960's seemed to signify America's readiness to finally adopt the egalitarian and democratic values that were more in keeping with the Reconstruction Amendments. Yet, by the time the ink dried on antipoverty and civil rights legislation, President Johnson began integrating an anticrime agenda into his War on Poverty—laying the foundation from a shift to the “War on Crime.”<sup>79</sup> Through the 1960's, intermittent race riots erupted in predominantly Black urban centers in response to various cases of police brutality and structural injustice. Instead of taking this context into account, however, policymakers again focused on Moynihan's notion of Black pathology. In fact, as it turned out, the continuity of Whites believing in inherent Black criminality not only survived the civil rights era, but was strengthened by it. Violence in places such as Los Angeles helped to cement the consensus that crime was, in general, specific to Black urban youth—with the media presenting Black youths as “public enemy no. 1.”<sup>80</sup> With both crime and poverty presented as essentially an innate part of Black culture, Johnson moved to fuse the fight against poverty and crime; In his own words Johnson stated:

“Effective law enforcement and social justice must be pursued together, as the foundation of our efforts against crime.”<sup>81</sup> As a result, the modernization of police forces and surveillance tactics became an essential part of addressing the issues that plagued Black communities. In 1965, Congress passed the Law Enforcement Assistance Act in response to the racial unrest that occurred in various urban centers in 1964. According to Elizabeth Hinton, “the punitive legislation offered a response

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<sup>77</sup> Ibid., 59.

<sup>78</sup> Ibid., 60, 70.

<sup>79</sup> Ibid., 61.

<sup>80</sup> Ibid., 12.

<sup>81</sup> Ibid., 74.



to the threat of future disorder by establishing a direct role for the federal government in local police operations, court systems, and state prisons for the first time in American History.”<sup>82</sup>

In 1968, the Johnson Administration introduced the Safe Streets Act of 1968, which initiated the investment of about \$400 million into combatting crime.<sup>83</sup> Again, this legislation was largely a response to racial unrest in 1967 and 1968—in 1967, riots erupted in over 150 cities with high Black populations, and in 1968, violence again swept the nation following the assassination of Martin Luther King Jr.<sup>84</sup> As Johnson’s term ended, it was clear that his War on Poverty was devolving into an all-out War on Crime—focused in urban ghettos.<sup>85</sup>

While Johnson set the stage for the shift towards a more punitive approach to Justice, Richard M. Nixon was the one to capitalize on it. By the late 1960’s Nixon began to take advantage of many White Americans resistance to the social movements of the 1960s and the perception of crime that accompanied them. In fact, Nixon rode the wave of ‘law and order’—citing the protests in urban communities during the ‘long hot summers’ of the 1960’s—all the way to the presidency in 1968. The rhetoric of law and order championed by Nixon cannot be understated in its importance as a political tool for election. Richard Nixon won the presidential election by adopting what is known as the ‘Southern Strategy’, using coded racialized appeals to White southerners who were resentful of the civil rights movement.<sup>86</sup> Nixon played on the growing notion that civil rights was to blame for increased Black violence—highlighting the ‘lawless’ behavior of civil

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<sup>82</sup> Ibid., 1 – 2.

<sup>83</sup> Ibid., 2.

<sup>84</sup> Kenneth O’Reilly, “The FBI and the Politics of the Riots, 1964-1968.” *The Journal of American History* 75, no. 1 (1988): 91–114. Accessed December 15, 2021. <https://doi.org/10.2307/1889656>.

<sup>85</sup> Hinton, *From the War on Poverty to the War on Crime*, 21.

<sup>86</sup> Frank Brown, “Nixon’s ‘Southern Strategy’ and Forces against Brown.” *The Journal of Negro Education* 73, no. 3 (2004): 191–208. <https://doi.org/10.2307/4129605>.

rights activists in an effort to resist many aspects of desegregation, including school desegregation—an element of his campaign that resonated with poor Whites in particular.<sup>87</sup>

As president, Nixon accelerated the shift from the War on Poverty to the War on Crime. Nixon disinvested in Johnson's anti-poverty programs in favor of strengthening punitive crime intervention in Black urban communities.<sup>88</sup> By this time, the political right had cemented its stance that lenient social policies were to blame for crime—and that these policies favored undeserving offenders. They argued that pathologically driven criminals rationally considered the benefits of committing a crime compared with its potential costs—leading them to commit crime with the idea that repercussions would be minor. The only solution, they contended, was an ideological shift away from rehabilitation and towards deterrence through more punitive 'tough on crime' measures.<sup>89</sup>

Importantly, Support for 'law and order' and 'tough on crime' policies was primarily driven by disadvantaged Whites, as the increasing notion of Blacks as criminal, once again, gave Whites a platform in which they could hold superiority over African Americans. In a 1969 speech, Nixon called on "the silent majority"—referring primarily to conservative, blue-collar, White Americans who typically stayed out of public discourse—to support his political agenda, and to embrace order in a time where anti-war and civil rights protests had caused a wave of crime.<sup>90</sup> Importantly, the silent majority Nixon was referring to consisted of the same demographic targeted

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<sup>87</sup> Brown, "Nixon's 'Southern Strategy' and Forces against Brown."

<sup>88</sup> Hinton, *From the War on Poverty to the War on Crime*, 17.

<sup>89</sup> Selman and Leighton, *Punishment for Sale*, 34.

<sup>90</sup> Hugh Davis Graham, "Richard Nixon and Civil Rights: Explaining an Enigma," *Presidential Studies Quarterly* 26, no. 1 (1996): 93–106. <http://www.jstor.org/stable/27551552>.

by the Southern Strategy. The silent majority speech boosted Nixon's approval ratings significantly, and is considered a big reason for his reelection in 1972.<sup>91</sup>

Nixon's increasingly punitive approach to the War on Crime evolved to include his administration's War on Drugs. Behind the curtain of upholding public safety, however, Nixon's War on Drugs was actually used as a means to combat his administration's main opponents—antiwar “hippies” and African Americans—and to ultimately get his poll numbers up by appealing to the popularity of tough on crime ideology.<sup>92</sup> According to John Ehrlichman, a top Nixon aide—“We couldn't make it illegal to be either against the war or Blacks, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”<sup>93</sup> As this revelation makes clear, Nixon's War on Drugs was a malicious and well thought out political tactic—it was not designed to reduce drug use or crime, rather, it was implemented to criminalize and control Nixon's political opposition.

Arguably, in fact, nowhere was Nixon's legacy felt more than in his administration's War on Drugs. Nixon presented the first call for a War on Drugs as an extension of the ‘law and order’ agenda.<sup>94</sup> Declaring drug abuse as “public enemy number one,” Nixon implemented several policies that reorganized drug crime enforcement. Unlike what came later during the Reagan administration, Nixon's legislation contained both punitive and some preventative measures. In the end, however, many of the provisions in Nixon's legislation set the stage for caustic interactions between law enforcement and Black Americans that characterized most of the late

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<sup>91</sup> Ibid.

<sup>92</sup> Jarecki, *The House I Live In*.

<sup>93</sup> Drug Policy Alliance. “A Brief History of the Drug War.” Drug Policy Alliance, 2021. Accessed November 15, 2021. <https://drugpolicy.org/issues/brief-history-drug-war>.

<sup>94</sup> Alexander, *The New Jim Crow*, 47.

*President Nixon Declares Drug Abuse “Public Enemy Number One.”* June 17, 1971, Accessed November 17, 2021. <https://www.youtube.com/watch?v=y8TGLLQID9M>.

twentieth century and early twenty-first century. In 1970, Nixon signed the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title I—"Rehabilitation Programs Relating to Drug Abuse"—expanded programs and funding designed to rehabilitate drug users. Title II of this act—the "Controlled Substances Act"—replaced over 50 pieces of drug legislation, and established five schedules of controlled substances (schedules I, II, III, IV, and V), with schedule I including drugs considered to have the highest risk for abuse. Schedule I drugs include marijuana, heroin, and LSD, among others. Nixon also increased to usage of "no-knock" warrants under this title—allowing law enforcement to enter private property without prior notification.<sup>95</sup> Title III of the act—"Importation and Exportation, Criminal Forfeiture and Drug Law Amendments"—harshened laws relating to the importation and exportation of controlled substances, and introduced criminal forfeiture as an essential aspect of drug control. New criminal forfeiture laws allowed law enforcement agencies to confiscate property involved in criminal activity, including, of course, drug crime.<sup>96</sup> Furthermore, the Nixon administration created the well-known Drug Enforcement Agency (DEA), creating a consolidated federal agency to enforce substance laws and regulations. The creation of the DEA helped to establish the federal government as a primary enforcer of drug laws—a responsibility that had been historically left to individual states and agencies.<sup>97</sup>

As this tortured racial history shows, even after the abolition of slavery, United States law was continually structured to intentionally criminalize African Americans. Following Reconstruction, Southern states in particular took advantage of obscure laws (i.e., vagrancy laws) to take away the freedoms that African Americans had been recently afforded. Once they had been

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<sup>95</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513. 84 Stat. 1236. (October 27, 1970).

"The DEA Years." History. Drug Enforcement Administration. Accessed December 23, 2021. [https://www.dea.gov/sites/default/files/2021-04/1970-1975\\_p\\_30-39\\_0.pdf](https://www.dea.gov/sites/default/files/2021-04/1970-1975_p_30-39_0.pdf).

<sup>96</sup> Ibid.

<sup>97</sup> "The DEA Years." Drug Enforcement Administration.

criminalized by these laws, Blacks could be legally leased to private corporations as free labor. This system not only served the purpose of reorganizing the African American labor force to provide free labor once again for White capitalists, but also to re-establish the racial hierarchy that had been threatened by the gains made during reconstruction.

While new legislation in the mid-20<sup>th</sup> century effectively eliminated convict leasing as a practice, the practice of criminalizing Black bodies lived on into the Civil Rights era. Just as Southern governments capitalized on the sentiment among Whites that Blacks posed a threat to existing social and economic order during reconstruction, Richard Nixon capitalized on the feeling that the Civil Rights movement was a threat to Whites. While overtly racist enforcement of the law was used to criminalize African Americans following Reconstruction, Nixon used ‘law and order’ rhetoric to paint the Civil Rights movement and its participants as criminal. Moreover, Nixon introduced his ‘War on Drugs’ in an effort to criminalize African Americans and others who opposed his stance of the Vietnam War, and to bolster his “tough on crime” stance. Unsurprisingly, Nixon’s efforts reinforced longstanding perceptions of Black criminality and laid the foundation for the rise of the carceral state. While Nixon’s War on Drugs was certainly not good for African American’s, if you can believe, things got demonstrably worse with Reagan and the Anti-Drug Abuse Act of 1986.

## Chapter II:

### Reagan and the Rise of the Prison-Industrial Complex

*Now we go on to the next stop: making a final commitment not to tolerate drugs by anyone, anytime, anyplace. So, won't you join us in this great, new national crusade?*<sup>98</sup>

- Nancy Reagan

#### Part I: Reagan and the Intensification of the War on Drugs

In the 1960's and 1970's, the Johnson and Nixon administration's lay the foundation for the rise of the carceral state by transitioning from a War on Poverty to a War on Crime, and eventually a War on Drugs. While these administrations played a pivotal role in the rise of mass incarceration, it was Ronald Reagan who cemented himself as the face of the War on Drugs and the carceral state, and for good reason. During his presidency, Reagan intensified the carceral state by building on the policies that aimed to control urban communities through increased policing and surveillance—drastically increasing the punitive nature of the War on Drugs. When Reagan officially declared his War on Drugs in October of 1982, evidence suggests that drug usage was actually on the decline, and drugs were of little concern to the American public.<sup>99</sup> Nonetheless, Reagan moved quickly to place the War on Drugs at the forefront of his agenda—passing legislation that stiffened and lengthened punishment for drug related offenses. Additionally, Nancy Reagan launched her “Just Say No” campaign in 1982, bringing more attention to the problem of

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<sup>98</sup> “Address to the Nation on the Campaign Against Drug Abuse, September 14, 1986,” Ronald Reagan Presidential Library & Museum. Accessed March 13, 2022. <https://www.reaganlibrary.gov/archives/speech/address-nation-campaign-against-drug-abuse>.

<sup>99</sup> Jarecki, *The House I Live In*.

United States Department of Health and Human Services. National Institutes of Health, National Institute on Drug Abuse, National Household Survey on Drug Abuse, 1982. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, November 23, 2015. Accessed March 13, 2022. <https://doi.org/10.3886/ICPSR06845.v4>.

drugs among legislators and the general public. Clearly, the War on Drugs was about far more than combatting a drug epidemic—it was about politics and control.

Among other things, Reagan introduced the Comprehensive Crime Control Act of 1984, which included legislation that mandated longer sentences for many drug-related offenses, largely eliminated the use of probation and parole in lieu of imprisonment, and made amendments to the Controlled Substances Act.<sup>100</sup> Reagan also took Nixon's strategy of disinvesting from social welfare services while subsequently increasing funding for law enforcement. According to Michelle Alexander in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*:

Between 1980 and 1984, FBI antidrug funding increased from \$8 million to \$95 million. Department of Defense antidrug allocations increased from \$33 million in 1981 to \$1,042 million in 1991. During that same period, DEA antidrug spending grew from \$86 to \$1,026 million, and FBI antidrug allocations grew from \$38 to \$181 million. By contrast, funding for agencies responsible for drug treatment, prevention, and education was dramatically reduced. The budget of the National Institute on Drug Abuse, for example, was reduced from \$274 million to \$57 million from 1981 to 1984, and antidrug funds allocated to the Department of Education were cut from \$14 million to \$3 million.<sup>101</sup>

In time, these policies further intensified people's belief in Black criminality and gave rise to exponential increases in America's carceral state. In fact, drug-related conviction during the 1980s and 1990s led to levels of imprisonment that far eclipsed the Jim Crow era.

When considering Reagan's massive expansion of the War on Drugs, it is impossible to separate the increasing support for punitive action from larger socio-economic forces in the twilight of the twentieth century. Before 1950, African Americans transformed from most rural, southern populations to an urban, northern (and western) population. In 1900, about 90 percent of the Black population lived in the South, with a majority in rural areas. By 1970, however, about

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<sup>100</sup> "S.1762 - 98th Congress (1983-1984): Comprehensive Crime Control Act of 1984." September 25, 1984. Accessed November 14, 2021. <https://www.congress.gov/bill/98th-congress/senate-bill/1762>.

<sup>101</sup> Alexander, *The New Jim Crow*, 49.

70 percent lived in cities, a majority in the North. For much of the 20<sup>th</sup> century, African American’s moved in droves from the South to the urban North in search of economic opportunity.<sup>102</sup> In fact, by 1980, cities such as New York, Chicago, Detroit, and Philadelphia had the largest African American populations in the United States.<sup>103</sup> In cities such as these, Blacks were part of the working poor. African Americans largely relied on manufacturing and other blue-collar industries for employment due to their general lack of educational attainment—In 1975, only about 25 percent of Black men and 29 percent of Black women older than 25 had four-years of high-school education.<sup>104</sup> In 1970 Detroit, close to one-third of all Blacks employed worked in manufacturing and heavy industry.<sup>105</sup> Over the course of the late 20<sup>th</sup> century, however, around the same time that the War on Drugs was gaining momentum, opportunities for legitimate employment were severely declining in urban centers. Globalization and developments in technology drastically reduced the number of manufacturing jobs available—from 1979 to 1990, the number of individuals employed in the manufacturing industry dropped by 1,756,000 people.<sup>106</sup> Moreover, while manufacturing employment was similar between racial and ethnic groups through 1990, by 2007, African Americans were 15 percent less likely than other groups to have a job in the already depleted manufacturing industry.<sup>107</sup>

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<sup>102</sup> Hinton, *From the War on Poverty to the War on Crime*, 29.

<sup>103</sup> Claudette E. Bennett, “We, The American Blacks.” *We The Americans*. Washington D.C.: Bureau of the Census, September 1993, Accessed December 12, 2021. <https://www.census.gov/prod/cen1990/wepeople/we-1.pdf>.

<sup>104</sup> Alexander, *The New Jim Crow*, 50.

U.S. Census Bureau, “Years of School Completed By Persons 25 Years Old and Over, by Age, Race, Spanish Origin and Sex, For Regions: March 1975”, Table 1. Accessed February 4, 2022.

<https://www2.census.gov/programs-surveys/demo/tables/educational-attainment/time-series/p20-295/tab-01.pdf>

<sup>105</sup> Reynolds Farley, “The Bankruptcy of Detroit: What Role did Race Play?” *City & Community* 14, no. 2 (2015): 118–37, Accessed November 14, 2021. <https://doi.org/10.1111/cico.12106>.

<sup>106</sup> Katelynn Harris, “Forty Years of Falling Manufacturing Employment.” *U.S. Bureau of Labor Statistics*, Beyond the Numbers: Employment & Unemployment, 9, no. 16 (2020). Accessed November 14, 2021.

<https://www.bls.gov/opub/btn/volume-9/forty-years-of-falling-manufacturing-employment.htm>.

<sup>107</sup> William J. Wilson, *More than Just Race: Being Black and Poor in the Inner City*, 1st ed. (New York: Norton & Company, 2009), 70.



Deindustrialization had other implications for urban communities. Middle-class Whites were continuing the trend of White-flight—moving from cities to predominantly White suburbs. Corresponding with this trend, employment became increasingly suburbanized and service-based—According to scholars Aaron J. Howell and Jeffrey M. Timberlake, “between 1970 and 1980 the central cities of Boston, Chicago, Cleveland, Detroit, New York, and Philadelphia lost nearly one million low-skill jobs, while their suburbs gained two million jobs, of which about 40% were low-skill.”<sup>108</sup> Although this data shows that some low skill jobs were still available, the suburbanization of employment put most jobs out of reach for city dwelling African Americans. For one thing, the government made it nearly impossible for African Americans to relocate to the suburbs. Legally sanctioned practices such as racial (exclusionary) zoning and redlining kept Blacks pinned down in city centers while jobs moved out.<sup>109</sup> Moreover, the lack of education among Black Americans meant that they did not have the necessary skills to compete for jobs in the globalized, service-based labor market—excluding them from well-paying opportunities that were afforded to better educated whites.<sup>110</sup>

The decline of the middle-class in cities also contributed greatly to urban-decay, as massive reductions in tax-collection impeded investment into infrastructure. Making matters worse, as part of his budget cuts, Reagan massively reduced federal contributions to city budgets—from 1980 to

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<sup>108</sup> Aaron J. Howell and Jeffrey M. Timberlake, “Racial and Ethnic Trends in the Suburbanization of Poverty in U.S. Metropolitan Areas, 1980–2010.” *Journal of Urban Affairs* 36, no. 1 (2014): 79–98. Accessed November 14, 2021. <https://doi.org/10.1111/juaf.12030>.

<sup>109</sup> Racial (exclusionary) zoning is the process of separating neighborhoods by race. Although neighborhoods are no longer explicitly zoned by race, zoning laws such as minimum lot size requirements indirectly function to keep neighborhoods segregated to this day.

Redlining was a way for banks to refuse giving mortgages to African American families or extracting severe subprime loans—ultimately limiting where Black Americans could live.

Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, First edition, (New York; London: Liveright Publishing Corporation, a division of W. W. Norton & Company, 2017), Preface & Ch. 3.

<sup>110</sup> Wilson, *More Than Just Race*, 71.

1989 in New York City, state aid was reduced by 20 percent, the equivalent of \$4 billion.<sup>111</sup> These economic factors had devastating effects for African Americans in particular—between 1980 and 1990 in Milwaukee, for example, the number of African Americans living in high-poverty ghetto neighborhoods increased from 25 percent to 55 percent.<sup>112</sup> The decline in legitimate employment among Black communities was certainly recognized among politicians as a dangerous social condition. When economic resources move out of a given area, people often find new ways to survive—prohibitive economies not only become viable solutions to underemployment and unemployment, but they also often directly conflict with the law. Among inner-city Black communities, the largest market that arose in the 1980s was that of crack cocaine.<sup>113</sup> Unfortunately for African American communities, the decline of meaningful employment opportunities among low-skill African American workers and the rise of illicit markets coincided with the late 20<sup>th</sup> century trend of dealing with social issues through punishment rather than structural reform. Between 1980 and 2000, the percentage of incarcerated African American high school dropout men, aged twenty to forty, increased from 10.7 percent to a whopping 32.4 percent.<sup>114</sup> This drastic rise in incarceration among the uneducated Black population coincided with the conservative trend of slashing funding for social services and education; For the fiscal year 1982, for example, Ronald Reagan proposed budget cuts of over \$44 billion—with more than half of this reduction coming from income security, education, training, employment and social services. Ultimately, this data

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<sup>111</sup> Ibid, 35.

<sup>112</sup> Franklin J. James, “Urban Economies: Trends, Forces, and Implications for the President’s National Urban Policy.” *U.S. Department of Housing and Urban Development, Cityscape: A Journal of Policy Development and Research*, 1, no. 2 (June 1995): 91, Accessed November 14, 2021.  
<https://www.huduser.gov/periodicals/cityscape/vol1num2/ch2.pdf>.

<sup>113</sup> Jarecki, *The House I Live In*.

Robert McLean, Grace Robinson, and James Densley, “The Rise of Drug Dealing in the Life of the North American Street Gang” *Societies* 8, no. 90 (September 18, 2018): 1–10, Accessed November 14, 2021.  
<https://www.mdpi.com/2075-4698/8/3/90/htm>.

<sup>114</sup> Bruce Western, *Punishment and Inequality in America*, (New York: R. Sage Foundation, 2006), 17.  
Low levels of educational attainment is positively associated with joblessness and drug usage.

indicates that incarceration rather than socioeconomic reform was the principal way of dealing with the socioeconomic issues that characterized Black communities.

As Black communities crumbled, Reagan demonized Black communities by making African American crack users and dealers the face of America's crime and drug "epidemic." During Reagan's first year of office in 1980, 25.9 percent of households relied on social security income, and approximately 12.5 percent of the Black population received some sort of public assistance.<sup>115</sup> Throughout his political career, Reagan spoke with disdain for those on welfare—a sizable amount of whom were African American. Reagan spoke harshly about Black "welfare queens" who took advantage of government resources—stirring up resentment towards Black Americans and the United States welfare system.<sup>116</sup> Moreover, the media broadcast images of Black crack addicts all across the nation—evidence of a dire drug scourge among those who relied on tax-funded welfare checks. Interestingly, research has shown that Whites are actually more likely to sell drugs than Blacks, and both racial groups use drugs at the same rate. In fact, in 1980, Whites were 45 percent more likely to sell drugs compared to Blacks.<sup>117</sup> Despite the evidence, African Americans were, and continue to be, disproportionately arrested for drug related crimes.<sup>118</sup> Accordingly, Blacks were portrayed as criminals on the news disproportionately compared to their

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<sup>115</sup> At the same time, 3.1 percent of Whites and 7.8 percent of Hispanics received public assistance. U.S. Census Bureau, "Households with Social Security Income." 1980 Census (SE: T70.), Social Explorer. Accessed March 3, 2022. <https://www.socialexplorer.com/tables/C1980/R13083322>.

National Center for Education Statistics, "Number and Percentage of People Receiving Public Assistance, by Sex, Race/Ethnicity, and Age Group: Selected Years, 1980 through 2009," National Center for Education Statistics. Accessed March 3, 2022. [https://nces.ed.gov/pubs2012/2012026/tables/table\\_32.asp](https://nces.ed.gov/pubs2012/2012026/tables/table_32.asp).

<sup>116</sup> Alexander, *The New Jim Crow*, 47.

<sup>117</sup> Christopher Ingraham, "White People Are More Likely to Deal Drugs, but Black People Are More Likely to get Arrested for it," Washington Post, September 30, 2014, Accessed October 13, 2021. <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-Black-people-are-more-likely-to-get-arrested-for-it/>.

<sup>118</sup> In 2019, African American adults made up approximately 12 percent of the United States population, yet 26 percent of drug related arrests.

Federal Bureau of Investigation, "Arrests by Race and Ethnicity, 2019," 2019 Uniform Crime Report (43A). <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>.

actual crime rates, and inner-city African Americans were branded as ‘super predators.’<sup>119</sup> Ultimately, the media intensified views of African Americans as part of a dangerous criminal subculture and increased support for the reduction of federally funded social services—the problem of drugs was established as a problem not of poverty, but of race.

As the frenzy surrounding the War on Drugs gripped the nation throughout the late twentieth century, politicians and lawmakers saw an opportunity to push forward increasingly harsh drug policies. The Reagan administration’s efforts in the War on Drugs culminated with the Anti-Drug Abuse Act of 1986, which included the infamous 100 – 1 crack to cocaine sentencing disparity. For sentencing purposes, federal law treated one gram of crack cocaine as equivalent to one-hundred grams of powder cocaine—five grams of crack cocaine carried a mandatory five-year prison sentence, while it took 500 grams of powder cocaine to carry the same sentence. Importantly, there is no chemical difference between crack and powder cocaine—the only difference is that Blacks had been associated with crack, while Whites were associated with powder cocaine. The act also included asset forfeiture amendments, allowing law enforcement to use seized assets to fund various expenses.<sup>120</sup> The Anti-Drug Abuse Act of 1986 greatly intensified the already harsh legislation of the Comprehensive Crime Control Act of 1984. In 1988, policymakers revised the act once again to include even harsher penalties for drug offenses, including new mandatory minimum sentences for first time offenders.<sup>121</sup> Quickly, one’s ability to

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<sup>119</sup> While there is limited data from the War on Drugs that compares racial crime statistics with media depiction statistics, more recent evidence suggests that Blacks have been, and continue to be disproportionately depicted as criminals by the media. In a study conducted between 2015 and 2016, researchers found that Blacks represented 37 percent of criminals shown in the news, but made up only 26 percent of those arrested on criminal charges.

Travis L. Dixon, “A Dangerous Distortion of Our Families: Representations of Families, By Race, In News and Opinion Media,” *Color Of Change*, Color of Change, January 2018. Accessed March 14, 2022.

<https://colorofchange.org/dangerousdistortion/>.

<sup>120</sup> "H.R.5484 - 99th Congress (1985-1986): Anti-Drug Abuse Act of 1986." October 27, 1986,

<https://www.congress.gov/bill/99th-congress/house-bill/5484>.

<sup>121</sup> "H.R.5210 - 100th Congress (1987-1988): Anti-Drug Abuse Act of 1988." November 18, 1988,

<https://www.congress.gov/bill/100th-congress/house-bill/5210>.

prove how tough on crime they could be became a cornerstone of election success for both major parties—Democrat presidential candidate Bill Clinton adopted the ‘tough on crime’ agenda to get elected in 1992, and subsequently passed the infamous “three strikes you’re out” law with bipartisan support.<sup>122</sup>

While politicians capitalized on the War on Drugs popularity, the war would not have been a success without the ability of police forces to round up and arrest a huge number of individuals—particularly people of color. Throughout history, the police have been given the most discretion of any criminal justice agency, and the War on Drugs was no exception. Police forces have the discretion to choose both who to target for intervention, as well as where to target this intervention. Research demonstrates that they used discretion during the War on Drugs similarly to the strategies devised during the segregation era—that is, it was used to target African Americans and African American communities.<sup>123</sup> By 1990 in New York, 1,558 per 100,000 Black residents age 15 – 64 were in prison, compared to 323 per 100,000 White residents—a discrepancy that continued to grow until 1999.<sup>124</sup> Moreover, across the country in 1989, Blacks were arrested for drug offenses at a rate of 1,460 people per 100,000, compared to 365 per 100,000 for Whites.<sup>125</sup> Between 1991 and 1993, senior statistician for the Bureau of Justice Statistics Patrick A. Langan put this disparity into context—despite making up 49 and 36 percent of arrests for selling and using drugs, African

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<sup>122</sup> The “three strikes you’re out” law created new capital crimes, mandated life sentences for many three-time offenders, and gave more than \$16 billion for state prison grants and police force expansion.

Alexander, *The New Jim Crow*, 55.

<sup>123</sup> Alec Karakatsanis, “The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’.”

<sup>124</sup> Vera Institute of Justice, “Incarceration Trends: State Demographics,” Vera. Accessed November 15, 2021. <http://trends.vera.org/rates/new-york>.

<sup>125</sup> Western, *Punishment and Inequality*, 46.

Americans made up only 16 and 13 percent of individuals who reported selling and using drugs respectively.<sup>126</sup>

Not only do police forces have the discretion to target African American communities, but several key judicial precedents have legally protected officers from challenges on the grounds of racial bias. In the 1968 case of *Terry v. Ohio*, a man named John Terry was stopped and frisked by police officer Martin McFadden, who suspected that Terry was planning to rob a store. Terry was found to be holding a pistol, and was subsequently arrested.<sup>127</sup> At trial, Terry’s lawyer argued that the search (or frisk) conducted by the officer violated Terry’s Fourth Amendment right protecting him from illegal search and seizure. In a landmark 8 – 1 decision, the court sided against Terry—finding that the search conducted by McFadden did not have to meet the constitutional standard of probable cause. In the decision, Chief Justice Earl Warren declared that police officers have the right to stop, question and even frisk an individual if they have “reasonable suspicion” that that individual is committing, has committed or will commit a crime.<sup>128</sup> This broad notion of ‘reasonable suspicion’ has allowed officers to stop individuals for countless reasons, and unsurprisingly, African Americans have faced disproportionately negative effects due to this decision. In fact, one study found that in New York between 2003 and 2011, 84 percent of pedestrian stops involved African Americans—yet African Americans were less likely to arrested from these stops.<sup>129</sup>

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<sup>126</sup> Patrick A. Langan, “The Racial Disparity in U.S. Drug Arrests.” Bureau of Justice Statistics, (Rockville, MD: U.S. Department of Justice), October 1, 1995.

<sup>127</sup> A man by the name of Richard Chilton was also searched and arrested for gun possession.

<sup>128</sup> *Terry v. Ohio*, 392 U.S. 1. (1967).

<sup>129</sup> Decio Coviello and Nicola Persico, “An Economic Analysis of Black-White Disparities in NYPD’s Stop and Frisk Program,” NBER Working Paper Series, Cambridge, MA: National Bureau of Economic Research, February 2013.

In 1987, *McCleskey v. Kemp* helped to further protect law enforcement and the criminal justice system from challenges of racial bias. Warren McCleskey—a Black man sentenced to death in Georgia for killing a White man, challenged the sentence on grounds of racial bias.<sup>130</sup> Supporting his argument was the Baldus study, which found that “defendants charged with killing White victims were 4.3 times more likely to receive a death sentence than defendants charged with killing Blacks. Black defendants, like McCleskey, who killed White victims had the highest chance of being sentenced to death.”<sup>131</sup> Nonetheless, the Court ruled that this was not enough to prove unlawful discrimination—evidence of overt, racial bias would be needed to make this argument.<sup>132</sup> This decision—which applied to sentencing decisions in this case—also had major implications for law enforcement. The *McCleskey* decision held that any accusations of racial bias by the police would need to be supported with evidence of overt discrimination—evidence that is extremely hard to come by particularly when officers can pin their actions on any number of causes for reasonable suspicion.

On top of all this, police forces also had financial incentives to seize property and make arrests during the War on Drugs. In 1984, amendments to the Drug Abuse Prevention and Control Act introduced the Department of Justice’s Assets Forfeiture Fund—used for depositing forfeiture proceeds for federal agency use.<sup>133</sup> Soon after, individual states followed the federal governments lead, allowing state agencies to reap the proceeds from forfeited assets. Importantly, civil forfeiture laws require very low standard of proof for asset seizure—while the law differs from state to state,

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<sup>130</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>131</sup> Alexander, *The New Jim Crow*, 107.

<sup>132</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>133</sup> "S.1762 - 98th Congress (1983-1984): Comprehensive Crime Control Act of 1984." September 25, 1984.

<https://www.congress.gov/bill/98th-congress/senate-bill/1762>.

While asset forfeiture had been introduced in 1970, the 1984 Drug Abuse Prevention and Control Act allowed for the state to profit from forfeitures.

civil asset forfeitures do not require a criminal conviction of the owner—assets can be seized with mere suspicion that they (or the owner) have been involved in a crime.<sup>134</sup> Naturally, the prospect of drastically increasing budgets has led police forces to take advantage of civil forfeiture laws—

In the “Department of Justice Assets Forfeiture Fund Statement of Income and Expenses Fiscal Year 1990” report, the department documented net deposits of just below \$460 million from forfeitures. In fact, from 1985 to 1990, asset seizures grew at an annual rate of 59 percent.<sup>135</sup> The massive funding afforded to police departments through civil forfeiture incentivized police departments to search for petty crime and seize assets, with the goal of lining their own pockets.

Making matters worse, Reagan’s administration offered up huge cash grants to law enforcement agencies willing to make drug-enforcement a top priority. As part of the 1988 Anti-Drug Abuse Act (amended from the 1986 Anti-Drug Abuse Act), the Edward Byrne Memorial State and Local Law Enforcement Assistance Program provided massive amounts of funding to law enforcement agencies in the form of either block or discretionary grants. Between 1989 and 1993, this program allocated over \$738 million (approximately 40 percent of funding during this period) to multijurisdictional task forces—task forces dedicated primarily to the enforcement of drug laws.<sup>136</sup> Funds were used by law enforcement to do things including improve equipment and training and add personnel to aid in the drug war. According to one study, Byrne grant funding certainly did its part to increase drug arrests—using weighted least squares regression estimates, the researchers found that “for every \$100 increase in Byrne Grant funding, arrests for drug

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<sup>134</sup> Dick M. Carpenter, Lisa Knepper, Angela C. Erickson, and Jennifer McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2<sup>nd</sup> ed., (Institute for Justice, 2015).

<sup>135</sup> U.S. Department of Justice. “Annual Report of the Department of Justice Asset Forfeiture Program 1990.” Annual Report of the Department of Justice Asset Forfeiture Program. National Institute of Justice, 1990.

<sup>136</sup> Terence Dunworth, Peter Haynes, Aaron J. Saiger, “National Assessment of the Byrne Formula Grant Program.” Research in Brief. National Institute of Justice. U.S. Department of Justice, June 1997, 5.



trafficking increased by roughly 22 per 100,000 White residents and by 101 arrests per 100,000 Black residents.”<sup>137</sup>

With funding directly tied to fighting the War on Drugs and financial incentives for afforded via civil asset forfeiture, police were given a stake in the perpetual existence of the War on Drugs. Arrest and incarceration rates soared through the 1980s and 1990s, particularly among the Black population—from 1980 to 1989 Black arrest rates for drug possession rose 219 percent, and Black arrest rates for drug sales and manufacturing rose 363 percent. In fact, Between 1980 and 2009, African Americans were arrested at higher rates than all other races across nearly every category of arrest.<sup>138</sup> Instead of seeing this as a deeply rooted social problem, conservatives saw opportunity—the opportunity to once again profit through the exploitation of Black bodies.

## **Part II: Privatization and the Rise of the Prison-Industrial Complex**

While Ronald Reagan’s policies were hardly a departure from the groundwork laid out by the administrations before him, his increased emphasis on punitiveness—particularly for drug crimes—was the tipping point for mass incarceration and the formation of the carceral state. Increases in police presence and funding improved the efficiency at which arrests could be made, while factors such as mandatory sentencing minimums ensured that even low-level offenders would be in jail for extended periods of time. As police forces arrested millions and the criminal justice system shuffled through the growing prison industrial complex, the carceral state ballooned. Tough on crime policies that had become essential to political success necessitated having secure

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<sup>137</sup> Robynn Cox and Jamein P. Cunningham, “Financing the War on Drugs: The Impact of Law Enforcement Grants on Racial Disparities in Drug Arrests,” Working Paper Series, University of Southern California, August 2017, 24.

<sup>138</sup> Howard N. Snyder, “Arrest in the United States, 1980 – 2009,” Bureau of Justice Statistics, U.S. Department of Justice, September 2011. Accessed December 2, 2022. <https://bjs.ojp.gov/content/pub/pdf/aus8009.pdf>

facilities to house dangerous criminals, but the rate at which people were being incarcerated and the increased length of sentences was overwhelming prison capacities. By the mid-1980s, prison overcrowding had become so severe that prisons in a majority of states were under court order to correct prison conditions due to the fact that current conditions violated the Eighth Amendment prohibiting cruel and unusual punishment.<sup>139</sup>

Importantly, the War on Crime and the War on Drugs cemented perceptions that prisons were the only solution to the hyperbolized crime problem in the United States. Conservative politicians—with assistance from the media—had done an excellent job in stoking fears about crime and building resentment towards alternative forms of rehabilitation for ‘undeserving’ criminals. Prisons, they argued, were the most effective way to reduce crime, through incapacitation and deterrence.<sup>140</sup> Much evidence, however, suggests that the correlations between crime and incarceration are not as strong as they are made out to be.<sup>141</sup> For one thing, the notion that increasing incarceration was a response to increases in crime committed was wrong in and of itself. Instead, increasing rates of incarceration resulted from changes in what people were being arrested and jailed for. According to scholar and economist Glenn C. Loury— “Between 1980 and 1997 the number of people incarcerated for nonviolent offenses tripled, and the number of people incarcerated for drug offenses increased by a factor of eleven. Indeed, the criminal-justice researcher Alfred Blumstein has argued that none of the growth in incarceration between 1980 and 1996 can be attributed to more crime.”<sup>142</sup> Moreover, Loury finds that between 1975 and 1999, the number of convicts increased from 22 per 10,000 to 106 per 10,000 with crime rates held at a

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<sup>139</sup> Selman and Leighton, *Punishment for Sale*, 42.

<sup>140</sup> Western, *Punishment and Inequality*, 176.

<sup>141</sup> *Ibid.*, 187.

Glenn C. Loury, *Race, Incarceration, and American Values*. A Boston Review Book. (Cambridge, MA: MIT Press, 2008), 8 – 63.

<sup>142</sup> Loury, *Race, Incarceration, and American Values*, 8.

constant.<sup>143</sup> This data indicates that crime was not, in fact, the cause of the prison boom during the late 20<sup>th</sup> century. Instead, increased arrests for nonviolent and drug offenses drove the expansion of the carceral state.

Several scholars have concluded that mass incarceration has had very minimal effect on reducing crime. From the early 1970s to the mid-2000s, incarceration increased at an exponential rate.<sup>144</sup> If rises in incarceration correlated with decreases in criminal activity, we would expect to see a steady decrease in crime rates during this period. However, crime rates during this period fluctuated greatly—evidence that this correlation is not accurate. In fact, even during the 1990s—a period where high rates of incarceration coincided with a steady decline in crime rates—incarceration cannot be significantly linked to crime reduction. Through sophisticated empirical analysis, scholar Bruce Western found that only about 2 to 5 percent of the reduction in crime through the 1990s could be attributed to the growth in imprisonment.<sup>145</sup> This was largely due to the fact that locking up drug offenders did very little to eliminate crime, increases in incarceration minimize stigma (and thus the deterrence effect) regarding imprisonment, and the fact that individuals were more likely to commit crime upon release from prison.<sup>146</sup>

Nonetheless, with the misguided belief that incarceration was the answer to the exaggerated crime problem, citizens in the 1980s pushed for more criminals to be arrested and subsequently jailed. Politicians—needing to appear tough on crime—were determined to find ways to appease these demands while also solving the problem of prison overcrowding. The simple solution to this problem seemed to be the construction of more state and federal prisons. Indeed, corrections

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<sup>143</sup> Ibid., 62 – 63.

<sup>144</sup> Western, *Punishment and Inequality*, 13.

<sup>145</sup> Ibid., 185.

<sup>146</sup> Ibid., 187.

expenditures did increase in the 1980s and 1990s. According to the Bureau of Justice Statistics data, corrections expenditures increased from about \$6 billion in 1979 to just under \$40 billion by 1995.<sup>147</sup> Yet, this strategy too was quickly becoming a problem. The economic downturn in the 1980s had imposed fiscal restraints on the government, and citizens shot down tax proposals that would be used to fund prison expansion. For example, as Donna Selman and Paul Leighton note—“three years after the legislature enacted the 650 Lifer Law, Michigan voters turned down a proposed tax increase for prisons.”<sup>148</sup> It was clear that the United States government would need balance being tough on crime with fiscal conservatism.

Fortunately for policymakers, at the same time that prison overcrowding was becoming a major issue, the American public, inspired by Ronald Reagan, was becoming increasingly anti-government, believing that government spending on generous social programs was the cause of the economic downturn that characterized the early 1980s. As the economy tumbled in the early 1980s and the public’s trust in the government wavered, Reagan—in his first inaugural address—stated that “In this present crisis, government is not the solution to our problem; government is the problem.”<sup>149</sup> By this, Reagan meant that government spending—particularly on social welfare programs—was the cause of America’s economic hardship. In turn, Reagan actively worked to reduce government spending and boost the economy. It was during this time that the “Reaganomics” model was introduced—cutting taxes for corporations and severely reducing

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<sup>147</sup> “Justice Expenditure and Employment in the U.S., 1979.” Preliminary report, Bureau of Justice Statistics, U.S. Department of Justice, December 1980.

Lea S. Gifford, “Justice Expenditure and Employment in the United States, 1995,” Bureau of Justice Statistics. U.S. Department of Justice, (November 1999).

<sup>148</sup> Selman and Leighton, *Punishment for Sale*, 43.

The “650 Lifer Law” was a piece of Michigan legislation that required a mandatory life sentence for the sale or possession (or conspiracy to sell or possess) 650 grams of cocaine or heroin.

<sup>149</sup> “First Inaugural Address of Ronald Reagan, January 20, 1981.” Ronald Reagan Presidential Library & Museum. Accessed December 27, 2021. <https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981>.

spending on social welfare (while also spending more on law enforcement).<sup>150</sup> Moreover, along with reductions in government spending, an increasing number of politicians and economic theorists had begun advocating for privatization of various government functions. In 1982, Reagan created the “President’s Private Sector Survey on Cost Control” (commonly known as the “Grace Commission”), where a panel of private sector executives concluded that the government could save approximately \$424 billion over three years by privatizing various government functions.<sup>151</sup> Then, in 1983, the federal Office of Management and Budget established Circular A-76—stating the following:

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.<sup>152</sup>

While this ideology favoring privatization was not specifically related to privatizing the prison industry or the criminal justice system, this sentiment, combined with the prison overcrowding concerns, set the stage for private prisons and, ultimately, the modern prison-industrial complex.

In 1983, Tom Beasley, Doctor Robert Crants, and Terrell Don Hutto took advantage of rising prison populations and growing opposition to government programs to found Corrections Corporation of America (CCA)—known today as CoreCivic.<sup>153</sup> CCA was a revolutionary idea at the time—proposing to design, build and operate prisons and detention facilities for the

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<sup>150</sup> Selman and Leighton, *Punishment for Sale*, 51 – 52.

<sup>151</sup> “Analysis of the Grace Commission’s Major Proposals for Cost Control.” A Joint Study by the Congressional Budget Office and General Accounting Office. The United States Congress, February 1984.

<sup>152</sup> Selma and Leighton, *Punishment for Sale*, 54.

Office of Management and Budget, Circular No. A-76, Pub. L. No. 105–270 (August 4, 1983).

<sup>153</sup> Selma and Leighton, *Punishment for Sale*, 55 – 56.

Tom Beasley was the Tennessee Republican Party Chairman in 1983, while Hutto was the president of the American Correctional Association.

government. Of course, privatizing the prison industry was more complicated and faced more pushback compared to other government services and industries at the time. Concerns arose from the notion that law enforcement is an inherently government function, as well as issues about the cost and quality of private facilities.<sup>154</sup> Despite these concerns, privatization of confinement institutions continued to grow in popularity and scope during the 1980s; By 1988, at least nine states had private companies operating juvenile detention centers, county prisons, immigration detention centers and other similar facilities.<sup>155</sup> Moreover, in the second President's Commission on Privatization in 1987, the panel made several recommendations lending to the idea that privatization of correctional institutions should be experimented with at the federal level.<sup>156</sup> In the eyes of the commission, private, for-profit prisons could reduce government spending on incarceration and help deal with prison overcrowding—all while fitting squarely within the all-important tough on crime agenda. Additionally, private companies like CCA offered the ability to build prisons using venture capital, credit lines, and stock offerings rather than tax dollars.

Private prisons were also able to take advantage of the socioeconomic factors of the late 20<sup>th</sup> century. While Black communities felt the worst of the effects of deindustrialization, rural White communities were also greatly affected. For these regions, prison construction had the allure of creating new construction and corrections jobs that could benefit their communities. As a result, rural communities lobbied hard for the construction of prisons in their communities. By the early 1990s, CCA held several government contracts for the operation of corrections facilities, was

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<sup>154</sup> “Report of the President’s Commission on Privatization.” Privatization: Toward More Effective Government. Washington D.C.: Agency for International Development, March 1988, 148 -149.

<sup>155</sup> *Ibid.*, 148.

<sup>156</sup> *Ibid.*, 146 – 155.

traded on the New York Stock Exchange, and had proved there was plenty of money to be made in corrections.<sup>157</sup>

### **Part III: The Prison-Industrial Complex**

On the surface, private prisons seem like an adequate solution to the government's issues surrounding incarceration. In reality, however, the introduction of private prisons has left a legacy where private interests are in constant conflict with justice and rehabilitation. In the past few decades, the United States has developed a prison-industrial complex—an 'iron triangle' in which government bureaucracy, politicians, and private business interests work together to expand criminal justice system. As the Critical Resistance organization puts it— "The prison industrial complex (PIC) is a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems."<sup>158</sup> Over the years, the prison-industrial complex has greatly expanded and has gained unwarranted influence over criminal justice procedures and institutions.

From their conception, private prison companies have treated incarceration as a business opportunity—a growth sector in a seemingly ever-expanding U.S. economy. The two largest of these corporations—CoreCivic (formerly CCA) and The GEO Group—are publicly traded companies (Although they are not the only ones). This means that their main goal is not to deter crime or rehabilitate offenders, but to maximize shareholder value through the generation of profit.

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<sup>157</sup> Selman and Leighton, *Punishment for Sale*, 45.

<sup>158</sup> Steven Donziger, "The Prison-Industrial Complex." *Washington Post*, March 17, 1996. Accessed December 27, 2021. <https://www.washingtonpost.com/archive/opinions/1996/03/17/the-prison-industrial-complex/6cd7b498-ad9b-4cf2-8ccb-a1b605e25fea/>.

"What Is the PIC? What Is Abolition?" Critical Resistance, 2021. Accessed December 27, 2021. <http://criticalresistance.org/about/not-so-common-language/>.

Undoubtedly, both companies have been successful at achieving this goal. In 2019, CoreCivic reported \$1,980,690,000 in total revenue, with a net income of \$188,890,000.<sup>159</sup> In the same year The GEO Group reported \$2,477,922,000 in total revenue and net income of \$166,603,000.<sup>160</sup> Moreover, some of the most well-known names in the business world have serious stake in these corporations—BlackRock Fund Advisors and Fidelity Management and Research Corporation are the two largest investors in CoreCivic at about 29 percent ownership (total value close to \$373 million), while the Vanguard Group, Inc. and BlackRock Fund Advisors have a combined 30 percent stake in The GEO Group (total value close to \$320 million).<sup>161</sup>

As of December 31, 2020, CoreCivic operated 47 correctional and detention facilities (owning 42 of these facilities), and had a design capacity of 70,000 beds.<sup>162</sup> The GEO Group reported operating 118 secure and community-based facilities with 93 thousand beds worldwide.<sup>163</sup> Private prison companies today house close to 10 percent of the U.S. prison population—and the total number of prisoners housed in these facilities has increased 32 percent between 2000 and 2019.<sup>164</sup> As an industry, private prison companies rely on these beds being filled in order to make a profit. Private prisons function on per diem payments—receiving a set amount of money from the government per inmate. With a largely fixed-cost structure, revenue for these

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<sup>159</sup> “Income Statement,” CoreCivic, Inc., Accessed December 27, 2021. <http://ir.corecivic.com/stock-information/fundamentals/income-statement>.

<sup>160</sup> The GEO Group, Inc., Form 10-K for the fiscal year ended December 31, 2020, 85. Accessed December 29, 2021. [https://sec.report/Document/0001564590-21-006003/0001564590-21-006003.txt#ITEM\\_1\\_BUSINESS](https://sec.report/Document/0001564590-21-006003/0001564590-21-006003.txt#ITEM_1_BUSINESS).

<sup>161</sup> “CoreCivic Inc Shareholders.” Cable News Network, 2021, Accessed December 27, 2021. <https://money.cnn.com/quote/shareholders/shareholders.html?symb=CXW&subView=institutional>.

“GEO Group Inc Shareholders.” Cable News Network, 2021. Accessed December 29, 2021. <https://money.cnn.com/quote/shareholders/shareholders.html?symb=GEO&subView=institutional>

<sup>162</sup> CoreCivic, Inc., Form 10-K for the fiscal year ended December 31, 2020, 7. Accessed December 29, 2021. <http://ir.corecivic.com/node/21411/html#COMPETITION>

<sup>163</sup> The GEO Group, Inc., Form 10-K for the fiscal year ended December 31, 2020, 3. Accessed December 29, 2021. [https://sec.report/Document/0001564590-21-006003/0001564590-21-006003.txt#ITEM\\_1\\_BUSINESS](https://sec.report/Document/0001564590-21-006003/0001564590-21-006003.txt#ITEM_1_BUSINESS)

<sup>164</sup> “Private Prisons in the United States.” The Sentencing Project, March 3, 2021. Accessed December 29, 2021. <https://www.sentencingproject.org/publications/private-prisons-united-states/>.



corporations depends on a steady inflow of inmates to turn a profit. As CoreCivic notes in its SEC filings— “We are dependent upon the governmental agencies with which we have contracts to provide offenders for facilities we operate.”<sup>165</sup> What is more, private prison companies have occupancy guarantees built into some contracts. For example, in Colorado, private prisons were implemented with the intention of housing the overflow prison population. When crime fell by about 33 percent in 2009, however, CoreCivic (then CCA) negotiated a quota in their contract— if their facilities were under 90% capacity in the fiscal year 2013, the state would make up the difference. This occupational guarantee for CCA’s three prison facilities cost the state at least \$2 million by mid-year 2013.<sup>166</sup>

Private prison companies have also been found to profit from disastrous cost-cutting techniques. As I discussed earlier, private prisons were lauded as a way to reduce government spending and operate prison services more efficiently. Yet, in reality, this efficiency amounts to malpractice. To improve profit margins, these corporations hire fewer correctional officers, provide less training, and invest less in medical care among other cost cutting strategies. The results of these practices are far from shocking—private prison companies experience high turnover rates, high rates of violence, and worse health among inmates. In one example, the State of Ohio sold the Lake Erie Correctional Facility to CoreCivic (CCA at the time) in 2011. CCA was contracted to manage 1,800 inmates and the deal was designed to save Ohio \$3 million per year. Shortly after receiving the contract, CCA began laying off experienced workers and instituted pay cuts. With a reduction in staff, violence at the prison flourished— “prisoner-on-prisoner

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<sup>165</sup> CoreCivic, Inc., Form 10-K for the fiscal year ended December 31, 2020, 40.  
<http://ir.corecivic.com/node/21411/html#COMPETITION>

<sup>166</sup> “Criminal: How Lockup Quotas and ‘Low-Crime Taxes’ Guarantee Profits for Private Prison Corporations,” Washington D.C.: In The Public Interest, September 2013, 7 – 8.

assaults increased 188 percent, and prisoner-on-staff assaults increased 306 percent.”<sup>167</sup> Clearly, the concerns raised in the early years of prison privatization regarding quality and accountability should have been given more thought.

Most disturbingly, perhaps, is that private prisons and companies affiliated with them profit from prison labor. Programs such as The Prison Industry Enhancement Certification Program (PIECP) set criteria that allow prisoners to work—including paying prisoners minimum wage. While this seems beneficial to both parties at the surface, in reality, prisons abuse loopholes in the law. For example, the PIECP permits the deduction of wages up to 80 percent for things such as room and board; In essence, prisoners are paying not only for their stay in prison, but for the expansion of the prison system all together. Making matters worse, prisons have been known to severely upcharge on basic necessities such as soap, deodorant, and personal phone calls. Prisoners are essentially forced to work long hours on miniscule wages in order to afford basic necessities.<sup>168</sup>

Carceral companies have a massive stake in the continuation of mass incarceration. Despite claims that they do not advocate for policies related to crime control or the duration of sentences, these claims are misleading. For one thing, private prison corporations have historically been involved with powerful organizations that have major influence in shaping criminal justice policy. Of these organizations, the most infamous is the American Legislative Exchange Council (ALEC). Despite branding itself as “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism”—in reality, ALEC is a corporate lobby group comprised of conservative politicians and large

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<sup>167</sup> “Cutting Corners in America’s Criminal Justice System: How Corrections Companies Harm Prisoners and the Public in Pursuit of Profit,” In *The Public Interest*, April 2016, 3.

<sup>168</sup> “About PIECP,” [nationalcia.org](https://www.nationalcia.org), National Correctional Industries Association, Accessed December 29, 2021. <https://www.nationalcia.org/about-piecp>.

corporations who draft and push for the passage of legislation.<sup>169</sup> Historically, conservative politicians have catered to corporate interests and pushed for pro-business legislation—For example, in 2017, conservative president Donald Trump cut corporate taxes from 35 percent to 21 percent under the Tax Cuts and Jobs Act of 2017.<sup>170</sup> Through ALEC, corporations have been granted undue influence over politics and the introduction of legislation, and it has had devastating consequences for mass incarceration and minority communities in particular. In fact, most, if not all, of the legislation introduced by ALEC has been in the interest of its corporate sponsors—including CCA. In fact, CCA was one of ALEC’s largest sponsors for nearly two decades, while also co-chairing ALEC’s Criminal Justice Task Force for a number of years. ALEC is responsible for introducing widely adopted legislation such as the ‘three-strikes laws’ and ‘Truth-in-Sentencing Act’, which required offenders to serve at least 85 percent of their sentence. ALEC has also been a firm advocate of allowing privatization in the criminal justice system—pioneering the “Private Correctional Facilities Act.” Although CCA is no longer a sponsor of ALEC, these laws have been pivotal to the success of private prison corporations, as they have played a major role in increasing the number of people arrested and lengthening sentences.<sup>171</sup>

Private prison corporations are also actively involved in lobbying through political donations—particularly to conservative lawmakers who support strict immigration and punitive crime policies. In one example, in 2004, CCA donated \$100 thousand to Texas Republican and U.S. House majority leader Tom Delay’s charity. Shortly thereafter, Delay signed a contract with CCA to manage seven state prisons with capacity of 83 thousand total beds.<sup>172</sup> More recently, The

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<sup>169</sup> “About ALEC,” American Legislative Exchange Council, 2021. Accessed December 27, 2021. <https://alec.org/about/>.

Ava Duvernay and Jason Moran, *13<sup>th</sup>*, USA, 2016.

<sup>170</sup> Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97. 131 Stat. 2054. (December 22, 2017).

<sup>171</sup> Duvernay and Moran, *13<sup>th</sup>*.

<sup>172</sup> Selman and Leighton, *Punishment for Sale*, 98.

GEO Group and CoreCivic have donated to President Trump—a well-known supporter of the tough on crime and anti-immigration policies that these corporations thrive on. Using The GEO Group as an example, in 2016, they donated a total of \$225 thousand to the pro-trump PAC ‘Rebuilding America Now.’ Once elected, not only did the stock price of both CoreCivic and The GEO Group soar, but The GEO Group was granted a 10-year, \$110 million federal contract.<sup>173</sup>

Today, the prison-industrial complex is responsible for the creation of millions of jobs. The bureau of labor statistics estimates that over 450 thousand people work as correctional officers and jailers alone.<sup>174</sup> Additionally, there are over 650 thousand police and sheriff’s officers in the United States.<sup>175</sup> Multinational corporations generate massive profits through prison labor. With the help of ALEC, corporations have been able to sidestep laws that require paying prisoners minimum wage for their work. Companies such as JC Penny, Whole Foods, Microsoft, and Victoria’s Secret have generated huge profits from prison labor—eerily reminiscent of the profits generated by corporations through convict leasing programs. Hundreds of other private corporations generate massive profits from incarceration; the food service Aramark controls dining services in close to 40 percent of all U.S. prisons, often using prison labor to assist in food preparation, while offering very low-quality food to improve profit margins (there have been several complaints of maggots in these meals over the years). As incarceration and criminality has become a growth sector of the U.S. economy, lobby groups such as ALEC have pushed for even more privatization in the criminal justice system—including the privatization of probation and parole services. Private companies

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<sup>173</sup> “Private Prison Company GEO Group’s Pay-to-Play,” Campaign Legal Center, Campaign Legal Center, 2021. Accessed December 27, 2021. <https://campaignlegal.org/cases-actions/private-prison-company-geo-groups-pay-play>.

<sup>174</sup> “Correctional Officers and Jailers,” Occupational Employment and Wage Statistics, U.S. Bureau of Labor Statistics, May 2020. Accessed December 27, 2021. <https://www.bls.gov/oes/current/oes333012.htm>

<sup>175</sup> “Police and Sheriff’s Patrol Officers,” Occupational Employment and Wage Statistics, U.S. Bureau of Labor Statistics, May 2020. Accessed December 27, 2021. <https://www.bls.gov/oes/current/oes333051.htm>.

such as Attenti Ltd. sell GPS tracking technology to assist in the surveillance of people on parole. Police services receive massive amounts of funding to improve their ability to fight crime and fill prisons—something I will discuss in greater detail in chapters three and four.<sup>176</sup>

Ultimately, with corporations, politicians, and bureaucratic interests all heavily invested in the carceral state, the system has evolved into an economy in its own right. Every economy, however, requires some form of currency, and the currency of the prison-industrial complex is human bodies—with Black bodies being the most valuable. As this thesis has made clear by this point, African Americans have long been the target of systematic criminalization and are disproportionately represented in the criminal justice system. Today, African Americans—particularly those in poverty—offer the path of least resistance for the continuation of the prison-industrial complex. Inside the invisible walls of urban ghettos, Black communities are targeted by police task forces with the goal of making seizures and arrests. Lacking social and economic capital, these communities are easy targets. In fact, over policing of Black communities has nothing to do with crime itself—although the vast majority of arrests are for drug crimes, at the height of mass incarceration between 1979 and 2000, White high school seniors reported using drugs at significantly higher rates compared with Black high school seniors; A study by the National Survey on Drug Abuse showed that drug use does not differ much between Black and White adults.<sup>177</sup>

Not only are African Americans targeted and incarcerated at grossly disproportionate rates, but this legacy of incarceration perpetuates the social and political issues that lead to incarceration

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<sup>176</sup> Duvernay & Moran, *13<sup>th</sup>*.

Leah Butz, “Prison Labor Is Remarkably Common Within the Food System,” NYC Food Policy Center (Hunter College), September 15, 2021. Accessed December 26, 2021. <https://www.nycfoodpolicy.org/prison-labor-is-remarkably-common-within-the-food-system/>.

<sup>177</sup> Western, *Punishment and Inequality*, 47.

in the first place. For convicted felons, gaining meaningful employment is next to impossible—leading them back to the same illicit activities that got them locked up in the first place. Felony disenfranchisement laws restrict convicted felons from ever having the right to vote. As of 2007, Florida and Alabama had permanently disenfranchised nearly a third of all Black men.<sup>178</sup>

The incredible and deeply rooted injustice of the United States criminal justice system presented thus far begs a simple question—how can we as a democratic society continue to have a system dedicated to oppression and restriction of rights? The answer unfortunately lies in perceptions of Black criminality. Years and years of effort by politicians has painted African Americans as nothing more than criminals to be dealt with. Because of this, the public has been slow to recognize the true injustice of the situation.

Fortunately, in recent years, more and more people have been waking up to the injustices posed by the prison-industrial complex and the criminal justice system. Grassroots movements such as ‘Black Lives Matter’ has brought greater attention to the plight of Black Americans. Just because people are opening their eyes, however, does not mean that the system has lost the incentive to make a profit. Sure, corporations such as GEO Group and CoreCivic have attempted to rebrand their image, but the simple fact is that they still depend on bodies—particularly Black bodies—to drive a profit. The system, it appears, is now evolving with the times. Instead of relying on overtly racist politicians and police practices to reinforce perceptions of Black criminality, those with a stake in the system have found new ways to advance their interests.

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<sup>178</sup> Lory, *Race, Incarceration, and American Values*, 48.

### Chapter III:

#### Predictive Policing and Perceptions of Black Criminality

*'The unconscious association between Blacks and crime is so powerful that it supersedes reality'... 'it predisposes Whites to literally see Black people as criminals. Their skin color marks Blacks as visibly lawless.'*<sup>179</sup>

- Dorothy Roberts

Police remain central to the expansion of the carceral state at the expense of minority communities. Yet, in the past few years in particular, social activists have brought more attention to policing tactics and injustices committed at the hands of the police. The reemergence of open racism has piqued newfound interest in the continuity of historical racism and institutionalized aggression against Black Americans. Indeed, some claim that American racism has not intensified, it is merely being filmed.<sup>180</sup> In 2014, Eric Garner was recorded being choked to death by police, all while screaming out that he could not breathe. In another instance, Walter Scott, an unarmed Black man, was shot in the back by a White police officer as he tried to run away. While the officer tried to claim self-defense in this case, a video recording of the incident shows that Scott posed no imminent threat to the safety of the officer. Moreover, in one of the most disturbing and widely followed hate crime cases of the 21<sup>st</sup> century, neo-Nazi terrorist Dylann Roof was convicted of killing nine people at a historic African American church in South Carolina. More recently, the murders of unarmed Black men Ahmaud Arbery and George Floyd have been caught on camera. Instances of violence against African Americans such as these have sparked widespread protests

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<sup>179</sup> Dorothy E. Roberts, "Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing," *The Journal of Criminal Law and Criminology* (1973-) 89, no. 3 (1999): 806. <https://doi.org/10.2307/1144123>.

<sup>180</sup> Cite this.

and calls for more police accountability.<sup>181</sup> These calls for change have forced American politicians to directly confront issues of racial violence and injustice. In fact, in President Joe Biden's inauguration speech, he made promises to deliver racial justice—a sign that positive change for racial equality could be on the horizon. Unfortunately, however, the historic pattern of racial progress being followed by racial restriction in the United States shows that meaningful progress for African Americans will always be met with some sort of resistance, and the 21<sup>st</sup> century is no exception.

Just as African American progress during Reconstruction and the Civil Rights Movement posed a threat to the political and economic standing of Whites, today, efforts to reduce the mass incarceration of African Americans poses a similar, albeit different, threat. Hundreds of corporations and millions of people have a vested interest in the system of mass incarceration that disproportionately effects minorities—African Americans in particular. Any efforts to change this system, then, poses a threat to these people and these businesses. As CoreCivic so bluntly puts it in their risk statement:

The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, the expansion of alternatives to incarceration and detention, leniency in conviction or parole standards and sentencing practices through the decriminalization of certain activities that are currently proscribed by criminal laws, disruptions to the criminal justice system... For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional or detention facilities to house them.<sup>182</sup>

At the bottom line, vested economic interests in mass incarceration lean on government bureaucracy to maintain the status quo—that being extreme levels of incarceration in the United States, particularly among minority populations. This happens despite all the evidence that the

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<sup>181</sup> Other notable instances of violence by police officers against African Americans include the murders of Breonna Taylor, Rayshard Brooks and Jacob Blake—although this is not the full extent of the violence.

<sup>182</sup> CoreCivic, Inc., Form 10-K for the fiscal year ended December 31, 2020, 43.  
<http://ir.corecivic.com/node/21411/html#COMPETITION>.



system of mass incarceration runs contrary to the public good. Most importantly to the maintenance of the status quo and the expansion of the prison-industrial complex is policing efforts—a fact that has held true for decades. These efforts have, however, evolved with the times. Instead of targeting African American through overtly racist laws and tactics, today, police hide behind a wall of data and analytics. We are now in the age of predictive policing—a relatively new development in police tactics that poses yet another serious risk to Black communities across the country.

### **Part I: Predictive Policing**

Predictive policing is the use of data and analytics to make predictions about future crime for proactive police intervention. While various forms of predictive policing have been around for decades, today, the methods for analyzing the geospatial dispersal of crime and identifying perpetrators now look much different in the United States. Police now have access to analytical tools and programs that use sophisticated mathematical algorithms to draw on massive data sets to make predictions about criminal activity. Importantly, the increased use and reliance on predictive technology in policing follows the global trend of increased reliance on data and prediction for decision making. In fact, models for evaluation and prediction now pervade nearly every corner of our society—sports teams use data to better prepare for their opponents; school systems create models to evaluate the effectiveness of teachers; multibillion dollar corporations use algorithms to determine patterns in consumer behavior, to make risk assessments, and assist in operations

management.<sup>183</sup> Now, police departments use similar programs to predict crime and evaluate risks.<sup>184</sup>

Two methods of predictive policing have risen to the fore—namely, hot-spot policing and person-based predictive policing. First, hot-spot policing is a place-based approach to policing that falls under the taxonomy of “methods for predicting crimes.”<sup>185</sup> Hot-spot policing methods use historical crime data to identify specific geographic locations where crime has frequently occurred in the past. In fact, hot-spot models can use years’ worth of crime data to generate hot-spots.<sup>186</sup> Under the assumption that crime is likely to occur again in areas that it has been highly concentrated in the past, police allocate more resources to these areas. The primary stated goal of this effort is the deterrence of crime, as increasing the number of officers in a particular area should hypothetically dissuade people from offending.<sup>187</sup> This is predicated on rational choice theory—an economic theory that reasons people rationally weigh the benefits of their actions against the costs when making a decision.

There are several different ways in which predictive algorithms generate and report crime hot-spots. In general, police rely on geographic information software (GIS) that use geospatial analysis to generate maps with the visual location of crime hot-spots. Importantly, hot-spots can vary greatly in size and scope; some hot-spots are identified as individual buildings, while others may include entire neighborhoods. Depending on the type of hot-spot police hope to identify,

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<sup>183</sup> Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, First edition, (New York: Crown, 2016), Chapter 3 – 4.

<sup>184</sup> Perry et. al., “Predictive Policing,” 1 – 2.

<sup>185</sup> *Ibid.*, 8.

“Proactive Policing: Effects on Crime and Communities,” 2.

<sup>186</sup> Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement*, 2017, Chapter 4. <https://www.degruyter.com/isbn/9781479854608>.

<sup>187</sup> “Proactive Policing: Effects on Crime and Communities,” 46 – 47.

different approaches to mapping are required to assist in police intervention.<sup>188</sup> One of the first modern programs (and one of the most popular), PredPol, collects police data related to crime type, crime location and crime date and time to generate 500 by 500-foot squares on a map relating to the areas deemed high-risk.<sup>189</sup> Hot-spot policing has increased in scale and importance for law enforcement in the United States.

While hot-spot policing focuses on geospatial indicators for crime intervention, person-based prediction methods focus on individual indicators of crime to assist in allocating police resources. Falling into the category of “methods for predicting offenders”, experts designed person-based predictive algorithms to assess the risk an of individual or organization with regard to the likelihood they will commit a crime or be a victim of a crime.<sup>190</sup> In order to identify the risk level of individuals, these algorithms are designed to take into account several factors, including, among other things—education and employment, family history, history of drug and alcohol abuse, friends, recreational activities and most importantly, prior criminal history. The use of this data to generate risk assessments is based on the notion that (1) identifiable groups with these indicators pose a risk for crime and violence, and (2) certain people within these social networks pose an even greater risk depending on their relationship to the aforementioned factors.<sup>191</sup> With these insight related to criminal activity serving as the basis for the use of personalized data, person-based predictive algorithms synthesize massive amounts of data to predict offenders and prioritize who is targeted for police intervention. The use of these systems is meant to allow police

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<sup>188</sup> Perry et. al., “Predictive Policing,” 20 – 29.

John Eck, Spencer Chainey, James G. Cameron, Michael Leitner, and Ronald E. Wilson, “Mapping Crime: Understanding Hot-spots,” Special Report, Washington, DC: National Institute of Justice, August 2005, 1 – 65. <https://www.ojp.gov/pdffiles1/nij/209393.pdf>.

<sup>189</sup> PredPol, “PredPol Law Enforcement Intelligence Led Policing Software,” PredPol, Inc., 2020, Accessed January 3, 2022. <https://www.predpol.com/law-enforcement/>.

<sup>190</sup> Perry et. al., “Predictive Policing,” 81.

<sup>191</sup> Ferguson, *The Rise of Big Data Policing*, Chapter 3.

to develop targeted strategies for crime intervention in a more efficient and cost-effective manner.<sup>192</sup>

The introduction of predictive policing methods such as hot-spot policing and person-based predictive policing has massively altered law-enforcement operations. With increased attention being drawn to the long history of racism in policing and the broader criminal justice system, predictive policing offers, at first glance, a bold step towards reform. Unlike people, data itself cannot have subjective or racist views. Advocates of predictive policing commonly argue that these programs have the ability to effectively end racism in police tactics—using technology to interpret “objective” crime data rather than relying on potentially biased police discretion in decision making.<sup>193</sup> Because the shift towards data analysis in policing fits within the broader trend of increased reliance on analytics in nearly every facet of human decision-making, its procedures and outcomes go unquestioned. What if, however, the data and models used in predictive policing are not as objective as they may seem?

Despite the widely-held belief that predictive policing is objective, in reality, it most often reinforces already-prevalent and deeply rooted perceptions of Black criminality. Indeed, as Cathy O’Neil notes in her book *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*— “...models, despite their reputation for impartiality, reflect goals and ideology.”<sup>194</sup> Both hot-spot models and person-based prediction models reflect longstanding racial ideologies that have permeated law enforcement agencies over the course of United States history.

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<sup>192</sup> Ibid., 55.

<sup>193</sup> Ibid., 11.

<sup>194</sup> O’Neil, *Weapons of Math Destruction*, Chapter 1.

In fact, contemporary racial inequality is a reflection of historical attitudes and behaviors that feed into self-confirming stereotypes.

## **Part II: Racial Inequality in Relation to Self-Confirming Stereotypes**

Longstanding racial biases and inequality in the United States are deeply rooted issues that feed on themselves, making the problem worse and worse over time. In fact, in *The Anatomy of Racial Inequality*, author, and economist Glenn C. Loury proposes that racial inequality itself should be understood as “a series of ‘vicious circles of cumulative causation.’”<sup>195</sup> Despite the scientific evidence that race itself is a physically arbitrary trait, we, as human beings, are conditioned to group people based on observable traits, and to make inferences about individuals and groups based on these traits.<sup>196</sup> As part of this classification process, human beings filter social experiences through racial classifications—endowing social significance to otherwise arbitrary physical traits.<sup>197</sup> Of course, one’s race in and of itself gives no indication of their unobservable traits or qualities—however, the human propensity to make inferences when presented with limited information gives social significance to the idea of race.<sup>198</sup> Importantly, as rational beings, humans create generalizations through reasonable cognitive processes. As Loury notes, however— “... this generalization is ‘reasonable’ in the specific sense that it is *self-confirming*: Observers, by acting on the generalization, set in motion a sequence of events that has the effect of reinforcing their initial judgement.”<sup>199</sup> Observing agents create the very facts upon which their generalizations

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<sup>195</sup> Glenn C. Loury, *The Anatomy of Racial Inequality*, W.E.B. Du Bois Lectures, (Cambridge, MA: Harvard University Press, 2002), 52.

<sup>196</sup> *Ibid.*, 17 – 26.

<sup>197</sup> *Ibid.*, 46.

<sup>198</sup> *Ibid.*, 58.

<sup>199</sup> *Ibid.*, 23.

rely—a difficult to break cognitive cycle that gives unwarranted social value to the arbitrariness of race.

Not only do humans create generalizations as a product of self-confirming stereotypes, but we also use race to derive conclusions regarding people's inner qualities—often with disastrous consequences for Black individuals.<sup>200</sup> This process of giving social meaning to race—particularly the Black race—has been well established throughout United States history. For example, Blackness has been historically associated with things such as crime and defeatism—especially after the demise of the American slave system.<sup>201</sup> These racial stigmatizations—while often considered to be a part of 'Black pathology'—are, in fact, rooted instead in historical processes.<sup>202</sup> Programs such as convict leasing and, nearly a century later, the War on Drugs have fostered negative connotations regarding the Black race. In the United States, the inferior status endowed upon slaves created an enduring perception of Blacks as social-others.<sup>203</sup> Since the establishment of this perception in American collective conscience, Black Americans have continued to feel the effects—views of Black criminality and defeatism are a mere extension of this perception of Black pathological inferiority.<sup>204</sup>

Despite these destructive views that have accrued over time, Black Americans have done their best to push back against these narratives and perceptions. They not only fought long and hard to for citizenship during Civil Rights Movement, but they also spent the better portion of the twentieth century reclaiming their humanity from the clutches of ideological White supremacy. As White powerbrokers used urban policies to systematically deprive Black communities of the tools

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<sup>200</sup> Ibid., 9.

<sup>201</sup> Wilson, *More Than Just Race*, 82 – 83.

<sup>202</sup> Lowry, *The Anatomy of Racial Inequality*, 67.

<sup>203</sup> Ibid., 68.

<sup>204</sup> Ibid., 70 – 71.

necessary to be upwardly mobile, Black Americans also fought long and hard for community control over neighborhoods and spaces that had been torn asunder by systematically racist policies such as redlining, slum clearance, public housing, and freeway construction. By the late twentieth century, however, these efforts often failed to meet the mounting challenge of urban decay and decline. In fact, during the War on Drugs of the 1980s, many African Americans supported tough-on-crime policies—the same policies that led to the mass incarceration of millions in the 20<sup>th</sup> century. For example, many Black leaders and citizens supported President Clinton’s Violent Crime Control and Law Enforcement Act of 1994, an act that included the death penalty for some drug offenses, billions of funding for police and prisons, and the infamous ‘Three-Strikes, You’re Out’ rule.<sup>205</sup> The support for this legislation showed the desire among the African American community to fight back against crime in their communities and reduce the perception that they were innately criminal. Calls for more punitive policies, however, were accompanied by calls for improvement in education, employment, housing and other areas that disproportionately affected African American communities.<sup>206</sup> Unfortunately, American ignored these calls for structural reform—reform necessary to fix the underlying solutions of crime. Blacks, then, were left to face the consequences of their support for punitive policies with little acknowledgement for their desire to reduce crime in the United States. More simply, African Americans were often blamed for problems not of their making.

Negative connotations associated with Black pathology have dire contemporary implications. Because people mistakenly associate Blackness itself with things such as crime, they are likely to feel as though Black individuals are merely facing the consequences of their actions—

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<sup>205</sup> Elizabeth Hinton, Julilly Kohler-Hausmann, and Vesla M. Weaver. “Did Blacks Really Endorse the 1994 Crime Bill?” *The New York Times*, April 13, 2016, sec. Opinion. Accessed March 15, 2022. <https://www.nytimes.com/2016/04/13/opinion/did-Blacks-really-endorse-the-1994-crime-bill.html>.

<sup>206</sup> Lowry, *The Anatomy of Racial Inequality*, 70 – 71.

with utter disregard for the social institutions that may truly be causing the issues. In turn, observers are less likely to support any sort of structural change to support Black individuals and communities. Without reform, however, social conditions that give rise to racial stigma persist, and these stigmas are thus reinforced.<sup>207</sup> Indeed, a study conducted by scholars’ Rebecca C. Hetey and Jennifer L. Eberhardt found that exposure to racial disparities in policing and incarceration actually increases public support for punitive policies that create the disparities in the first place.<sup>208</sup> Importantly, high rates of incarceration among the Black population in particular have material, as well as cognitive consequences for Black communities. For example, one study found that having an incarcerated parent makes it far more likely that a child will drop out or be expelled from school, experience learning and behavioral disabilities, and suffer from things such as increased stress and anxiety—issues that can be a sign of future incarceration themselves. Unsurprisingly, an African American child is six times as likely as a White child to have a parent who is or has been incarcerated.<sup>209</sup>

In the end, racial inequality is an enduring feature of contemporary American society—reinforced through historically rooted perceptions related to Blackness. Building on this analysis, In the next section, I argue that perceptions of Blacks as criminal and disparities in criminal justice outcomes—in the era of big data and mass incarceration—now rely on self-confirming cycles of causation produced by predictive policing algorithms.

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<sup>207</sup> Ibid., 52.

<sup>208</sup> Hetey and Eberhardt, “The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System.”

<sup>209</sup> Leila Morsy, and Rothstein Richard. “Mass Incarceration and Children’s Outcomes: Criminal Justice Policy Is Education Policy.” *Economic Policy Institute* (blog), December 15, 2016. Accessed April 20, 2022. <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.



### Part III: The Data Problem

Despite the notion that predictive policing methods—including hot-spot and person-based methods—are part of a progressive movement in the crime fighting arena based on objective data, in reality, these methods merely reinforce Black criminality and public perceptions of it. Predictive policing—as well as any actuarial technology—only functions as well as the input data allows. In other words, bad data leads to bad predictions, and these predictions can lead police forces to disproportionately target specific individuals and communities. As methods used by police to predict crime, predictive policing is rooted in historic crime data collected by the police themselves.<sup>210</sup> Experts contend, however, that this data is less a representation of crime than it is a representation of police activity. Crime statistics, in fact, have been noted to be a misleading—if not entirely inaccurate—representation of actual crime.<sup>211</sup> For one thing, crime itself is a relatively infrequent event that often goes entirely undiscovered—in a sense, searching for crime is like searching for a proverbial needle in a haystack. Moreover, a great deal of crime goes unreported by citizens. Indeed, the 2020 National Crime Victimization Survey found that only 40 percent of violent victimizations and 33 percent of property victimizations were reported to police in 2020.<sup>212</sup> Finally and most importantly to this report, is the role that police discretion plays in the formulation of crime statistics. Police have both the discretion to choose where to search for crime as well as

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<sup>210</sup> Many predictive models have expanded to include data beyond just historical crime data (i.e., geographic features, weather, social events), however, historical crime data remains the cornerstone of predictive policing. David Robinson and Logan Koepke, “Stuck in a Pattern: Early Evidence on ‘Predictive Policing’ and Civil Rights,” Washington D.C.: Upturn, August 2016. 3 – 4. Accessed February 27, 2022.

[https://www.upturn.org/static/reports/2016/stuck-in-a-pattern/files/Upturn\\_-\\_Stuck\\_In\\_a\\_Pattern\\_v.1.01.pdf](https://www.upturn.org/static/reports/2016/stuck-in-a-pattern/files/Upturn_-_Stuck_In_a_Pattern_v.1.01.pdf)

<sup>211</sup> Carl B. Klockars, “Some Really Cheap Ways of Measuring What Really Matters,” Research Report, Measuring What Matters: Proceedings From the Policing Research Institute Meetings, Washington D.C.: U.S. Department of Justice, (July 1999), 195. Accessed February 22, 2022. <https://www.ojp.gov/pdffiles1/nij/170610.pdf>

<sup>212</sup> “Criminal Victimization, 2020,” Summary, National Crime Victimization Survey, U.S. Department of Justice, October 2021, Accessed January 24, 2022.

[https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20\\_sum.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20_sum.pdf)

what to report as a crime. With this fact in consideration, it is entirely true that police activity can drastically effect and manipulate crime data. As scholar Carl B. Klockars masterfully conveys:

...both crime and crime clearance rates can be manipulated dramatically by any police agency with a will to do so. It is also absolutely axiomatic that for certain types of crime (drug offenses, prostitution, corruption, illegal gambling, receiving stolen property, driving under the influence, etc.), police statistics are in no way reflective of the level of that type of crime or of the rise and fall of it, but they are reflective of the level of police agency resources dedicated to its detection. Is there a police chief anywhere in this country who does not believe that he or she could double or half the drug crimes his or her agency reports by doubling or halving the number of officers assigned to drug enforcement?<sup>213</sup>

The fact that African Americans are vastly overrepresented in the criminal justice system stems from historically racist criminal laws and police procedures. Because African Americans are overrepresented in the system, however, this also means that they are overrepresented in reported crime data—the same crime data used to inform predictive models. Once this data is entered into a predictive model, that model is unable to account for biases or inaccuracies.<sup>214</sup> As a result, Black Americans and Black communities have continued to be disproportionately targeted by the police. Evidently, policing tactics have not changed with the introduction of sophisticated methods such as hot-spot and person-based policing—all that has changed are the tools being used.

Importantly, as bad data is fed into predictive models, and a particular group or area is targeted for police intervention at a disproportionate rate, there begins to arise a growing imbalance between the [actual] offending population and the carceral population—a social process scholar Bernard E. Harcourt calls the “ratchet effect.”<sup>215</sup> To illustrate this idea, consider that between 1991 and 1993, African Americans made up 16 percent of reported drug dealers, yet made up 49 percent of arrests for the sale of drugs.<sup>216</sup> In this scenario, the 16 percent represents the *actual offending*

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<sup>213</sup> Klockars, “Some Really Cheap Ways of Measuring What Really Matters,” 195.

<sup>214</sup> Robinson and Koepke, “Stuck in a Pattern,” 5.

<sup>215</sup> Harcourt, *Against Prediction*, 147.

<sup>216</sup> Patrick A. Langan, “The Racial Disparity in U.S. Drug Arrests.”

*population*, while the 49 percent represents the *actual carceral population*. This had national implications for many of America's urban African Americans. For instance, according to the *Los Angeles Times*, "In Los Angeles County, hundreds of white crack traffickers were convicted in state court between 1988 and 1994, according to data obtained by The Times. No whites were prosecuted federally during this period...." The same article later demonstrated that 96 percent of federal crack defendants were not white during the same period.<sup>217</sup> Clearly, this variation is evidence of an imbalance between the *actual offending population* and the *actual carceral population*—if distribution were balanced, we would expect to see African Americans representing 16 percent of the carceral population. This disparity—which exists as a result of longstanding biases and discriminatory practices—necessarily has a distortive effect on law enforcement operations.

If police use crime data and the carceral population to allocate resources, they will, by design, allocate more resources towards Black individuals and communities—a process that can be described as criminal profiling. Over time, then, the disparity between the offending population and the carceral population will continue to grow as more resources are allocated based on arrest data and the carceral population—the more time and resources spent policing a particular subgroup (or region), the more crime will be found in that subgroup (or region).<sup>218</sup> As Harcourt notes, "criminal profiling accentuates the apparent correlation between the group trait and criminality by skewing the carceral population, which is what we all use to proxy criminality."<sup>219</sup> In other words, as more Black Americans become part of the carceral population, criminality becomes more intertwined with Blackness itself, and police feel justified in their efforts to over police Black

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<sup>217</sup> Dan Weikel, "War on Crack Targets Minorities over Whites," *Los Angeles Times*, May 21, 1995. Accessed April 4, 2022. <https://www.latimes.com/archives/la-xpm-1995-05-21-mn-4468-story.html>

<sup>218</sup> Harcourt, *Against Prediction*, 156.

<sup>219</sup> *Ibid.*

individuals and communities. Moreover, increased criminal supervision and incarceration has the ability to actually create crime by reducing work opportunities, disrupting education, and breaking down families and communities.<sup>220</sup> In fact, in a recently released report by the Bureau of Justice Statistics, approximately 33 percent of people released from federal prison in 2010 were unable to secure employment at any point over the next four years.<sup>221</sup> Additionally, the “Prison Policy Initiative” found that a formerly incarcerated person only has a one-in-twenty chance of attaining a college degree, compared to one-in-three for the general public.<sup>222</sup> Finally, the most recent available data shows that more than half of the U.S. prison population have minor children, and parental incarceration has been found to contribute to learning disabilities, antisocial behavior, and delinquent activity that can lead to further crime.<sup>223</sup>

#### **Part IV: Enduring Inequality Through Hot-Spot Policing**

The implications of this intensifying ratcheting effect are evident with predictive policing models. With specific regard to hot-spot policing, the data used to determine crime hot-spots reflects the historic over policing of Black communities. In particular, civil unrest that characterized the Civil Rights movement and the hyperbolized War on Drugs generated extensive police attention in predominantly Black, urban centers.<sup>224</sup> In turn, this led to more arrests among the Black population

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<sup>220</sup> Ibid., 161 – 162.

<sup>221</sup> “Employment of Persons Released from Federal Prison in 2010,” Special Report, U.S. Department of Justice: Bureau of Justice Statistics, December 2021. Accessed March 14, 2022. <https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf>

<sup>222</sup> Lucius Couloute, “Getting Back on Course: Educational Exclusion and Attainment among Formerly Incarcerated People,” Prison Policy Initiative. Prison Policy Initiative, October 2018. Accessed March 14, 2022. <https://www.prisonpolicy.org/reports/education.html>.

<sup>223</sup> “Child Welfare Practice With Families Affected by Parental Incarceration,” Administration for Children and Families, Children’s Bureau, Child Welfare Information Gateway, U.S. Department of Health and Human Services, 2021, 2. Accessed March 14, 2022. [https://www.childwelfare.gov/pubPDFs/parental\\_incarceration.pdf](https://www.childwelfare.gov/pubPDFs/parental_incarceration.pdf)

<sup>224</sup> Hinton, *From the War on Poverty to the War on Crime*, 21.

and in Black communities—by spending more time looking for crime in a particular area, it becomes more likely that crime will be found in that area.<sup>225</sup> When this crime data is entered into hot-spot models—however skewed it may be—the model generates hot-spots in the same communities where the law enforcement collected crime data. Police, using these models, are then justified in focusing their resources on those crime hot-spots. In fact, information about crime hot-spots has been shown to cause over policing of designated areas and increasingly aggressive intervention tactics. As Andrew Guthrie Ferguson notes, “Individuals in the predicted areas—innocent or guilty—will be seen with the same suspicious eyes.”<sup>226</sup> Of course, as police spend more time in the same communities where the data was first collected, they will both expect to find more crime in those areas and are likely to find more crime due to increased monitorization.<sup>227</sup> This then leads to more skewed crime data being fed into the hot-spot models, and police are once again justified in heading back to those areas—a vicious, self-confirming cycle.

The discriminatory nature of self-confirming feedback loops innate to hot-spot policing is confirmed by a 2016 study in which researchers Kristian Lum and William Isaac apply the PredPol algorithm to drug crime in Oakland, California. In this study, Kristian Lum and William Isaac provide compelling evidence that demonstrates how predictive policing of drug crimes results in increasingly disproportionate levels of policing in already over-policed communities in Oakland, California.<sup>228</sup> In this study, Lum and Isaac first compare survey data from the 2011 National

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Alexander, *The New Jim Crow*, 121.

<sup>225</sup> Harcourt, *Against Prediction*, 150.

<sup>226</sup> Ferguson, *The Rise of Big Data Policing*, Chapter 4.

<sup>227</sup> The notion that you will expect to find an individual committing crime due to a designation is the result of confirmation bias—the seeking or interpreting of evidence in ways that are partial to existing beliefs or expectations. Raymond S. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,” *Review of General Psychology* 2, no. 2 (June 1998): 175–220. Accessed March 1, 2022. <https://doi.org/10.1037/1089-2680.2.2.175>. Ferguson, *The Rise of Big Data Policing*, Chapter 4.

<sup>228</sup> Kristian Lum and William Isaac, “To Predict and Serve?” *Significance* 13, no. 5 (2016): 14–19, Accessed January 26, 2022. <https://doi.org/10.1111/j.1740-9713.2016.00960.x>.

Survey on Drug Use and Health with drug arrest data collected by the Oakland Police Department. Through this comparison, the researchers found that drug arrests in neighborhoods around West Oakland and International Boulevard—two regions with predominantly non-White, low-income populations—were approximately 200 times greater than areas outside these regions, despite the fact that survey data shows drug usage to be more uniformly distributed throughout Oakland. To gauge how this clearly biased police data affects predictive models, Lum and Isaac applied the PredPol algorithm to the Oakland police database to see how the algorithm would flag hot-spots in the city for every day in 2011.<sup>229</sup> Unsurprisingly, they found that the locations targeted as hot-spots were the same areas that had been over-represented in the historical police data—in other words, the PredPol algorithm reproduced police biases in its model.

With this information in hand, the researchers ran an experiment to observe the consequences of the ratchet effect. With the assumption that the more time police spend in a location, the more crime they will find there, the researchers increased the variable number of observed crimes in hot-spot areas targeted by police on a daily basis by 20 percent. This process, as expected, created a feedback loop where the algorithm increasingly predicted that crime would occur in those specific locations—a process that, in reality, would continually send police back to the same locations.<sup>230</sup>

The self-confirming nature of hot-spot policing is not only relevant in an experimental setting—hot-spot models are leading law-enforcement to over police African American communities in real time. In New York City, for example, one study found that there were 5.8 times as many enforcement actions against Black people compared to White people between 2003

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<sup>229</sup> PredPol's algorithm is one of few that has been publicly released in a peer reviewed journal.

<sup>230</sup> Lum and Isaac, "To Predict and Serve?"

and 2018.<sup>231</sup> During this period, the New York Police Department experimented with hot-spot models (i.e., PredPol and Palantir) and eventually developed their own algorithm. In Tulsa, Oklahoma, Black people are 2.3 times as likely to be arrested compared to Whites, and arrest rates are positively correlated with the percentage of the population that is Black in particular region. Moreover, a large percentage of arrests in Tulsa (40 percent) are based on outstanding county and municipal warrants, indicating that a huge number of arrests are for minor infractions (i.e., failure to pay court fees) that disproportionately effect those with limited economic resources.<sup>232</sup> Unsurprisingly, Tulsa’s policing efforts have been supported by crime mapping software provided by the corporation Crime Tech Solutions since 2016.<sup>233</sup>

## **Part V: Enduring Inequality Through Person-Based Predictive Policing**

Hot-spot policing is not the only mechanism used by law enforcement that reinforces inequalities—person-based predictive algorithms operate in largely the same capacity. Just as historic over policing in Black communities has led to those areas being labeled as crime hot-spots, external factors influence the disproportionate rate at which African Americans are targeted by person-based systems.<sup>234</sup> Historical discriminatory practices in the United States in just about every walk of life (i.e., education, housing, criminal justice) have put African Americans at a major

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<sup>231</sup> The study defines enforcement actions as felony/misdemeanor arrests, criminal summonses and pedestrian stops. Luke Schrivener Allie Meizlish, Erica Bond, and Preeti Chauhan, “Tracking Enforcement Trends in New York City: 2003 – 2018,” Data Collaborative for Justice, John Jay College of Criminal Justice, September 2020. Accessed March 21, 2022. [https://datacollaborativeforjustice.org/wp-content/uploads/2020/09/2020\\_08\\_31\\_Enforcement.pdf](https://datacollaborativeforjustice.org/wp-content/uploads/2020/09/2020_08_31_Enforcement.pdf)

<sup>232</sup> “‘Get on the Ground!’: Policing, Poverty and Racial Inequality in Tulsa, Oklahoma,” Case Study, United States of America: Human Rights Watch, 2019, 7. Accessed March 21, 2022. [https://www.hrw.org/sites/default/files/report\\_pdf/us0919\\_tulsa\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0919_tulsa_web.pdf).

<sup>233</sup> Police1, “Tulsa County Sheriff’s Office to Implement Crime Analytics and Predictive Policing Software,” LexiPol, July 5, 2016. Accessed March 21, 2022. <https://www.police1.com/police-products/incident-planning-software/press-releases/tulsa-county-sheriffs-office-to-implement-crime-analytics-and-predictive-policing-software-RdIRSc2xJKwTmFUV/>.

<sup>234</sup> By external factors, I mean to include any factor outside of one’s pathological drive to commit crime.

social disadvantage. In the United States, Black Americans aged 16 and above are 5 percent more likely to be unemployed compared to Whites, Black Americans are 64.1 percent less likely to own a house compared to Whites, and Black homeowners have an average income that is more than \$33 thousand less than White homeowners.<sup>235</sup> Factors such as these weigh heavily in the algorithmic risk assessment process, so it is no surprise that African Americans are more likely to be labeled high risk compared to their White counterparts.

Despite the fact that disparities such as these are becoming more recognized as the result of systematic racism rather than Black pathology, person-based predictive programs continue to rely heavily on these factors as risk indicators.<sup>236</sup> Naturally, because Blacks are disproportionately affected by these “risk factors,” the person-based models that implement the data disproportionately identify Blacks as posing an increased risk for crime or victimization—thus prompting police to pay more attention to these individuals.<sup>237</sup> Of course, by paying increased attention to individuals labeled as high risk for crime, police departments will not only *expect* to find these individuals involved in crime due to the designation, but will be increasingly likely to find them committing a crime simply through increased monitoring.<sup>238</sup> For those with prior

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<sup>235</sup> U.S. Census Bureau, “Unemployment Rate for the Population 16 Years and Over (White Alone),” 2015 – 2019 *American Community Survey Estimates* (SE:A17006A.), Social Explorer, accessed February 9, 2022.

[https://www.socialexplorer.com/tables/ACS2019\\_5yr/R13034901](https://www.socialexplorer.com/tables/ACS2019_5yr/R13034901).

U.S. Census Bureau, “Unemployment Rate for the Population 16 Years and Over (Black or African American Alone),” 2015 – 2019 *American Community Survey Estimates* (SE:A17006B.), Social Explorer, accessed February 9, 2022. [https://www.socialexplorer.com/tables/ACS2019\\_5yr/R13034901](https://www.socialexplorer.com/tables/ACS2019_5yr/R13034901).

U.S. Census Bureau, “Households by Race of Householder,” 2015 – 2019 *American Community Survey Estimates* (SE:A10010.), Social Explorer, accessed February 9, 2022.

[https://www.socialexplorer.com/tables/ACS2019\\_5yr/R13034901](https://www.socialexplorer.com/tables/ACS2019_5yr/R13034901).

U.S. Census Bureau, “Average Household Income by Race (In 2019 Inflation Adjusted Dollars),” 2015 – 2019 *American Community Survey Estimates* (SE:A14009.), Social Explorer, accessed February 9, 2022.

[https://www.socialexplorer.com/tables/ACS2019\\_5yr/R13034901](https://www.socialexplorer.com/tables/ACS2019_5yr/R13034901).

<sup>236</sup> Perry et. al., “Predictive Policing,” 91 – 96.

Ferguson, *The Rise of Big Data Policing*, Chapter 3.

<sup>237</sup> Ferguson, *The Rise of Big Data Policing*, Chapter 3.

<sup>238</sup> This is the same process relating to confirmation bias noted with regard to hot-spot policing.

Ferguson, *The Rise of Big Data Policing*, Chapter 3.



criminal history in particular, it can be incredibly difficult to avoid recommitting crime to some extent—the stigma associated with a criminal conviction often leaves very few economic options available upon release, forcing these individuals to turn back to illicit activity to support themselves.<sup>239</sup>

One prime example regarding the discriminatory nature of person-based predictive policing comes from the city of Chicago. In 2013, the Illinois Institute of Technology partnered with the Chicago Police Department to create an algorithm that would create a “strategic subject list”—also known as Chicago’s “heat list.”<sup>240</sup> This algorithm set out to predict gun violence in the city—using several variables to create a risk score between 1 and 500 for individuals. Although the algorithm used to determine risk scores has not been released—nor has the weight given to each variable in creating scores—the CPD eventually released the eight factors they claimed were involved in creating risk scores after a legal battle with the Chicago Sun-Times. Those factors include arrest for gun crimes, violent/drug crimes, the number of times a person has been shot or assaulted, age at the time of the last arrest, gang membership, and a formula that could tell whether someone’s criminal activity was increasing.<sup>241</sup>

In all, the Strategic Subject List included 398,684 individuals—52 percent of whom were African American.<sup>242</sup> Importantly, the CPD has claimed that individuals are only really monitored

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<sup>239</sup> Alexander, *The New Jim Crow*, 151.

Jarecki, *The House I Live In*.

<sup>240</sup> Ferguson, *The Rise of Big Data Policing*, Chapter 3.

<sup>241</sup> Chicago Police Department, “Custom Notifications In Chicago, Special Order S10–05 III.B” (Oct. 6, 2015), Accessed January 31, 2022. <http://directives.chicagopolice.org>.

Mick Dumke and Frank Main. “A Look inside the Watch List Chicago Police Fought to Keep Secret.” Chicago Sun-Times. Chicago Sun-Times, May 18, 2017. Accessed January 31, 2022. <https://chicago.suntimes.com/2017/5/18/18386116/a-look-inside-the-watch-list-chicago-police-fought-to-keep-secret>.

<sup>242</sup> City of Chicago Data Portal, “Strategic Subject List – Historical,” City of Chicago, 2022, Accessed January 31, 2022. <https://data.cityofchicago.org/Public-Safety/Strategic-Subject-List-Historical/4aki-r3np>.

once their risk scores reaches the threshold of a score of 250 or above.<sup>243</sup> Although it is not exactly clear why 250 is used as a threshold—nor is it clear what exactly scoring above this threshold means for individuals—we do know that more than 287,000 people (approximately 72 percent of the list) met this threshold.<sup>244</sup> Moreover, inclusion on the so called ‘heat list’—particularly for those with higher scores—qualified someone for “custom notification.” Custom notification, according to the Chicago Police Department, is a process by which selected individuals are paid a home visit—typically by an officer, social worker, and member of the community—a visit in which they are delivered a “custom notification letter” meant to inform them of both what the police already know about them [criminally], as well as the consequences for future public violence.<sup>245</sup>

The strategic subject list proved to be far from an objective or equitable risk model. For one thing, research by the organization *Upturn* found that as of 2017, over 126,000 people on the heat list had never once been arrested or fell victim to a crime—and over 88,000 of these individuals had a risk score above 250.<sup>246</sup> In other words, the strategic subject list encouraged police to monitor individuals even if they had not ever been involved in a crime. Making matters worse, a 2016 study conducted by the RAND Association found that inclusion on the heat list did not correspond with increased victimization of a shooting or homicide. Inclusion on the list did, however, correspond with an increased likelihood of being arrested for a shooting.<sup>247</sup> Instead of

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<sup>243</sup> Dumke and Main, “A Look inside the Watch List Chicago Police Fought to Keep Secret.”

<sup>244</sup> City of Chicago Data Portal, “Strategic Subject List.”

<sup>245</sup> Ferguson, *The Rise of Big Data Policing*, Chapter 3.

Chicago Police Department, “Custom Notifications In Chicago, Special Order S10–05 III.D.”

<sup>246</sup> Brianna Posadas, “How Strategic Is Chicago’s ‘Strategic Subjects List’? Upturn Investigates,” *Equal Future*, June 26, 2017, Accessed January 31, 2022. <https://medium.com/equal-future/how-strategic-is-chicagos-strategic-subjects-list-upturn-investigates-9e5b4b235a7c>.

<sup>247</sup> Jessica Saunders, Priscillia Hunt, and John S. Hollywood. “Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago’s Predictive Policing Pilot.” *Journal of Experimental Criminology* 12, no. 3 (September 1, 2016): 347–71. Accessed January 31, 2022. <https://doi.org/10.1007/s11292-016-9272-0>.

being an effective tool for social intervention and crime deterrence, the heat list proved to function as little more than a most wanted list. The program was officially put to rest in the Fall of 2019.

Predictive policing legitimizes widely held views of African American criminal pathology and shapes our perceptions of justice in much the same way that Jim Crow and ‘tough on crime’ era policies did—an effect that is by design. In fact, by over policing Black individuals and communities with the help of “objective” models, the correlation between [Black] group traits and criminal behavior is strengthened while casting aside social structures and historic discrimination that feed into bad data.<sup>248</sup> With both hot-spot and person-based policing, the vicious, reaffirming cycle of Black criminality is evident. First, racial prejudice and historically discriminatory police practices led to the over policing of Black communities and individuals—fostering perceptions of Black criminality and creating a reality that reinforces these perceptions. Data collected from this racially tortured history is then fed into predictive models where Black individuals and communities are reinforced as criminal—leading to increased supervision. As a result, Black individuals are more likely to be punished (in this case incarcerated)—ripping communities apart and strengthening perceptions of Black criminality and legitimizing further discrimination that caused the problems in the first place. In the end—as Dorothy Roberts nicely sums it up—“Today’s computerized predictive policing reincarnates in high-tech garb ‘vague loitering and vagrancy laws [that historically gave] license to police officers to arrest people purely on the basis of race-based suspicion,’ categorically identifying Black people as lawless apart from their criminal conduct.”<sup>249</sup>

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<sup>248</sup> Roberts, “Digitizing the Carceral State,” 1708.

<sup>249</sup> *Ibid.*, 1714.

## Chapter Four: Predictive Policing and the Prison-Industrial Complex

*The conventional wisdom is that there is an emerging consensus that the criminal legal system is “broken.” But the system is “broken” only to the extent that one believes its purpose is to promote the well-being of all members of our society. If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well.<sup>250</sup>*

- Alec Karakatsanis

Despite arguments that predictive policing is a progressive trend in law enforcement, these methods continue to harm the same communities that have felt the historical effects of racism and discrimination throughout United States history. On the one hand, predictive policing has potential to improve law enforcement and how we deal with crime. If used correctly, predictive policing could allow law enforcement to take advantage of limited resources and efficiently recognize at risk individuals and communities—communities that could benefit from positive social interventions.<sup>251</sup> On the other hand, however, predictive policing’s primary role in law enforcement has been to reinforce perceptions of Black criminality and to target at risk communities for punishment. With that said, a casual observer might conclude that—like the larger criminal justice system—predictive policing is merely flawed in its [relatively] early stages and in need of reform. This idea, however, is only true to the extent that we believe the function of predictive models is to promote a more objective/egalitarian form of law enforcement. Ultimately, predictive policing is already effectively serving its designed purpose—that purpose being the

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<sup>250</sup> Karakatsanis, “The Punishment Bureaucracy: How to Think About Criminal Justice Reform’.”

<sup>251</sup> Perry et. al., “Predictive Policing,” xiii.

reinforcement of the prison-industrial complex through effective and efficient minority criminalization.

The United States has developed a carceral approach to justice—an argument that is supported by the incredibly large number of individuals currently incarcerated or under some form of government control. According to scholar Dorothy Roberts “Under a carceral approach, the state’s aim is to control populations rather than to adjudicate individual guilt or innocence, to manage social inequalities rather than to aid those who are suffering from them.”<sup>252</sup> Moreover, as the carceral state has expanded, hundreds of corporations and millions of people now profit from mass incarceration as part of the prison-industrial complex. This intertwined relationship between profit and incarceration has strengthened the punitive nature of the criminal justice system—any changes to the system pose a massive financial threat to those with a vested economic interest in the prison-industrial complex. Ultimately, because the system is designed to punish rather than support—to incarcerate rather than improve social inequality—it must be expected that, by nature, predictive policing will reinforce the punitive, profit driven goals of the prison-industrial complex.

## **Part I: Institutionalization of Predictive Policing**

By 2008, interest in the use and development of predictive algorithms began to grow substantially in several major cities across the United States. In fact, the National Institute of Justice began offering millions of dollars in grant funding to police departments to develop these programs.<sup>253</sup> For example, the Office of Inspector General for the City of Chicago reported that the Chicago

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<sup>252</sup> Roberts, “Digitizing the Carceral State,” 1712.

<sup>253</sup> Perry et. al., “Predictive Policing,” 4 – 5.

Police Department received \$3.8 million over ten years through federal grants—money used to develop the Strategic Subject List and Crime and Victimization Risk Model.<sup>254</sup> Other cities including Memphis, Miami, San Diego, and Washington D.C. have received grant funding from the Bureau of Justice Assistance (BJA).<sup>255</sup> Moreover, as predictive policing grew in popularity among law enforcement, several private, for-profit institutions jumped at the chance to develop predictive policing technology. In fact, several notable cities have paid large sums of money to for-profit institutions for the use of their technology. In Fresno, California, the Fresno Police Department signed a one-year, \$80,000 contract with PredPol in March 2016.<sup>256</sup> In May 2013, the City of Richmond, Virginia signed a three-year \$150,000 dollar contract with PredPol that expired in 2016. The San Jose Police Department in California began using predictive analytics from The Omega Group in 2015 when they signed a five-year, \$443,554 contract with the organization. In St. Louis County, Missouri—containing Ferguson, Missouri—the police department began using the predictive technology Hunchlab in 2015 for the price of \$45,000 dollars the first year, and \$35,000 dollars for each subsequent year.<sup>257</sup> Public purchase orders obtained by the Brennan Center for Justice show that New York City—one of the largest cities in the nation—paid \$2.5 million to the company Palantir for the use of their technology.<sup>258</sup>

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<sup>254</sup> The Crime and Victimization Risk Model is a slightly revised (and renamed) version of the strategic subject list. Joseph M. Ferguson, “Advisory Concerning the Chicago Police Department’s Predictive Risk Models,” City of Chicago: Office of Inspector General, January 2020. Accessed February 3, 2022. <https://igchicago.org/wp-content/uploads/2020/01/OIG-Advisory-Concerning-CPDs-Predictive-Risk-Models-.pdf>.

<sup>255</sup> Robinson and Koepke, “Stuck in a Pattern,” 15 – 17.

<sup>256</sup> *Ibid.*, 15.

<sup>257</sup> *Ibid.*, 17.

<sup>258</sup> According to a 2015 internal email obtained by the Brennan Center for Justice, the NYPD may have actually paid \$17.5 million over 5-years to Palantir.

Michael Price and Emily Hockett, “Palantir Contract Dispute Exposes NYPD’s Lack of Transparency,” Brennan Center for Justice, Brennan Center for Justice at NYU Law, July 20, 2017. Accessed March 28, 2022. <https://www.brennancenter.org/our-work/analysis-opinion/palantir-contract-dispute-exposes-nypds-lack-transparency>.

Ultimately, these contracts mean that organizations such as PredPol are profit-driven, privately owned corporations and their predictive technologies have financial incentives in making law enforcement agencies dependent on their products—i.e., they are driven by a quest for profit rather than the achievement of creating safer communities or more equitable police practices. In order to build this dependence, however, predictive models must provide unquestionable value to law enforcement—the results must justify the cost of the models. This value is created not through the promotion of more equitable outcomes or even the reduction of crime—instead, predictive policing algorithms provide value to law enforcement by increasing the efficiency at which they can round up and arrest large numbers of people.<sup>259</sup> In fact, one primary measure of police success is enforcement productivity—including arrests, citations, and searches.<sup>260</sup> This ultimately means that as police search and arrest more and more individuals with the help of predictive algorithms, their operations are deemed successful regardless of discriminatory impact or actual crime reduction.

Importantly, predictive policing models such as PredPol are designed to predict low-level street crime—the type of crime typically committed by individuals with limited social and economic capital.<sup>261</sup> In other words, predictive algorithms intentionally focus police resources on taking down criminals with little ability to fight back, despite the fact that other crime, such as white-collar crime, tends to have a more far-reaching negative impact. As author Jennifer Taub notes, “White collar crime in America, such as fraud and embezzlement, costs victims an estimated

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<sup>259</sup> O’Neil, *Weapons of Math Destruction*, Chapter 5. Harcourt, *Against Prediction*, 188.

<sup>260</sup> Other measures include reductions in serious crimes reported, clearance rates, and response times. I focus on enforcement productivity because this is the area where predictive models provide their value to law enforcement. Malcolm K. Sparrow, “Measuring Performance in a Modern Police Organization.” Executive Session on Policing and Public Safety, National Institute of Justice, March 2015, 2. Accessed February 7, 2022. <https://www.ojp.gov/pdffiles1/nij/248476.pdf>.

<sup>261</sup> The PredPol algorithm is designed to predict property crimes.

\$300 billion to \$800 billion per year. Yet street level “property” crimes, including burglary, larceny, and theft, cost us far less— around \$16 billion annually, according to the FBI.”<sup>262</sup> That the vast majority of people in prison are poor and Black indicates that police actively choose to focus their resources on that particular subset of the population, as targeting this group is the most efficient way to find crime and make arrests—arrests that fill the pockets of the police and others with a stake in the prison-industrial complex. This also indicates that criminal law and procedure are designed to uphold the interests of those with social and economic capital—the force of the law falls on those who cannot challenge it. By using historical crime data—data derived from historically racist police tactics—police are drawn back into these communities, where they can efficiently arrest more African Americans for low-level crimes—crimes that would likely go unnoticed but for the increased police presence.<sup>263</sup>

While the use of predictive models may improve the efficiency by which police are able to detect crime and make arrests, this efficiency comes at the expense of actual crime reduction. For one thing, recidivism rates are remarkably high in the United States. In one study by the Bureau of Justice Statistics, researchers found that 83 percent of prisoners released across 30 states in 2005 were rearrested within nine years, and at least 44 percent of these prisoners were rearrested at least once within the first year of release.<sup>264</sup> Moreover, several programs have been independently evaluated by their ability to reduce crime—with telling results. For example, a study by the RAND corporation found that individuals on Chicago’s Strategic Subject List were just as likely to

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<sup>262</sup> It is difficult to get an exact number of how many White-collar crimes go unpunished or how much it truly costs Americans each year. No government agency measures and reports full White-collar crime statistics. Jennifer Taub, *Big Dirty Money: The Shocking Injustice and Unseen Cost of White-Collar Crime*, (New York: Viking, 2020), Chapter 1.

<sup>263</sup> O’Neil, *Weapons of Math Destruction*, Chapter 5.

<sup>264</sup> “2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period,” Summary, Bureau of Justice Statistics, U.S. Department of Justice, May 2018. Accessed February 7, 2022. [https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514\\_sum.pdf](https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514_sum.pdf).



become a victim of a homicide or shooting compared to individuals excluded from the list—demonstrating clear failure by the SSL to reduce gun violence.<sup>265</sup> Other programs, too, have found that their models were woefully ineffective. In 2019, the Los Angeles Police Department—one of the pioneers in the use of predictive algorithms—concluded through an internal audit that there was insufficient data to determine whether or not PredPol’s software helped to reduce crime.<sup>266</sup>

Ultimately, predictive policing models have become a tool to uphold the structure of the prison-industrial complex rather than one used to fight crime with objectivity. By sending law enforcement to monitor areas or people deemed high risk, the police are naturally more successful in finding crimes in these areas—providing validation that the predictive models work well, despite the discriminatory impact.<sup>267</sup> With the notion that the models are working well, police departments are willing to pay large sums of money for the use of the technology. For example, from November 2012 through March 2014 in New Orleans, law enforcement successfully indicted 83 alleged gang members with the help of Palantir’s software—software that helped to create “The NOLA Model.”<sup>268</sup> During this time, there was, in fact, a temporary decline in violent crime—however, an independent study found that this drop off was not the result of the use of Palantir’s model. Nonetheless, Palantir leveraged the “success” of their work in New Orleans to extend their contract in the city three times, as well as to win large contracts with cities in the United States and around the world.<sup>269</sup> In the end, this shows that companies that produce predictive models

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<sup>265</sup> Saunders et. al, “Predictions Put into Practice.”

<sup>266</sup> Mark Puente, “LAPD Pioneered Predicting Crime with Data. Many Police Don’t Think It Works,” Los Angeles Times, California Times, July 3, 2019. Accessed February 9, 2022. <https://www.latimes.com/local/lanow/la-me-lapd-precision-policing-data-20190703-story.html>.

<sup>267</sup> Roberts, “Digitizing the Carceral State,” 1720.

<sup>268</sup> The NOLA Model closely resembles Chicago’s Strategic Subject List, as it is a list that ranks people based on their likelihood to be involved in gun violence because of connections to a previous shooter or victim. Ali Winston, “Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology,” The Verge, February 27, 2018. Accessed March 16, 2022. <https://www.theverge.com/2018/2/27/17054740/palantir-predictive-policing-tool-new-orleans-nopd>.

<sup>269</sup> Ibid.

profit from enabling law enforcement to over monitor historically at-risk communities and individuals—a process that leads to more efficient arrests and once again reinforces the effectiveness of these tools. As predictive models have become institutionalized as part of the wider prison-industrial complex, the sad reality is that these programs to rely upon the Black criminality and perceptions of it that they innately create.

## **Part II: An Intentional Lack of Transparency**

With all the issues surrounding the discriminatory nature of predictive policing algorithms, these models are able to avoid public scrutiny due to an intentional lack of transparency. In recent years, several scholars have started to identify predictive policing algorithms as “black boxes.”<sup>270</sup> In one sense, machine learning algorithms are designed to produce outcomes directly from static datasets without human oversight or interference. This machine learning process, however, means that humans—including the experts who design the algorithms—are unable to fully grasp how the data is being interpreted.<sup>271</sup> As one scholar puts it— “machine-learning algorithms can constantly evolve, meaning that outputs can change from one moment to the next without any explanation or ability to reverse engineer the decision process.”<sup>272</sup>

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<sup>270</sup> The expression “Black box” refers to a device—typically an electronic device—whose internal functions difficult if not impossible to fully understand.

Mira Ortegón, “Dismantling the Black Box: Why Governments Should Demand Algorithmic Accountability,” *Brown Political Review*, March 30, 2019, Accessed February 9, 2022. <https://brownpoliticalreview.org/2019/03/dismantling-Black-box-governments-demand-algorithmic-accountability/>. Ferguson, *The Rise of Big Data Policing*, Chapter 7.

Elizabeth E. Joh “Feeding the Machine: Policing, Crime Data, & Algorithms,” *William & Mary Bill of Rights Journal* 26, no. 2 (December 2017): 292 – 293.

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1835&context=wmborj>.

<sup>271</sup> Cynthia Rudin and Joanna Radin. “Why Are We Using Black Box Models in AI When We Don’t Need To? A Lesson From an Explainable AI Competition.” *Harvard Data Science Review* 1, no. 2 (November 22, 2019). Accessed February 9, 2022. <https://doi.org/10.1162/99608f92.5a8a3a3d>.

<sup>272</sup> Ortegón, “Dismantling the Black Box.”

Predictive algorithms acts as “black boxes” in another way—namely, companies that produce these technologies often claim proprietary rights over their codes. As private enterprises, the companies that produce predictive models are in the business of selling their technology. By releasing information related to their algorithms, companies risk revealing trade secret information. As a result, companies make “trade secret” claims to protect themselves from disclosing this information.<sup>273</sup> What if, however, the lack of transparency with regard to predictive algorithms has less to do with protecting trade secrets, and more to do with supporting and expanding the reach of the prison-industrial complex?

The prison-industrial complex relies on human bodies for its survival. Predictive algorithms, by design, allow police to supply these bodies more efficiently—due in large part to the lack of transparency. In fact, communities impacted by predictive policing tactics have essentially no ability to truly understand how the technology is affecting their lives. The report titled “Garbage in Gospel Out” summarizes this issue:

The relationship between the private companies that build these tools and police departments is insular and exclusive. With exceptions in a very small number of jurisdictions, police departments do not inform impacted communities of their desire to deploy these tools, do not provide a justification to the impacted communities for the tools, and do not disclose the actual use of these tools or the policies that govern their use (to the extent that there are any).<sup>274</sup>

In New Orleans, for example, an investigation by *The Verge* reported that several key city council members and attorneys had no knowledge that the city had adopted Palantir’s predictive policing

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<sup>273</sup> It is important to note that a select few companies—most notably PredPol—have released their proprietary algorithms, yet their complexity makes the algorithms difficult to understand regardless.

<sup>274</sup> NACDL Task Force on Predictive Policing, *Garbage In, Gospel Out: How Data-Driven Policing Technologies Entrench Historic Racism and “Tech-Wash” Bias in the Criminal Legal System*, (Washington D.C.: National Association of Criminal Defense Lawyers), 2021, 53. <https://www.nacdl.org/getattachment/eb6a04b2-4887-4a46-a708-dbaade82125/garbage-in-gospel-out-how-data-driven-policing-technologies-entrench-historic-racism-and-tech-wash-bias-in-the-criminal-legal-system-11162021.pdf>

model.<sup>275</sup> Still, even if law enforcement were to inform communities of their use of predictive algorithms, that would only go so far—the complexities and inconsistencies associated with both the algorithms and data they rely upon prevent impacted individuals and communities from fully understanding how the technology is being deployed.

The lack of transparency with regard to predictive algorithms also serves to protect police from violations of the Fourth Amendment. Under the Fourth Amendment, law enforcement must have either reasonable suspicion [that an individual is involved with criminal activity] or probable cause in order to conduct a stop and search. With regard to what can be considered reasonable suspicion, the use of predictive algorithms is uncharted territory. In fact, scholars believe it likely that these algorithms—like criminal tips and profiles—will be accepted as reasonable suspicion to at least some extent.<sup>276</sup> If accepted, the lack of transparency with predictive algorithms will make them almost impossible challenge, and will therefor improve the efficiency at which individuals are cycled through the profitable carceral system.

With the understanding that predictive methods allow police to efficiently sweep up and incarcerate large numbers of African Americans with little scrutiny or accountability, many of those with a stake in the prison-industrial complex now do what they can to support the use of the technology. One way that this is done is through police foundations. While the National Police Foundations website claims that “The National Police Foundation’s mission is to advance policing through innovation and science,” In reality, police foundations are a medium through which

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<sup>275</sup> Winston, “Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology.”

<sup>276</sup> Andrew G. Ferguson, “Predictive Policing and Reasonable Suspicion,” *Emory Law Journal* 62, no. 2 (2012): 288. Accessed March 7, 2022.

<https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1251&context=elj>.

Elizabeth E. Joh, “The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing,” *Harvard Law and Policy Review* 10 (2015): 33 – 35. Accessed March 10, 2022. [https://harvardlpr.com/wp-content/uploads/sites/20/2016/02/10.1\\_3\\_Joh.pdf](https://harvardlpr.com/wp-content/uploads/sites/20/2016/02/10.1_3_Joh.pdf).

corporations can privately fund police forces.<sup>277</sup> Importantly, police foundations are private charities, meaning that they are not subject to the same public information laws that apply to law enforcement agencies.<sup>278</sup> This means that there is little to no public oversight or input with regard to how police foundation funds are spent—despite having a direct impact on how the public is policed. While there is very little transparency regarding how police use funds provided by police foundations, available evidence shows that a good portion of funding from police foundations is used to increasingly militarize police forces and arm them with surveillance technology that puts minority communities at increased risk.<sup>279</sup> For example, nearly half of the \$6.5 million distributed by the New York Police Foundation in 2013 went towards to NYPD’s “technology campaign.”<sup>280</sup>

Although police foundations are protected from disclosing their donors, existing information reveals that companies with a direct stake in the prison-industrial complex have contributed to police foundations. For example, the publicly traded company Palantir—a large producer of predictive policing technology—has donated to both Los Angeles and New York City police foundations, areas that unsurprisingly have used and signed contracts with Palantir in the past.<sup>281</sup> Moreover, other corporations who benefit from incarceration—and thus the use of predictive policing models—contribute to police foundations. Indeed, BlackRock, one of the

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<sup>277</sup> National Police Foundation, “Home,” Accessed February 14, 2022. <https://www.policefoundation.org/>.

<sup>278</sup> “Police Foundations: A Corporate-Sponsored Threat to Democracy and Black Lives,” Color of Change, 2021. Accessed February 14, 2022. [https://policefoundations.org/wp-content/uploads/2021/10/Police-Report-2021\\_10\\_05\\_FINALV3.pdf](https://policefoundations.org/wp-content/uploads/2021/10/Police-Report-2021_10_05_FINALV3.pdf).

Darwin Bond Graham, and Ali Winston, “Private Donors Supply Spy Gear to Cops,” ProPublica. ProPublica, October 13, 2014. Accessed March 16, 2022. <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops?token=p-v0T1xjfOJ8jrJHzc08UxDKSQrKgWJk>.

<sup>279</sup> “Surveillance technology” includes predictive policing models, but also includes things such as facial recognition technology, security cameras, etc.

“Police Foundations: A Corporate-Sponsored Threat to Democracy and Black Lives,” 17 – 25.

<sup>280</sup> Notably, the New York and Los Angeles Police Foundations—the two largest in the nation—provide their police departments with upwards of \$3 million annually.

Graham and Winston, “Private Donors Supply Spy Gear to Cops.”

<sup>281</sup> Palantir’s predictive policing technology has been historically used to support military operations. The same technology is used for community policing today.

NACDL Task Force on Predictive Policing, *Garbage In, Gospel Out*, 25.

largest investors in private prison companies CoreCivic and The GEO Group—is deeply involved with the New York City Police Foundation.<sup>282</sup> By supporting police foundations and the introduction of predictive models, companies like BlackRock indirectly support their investments in the private-prison industry.

### **Part III: Law Enforcement Financial Incentives**

Law enforcement themselves have selfish—if not entirely twisted—financial incentives to implement predictive algorithms into their methods for finding crime. Perhaps the most prominent and contested incentive dates back to the War on Drugs with the introduction of civil forfeiture.<sup>283</sup> For police, the incentive to forfeit property is straightforward: a vast majority of revenues from forfeited property go to law enforcement budgets. In fact, the 3<sup>rd</sup> edition of the report “Policing for Profit” finds— “In 32 states and at the federal level, between 80 and 100% of forfeiture proceeds go to funds controlled by law enforcement.”<sup>284</sup> This incentive has proved fruitful for law enforcement across the country—In 2018, reported data for the federal government, Washington D.C., and forty-two states shows assets forfeited in the amount of more than \$3 billion; Since 2000, available data shows that, for all states and the federal government, forfeitures exceed \$68 billion.<sup>285</sup>

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<sup>282</sup> The CEO of BlackRock, Larry Fink, donates millions of dollars every year, and was even honored by the foundation in 2015.

Ibid., 41.

<sup>283</sup> Civil forfeiture, as discussed in Chapter II, allows police to seize and forfeit property on the suspicion that it is involved in criminal activity.

Lisa Knepper, Jennifer McDonald, Kathy Sanchez, and Elise Smith Pohl. “Policing for Profit: The Abuse of Civil Asset Forfeiture 3rd Edition.” Policing for Profit: The Abuse of Civil Asset Forfeiture. Institute for Justice, December 2020. <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>.

<sup>284</sup> Knepper et. al., “Policing for Profit,” 34.

<sup>285</sup> This data is an underestimate of actual forfeiture activity. Reporting across states varies, and is often incomplete (i.e., may only include revenue from a particular type of forfeiture, or revenue from forfeiture may not be reported in

Profiting from forfeited property—without even needing to prove said property is related to criminal activity—is, of course, motivation to seize property. Again, however, police do not focus their resources on seizing large assets from those with social capital or political influence. Instead, a vast majority of forfeited property come from small seizures suspected of being related to small crimes. Across 21 states with available data, average cash forfeitures—by far the most frequent type of civil forfeiture—equal just under \$1.3 thousand.<sup>286</sup> In Pennsylvania, half of their currency forfeitures were below \$369. Moreover, one study found that from 2012 – 2017 in Cook County, Illinois, law enforcement seized \$150 million in assets, yet many of the seizures were concentrated in the poorest areas of the county and valued under \$100. The process of seizing predominantly small amounts of cash makes a great deal of sense when thinking in terms of efficiency. First, those who have their property seized are far less likely to fight back—they cost of attorney would more than likely exceed the cost of the forfeiture itself (considering the average cost of forfeiture mentioned above).<sup>287</sup> This is compounded by the fact that people at greatest risk of having their cash seized are low-income, uneducated minorities. Not only do these people have less resources available to contest the forfeiture to begin, but they are left with even less once their assets are taken under mere suspicion.<sup>288</sup>

Civil forfeiture laws not only provide police a skewed financial motive for seizing property, but the evidence indicates that civil forfeiture is far from helpful in decreasing criminal activity. In a sample of one-hundred Drug Enforcement Administration cash seizures collected by the Office of the Inspector General in 2017, zero evidence was found that these seizures contributed

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a particular year). The lack of transparency makes it incredibly difficult to track how much is being forfeited, and how proceeds are utilized.

Knepper et. al., “Policing for Profit,” 15.

<sup>286</sup> Ibid., 20.

<sup>287</sup> Ibid., 21.

<sup>288</sup> Ibid., 20.

to a criminal investigation.<sup>289</sup> Additionally, in 2015, New Mexico overhauled their civil forfeiture legislation, prohibiting the practice. A study conducted by the Institute for Justice analyzed the effect that this reform had on crime, ultimately finding no statistically significant rise in crime rates.<sup>290</sup> Moreover, while the federal government tracks forfeiture activity in great detail, there is no measurement of whether anyone was charged with a crime in conjunction with each forfeiture. This data, or lack thereof, gives the illusion that the police are actively fighting crime through forfeiture collections, without actually being held accountable for crime reduction.<sup>291</sup> In the end, civil forfeiture allows police to collect money to fund future operations, resulting in more seizures and more arrests, which again fills the pockets of police and government agencies.

The introduction of hot-spot policing has made it easier for police to justify their discriminatory search and seizure practices. Historical patterns of racist law enforcement have ensured that police officers have a tendency to think geographically when searching for crime—a vast majority of asset seizures occur in low-income, minority communities. Hot-spot models, by nature, justify and legitimize this tendency as necessary for effective law enforcement. As the algorithms behind these models send police back to the same neighborhoods over and over again as part of a vicious reaffirming cycle, police are able to justify not only searching for crime and making arrests, but also forfeiting property based on the fact that an algorithm labeled the area as high risk for crime. Paradoxically (and predictably), seizing assets from the least well off in society does not discourage crime—rather, those affected by civil forfeiture are forced to find ways to survive by any means necessary.<sup>292</sup>

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<sup>289</sup> Ibid., 52.

<sup>290</sup> Ibid., 32.

<sup>291</sup> Ibid., 51.

<sup>292</sup> Jarecki, *The House I Live In*.



In the end, the propensity for predictive policing algorithms to perpetuate and justify over policing Black communities—while strengthening perceptions of Black criminality—has made these tools essential to the prison-industrial complex. Predictive models have become institutionalized as part of the prison-industrial complex, functioning not to protect communities or eliminate bias in policing, but instead supporting corporate interests and helping police reach financial incentives. Predictive policing, it appears, has not revolutionized law enforcement—it has merely expanded longstanding discriminatory practices that fill the pockets of the rich at the expense of Black communities and Black Americans.

## Conclusion

*Overall, we need bold change in our criminal justice system. A good first step forward is to start treating prisoners as human beings, not profiting from their incarceration. Our emphasis must be on rehabilitation, not incarceration and longer prison sentences.*<sup>293</sup>

- Bernie Sanders

The 2020 murder of George Floyd—a killing in which the stomach-churning injustice of the situation was released in video footage online—sparked perhaps the most widespread and well sustained calls for racial equality since the Civil Rights Movement. Floyd’s tragic death, as well as those of numerous other unarmed Black individuals is not the result of a few bad apples in the police department. These events are not the [sole] result of overinflated police budgets or undertrained police forces. Sadly, the mistreatment and murder of Black civilians by the police is the predictable result of a criminal justice system plagued by a history of racial bias; a system that is designed to punish the most at-risk populations rather to provide support; a system that is not broken, but is in fact the result of a grossly misguided perception of justice that puts economic interests before racial equality.

While this study paints a rather bleak picture of the United States criminal justice system, this does not mean that systematic change is out of reach—laying out the structural issues rooted in the system is an important first step towards finding meaningful solutions. With that said, achieving structural change requires a fundamental shift in our approach to justice—one that

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<sup>293</sup> “Statement by Senator Bernie Sanders: Our Criminal Justice System Is Broken, Ending Private Prisons Is a Good First Step Forward,” The American Presidency Project, September 8, 2015. Accessed March 29, 2022. <https://www.presidency.ucsb.edu/documents/statement-senator-bernie-sanders-our-criminal-justice-system-broken-ending-private-prisons>.

recognizes the United States tortured racial history and uses resources to support marginalized peoples and communities rather than punish them.

To start, states and the federal government must revisit the draconian drug laws and sentencing policies enacted during the War on Drugs—laws and policies that continue to disproportionately effect people of color. In recent years, there has been some effort on this front. In 2012, Colorado became the first state to legalize the recreational use and sale of marijuana. Today, a total of eighteen states and Washington, D.C. have followed suit, while a total of twenty-seven states have decriminalized marijuana.<sup>294</sup> In 2010, President Barack Obama signed into law the Fair Sentencing Act, reducing the crack and powder cocaine sentencing disparity from 100:1 to 18:1, while also eliminating mandatory minimums for possession of crack cocaine.<sup>295</sup> While these changes indicate a step in the right direction, they have not gone nearly far enough. For one thing, there is no reason that a sentencing disparity should exist at all between crack and powder cocaine—two substances that are chemically identical. Moreover, tens of thousands of people remain incarcerated for the possession and sale of marijuana, while private companies and states now profit from the drug. All fifty states still have mandatory sentencing laws, including twenty-eight states that still have some form of the barbaric three-strikes law.<sup>296</sup> Across the nation, more than five million people remain disenfranchised due to a prior felony charge.<sup>297</sup>

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<sup>294</sup> Michael Hartman, “Cannabis Overview,” National Conference of State Legislators, National Conference of State Legislators, July 6, 2021. Accessed March 22, 2022. <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx#:~:text=Twenty%2Dseven%20states%20and%20the,no%20possibility%20of%20jail%20time>).

<sup>295</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. (August 3, 2010).

<sup>296</sup> Joshi Apoorva, “Explainer: Three Strikes Laws and Their Effects,” *Interrogating Justice* (blog), July 23, 2021. Accessed March 29, 2022. <https://interrogatingjustice.org/mandatory-minimums/three-strikes-laws-and-effects/>.

<sup>297</sup> Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,” The Sentencing Project, The Sentencing Project, October 30, 2020. Accessed March 29, 2022. <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

The persistence of mandatory minimum sentences, strict drug laws and disenfranchisement laws are all issues that disproportionately effect African Americans and contribute to the negative perception of Black criminality. Therefore, the United States should move to eliminate these facets of the criminal justice institution. To start, the supreme court and individual states should move to completely legalize recreational marijuana—a drug that has shown to be less harmful to adults than alcohol and tobacco, yet whose consumption is still an incarcerable offense in many places.<sup>298</sup> Individuals currently incarcerated on marijuana charges should be immediately released from custody, and have their records wiped clean.<sup>299</sup> In addition to loosening drug laws, the United States must repeal the use of mandatory sentencing—an outdated and dehumanizing practice serving only to keep people in prison for unnecessarily long periods of time. By eliminating these laws, justices might have more discretionary power to hand down individualized sentencing decisions, an essential step towards treating the accused as human beings rather than statistics. Finally, the United States should move to eliminate disenfranchisement laws for released felons. Once an individual has served their time in prison, they should not continue to be treated as a second-class citizen—someone with no say in how the country is run or what policies are put in place. Repealing the unjust disenfranchisement laws that serve as a roadblock for reintegration in society is an important measure that will help to ensure all Americans have a say in the policies and regulations that continue to affect their lives.

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<sup>298</sup> NBC News, “No High Risk: Marijuana May Be Less Harmful Than Alcohol, Tobacco,” NBC Universal, February 26, 2015. Accessed March 29, 2022. <https://www.nbcnews.com/storyline/legal-pot/marijuana-safer-alcohol-tobacco-study-shows-n312876>.

<sup>299</sup> In some places, efforts to eliminate criminal records for those with Marijuana offenses is underway. In New York, for example, the 2021 legalization law automatically expunged the record of anyone convicted of possessing up to 16 ounces or selling up to 25 grams of Marijuana.

“Marijuana Expungement: What You Need to Know,” The Legal Aid Society, Accessed March 29, 2022. <https://legalaidnyc.org/wp-content/uploads/2021/05/marijuana-expungement-english-spanish.pdf>.

Another initiative the United States must take is to remove financial interests from the process of mass incarceration. Of course, disentangling the private interests of corporate giants from the criminal justice system is not something that will happen overnight. There are, however, practical steps that the federal and state governments can take to reduce financial motives related to mass incarceration. For one, congress must take immediate action to outlaw the construction and use of private prisons. Although eliminating private prisons will not eliminate mass incarceration by itself (only about 10 percent of prisoners are currently held in private prisons), removing private prisons will help to curb the economic interest of keeping these facilities at maximum capacity, and the carceral corporations who have long profited on the exploitation of primarily Black bodies will no longer have an interest in locking people away in their facilities. Banning private prisons will have positive implications for those already incarcerated as well—the cost-cutting strategies essential to the business model of private prisons greatly affect the safety and quality of life for prisoners housed in these facilities. In some places, steps towards removing private prisons have already taken place—in 2019, California state legislators voted to ban all private prison contracts in the state.<sup>300</sup>

Along with banning the use of private prisons, states and the federal government must work to remove civil forfeiture laws provide law enforcement unwarranted financial incentives to search out crime, particularly in poor, African American communities. Funds collected through civil forfeiture continue to fund the militarization of police forces, contributing to the abusive over policing practices that have disproportionately affected Black communities for decades. Eliminating civil forfeiture necessarily involves shutting down the federal equitable sharing

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<sup>300</sup> Andrea Castillo, “California Banned Private Prisons, Immigrant Detention Centers. Will the Law Survive Court?” Los Angeles Times, Los Angeles Times, June 15, 2021. Accessed March 23, 2022. <https://www.latimes.com/california/story/2021-06-15/california-banned-private-prisons-immigrant-detention-centers-will-the-law-survive-court>.

program—a program which allows police forces to transfer seized property to the federal government and receive up to 80 percent of the proceeds.<sup>301</sup> Eliminating civil forfeiture as a means for law enforcement agencies to profit will, in theory, create less incentive for police to target at-risk communities. Thus far, four states—Maine, Nebraska, New Mexico and North Carolina are the only states to have enacted laws to abolish civil forfeiture.<sup>302</sup>

Another problem with the criminal justice system—the primary problem discussed in this study—is the use of predictive police technology. On one hand, the use of predictive technology by law enforcement is here to stay. Overall, technology across industries has greatly improved human lives. The development of technology, particularly in the 21<sup>st</sup> century has led to massive improvements in communication, healthcare, education, infrastructure, energy etc. In law enforcement, technology has certainly improved the efficiency at which agencies use their resources. The problem, however, lies in the fact that predictive policing technology uses historically skewed data to make decisions regarding who to target for punishment—an extension of the deeply misguided goals of the punishment bureaucracy. Moreover, as this technology becomes increasingly engrained in policing tactics, and the desire to reduce crime stays high, it becomes difficult to balance the pressures of combatting structural issues and keeping up with progressive law enforcement tactics. Nonetheless, the fact that police technology is being used in this manner has had drastic effects for communities of color, and has eroded vital trust between law enforcement and the community—According to a poll conducted by PBS, approximately half

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<sup>301</sup> Knepper et. al., “Policing for Profit,” 46.

<sup>302</sup> Knepper et. al., “Policing for Profit,” 40.

of Black Americans have little or no confidence that police officers treat people with different skin colors the same.<sup>303</sup>

The fact that law enforcement has relied on predictive algorithms to punish African American communities does not mean that the technology is innately bad. In fact, if put to the proper use, predictive policing models could serve to build trust between law enforcement and Black communities and help correct the systematic issues that lead to poverty and crime in these communities. By design, predictive policing models are effective at narrowing in on at-risk communities and at-risk individuals for intervention. While this intervention is currently punitive in nature, the government and law enforcement agencies could use these models to correct the structural issues that contribute to the high-risk designation given to these areas and people. Instead of providing funding to militarize police forces for the purpose of punitive enforcement, the government and private donors should redirect funds to improve schools, foster employment opportunities, provide rehabilitation programs and improve infrastructure. Moreover, police should make a concentrated effort to connect with at risk communities with the purpose of reducing tensions that have resulted from years of racist policies and practices. As part of this effort, law enforcement absolutely must engage community members in discourse regarding how their communities are to be policed—including welcoming public criticism and reform recommendations, and providing full transparency with regard to any technology being used (i.e., hot-spot maps).

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<sup>303</sup> Laura Santhanam, “Two-Thirds of Black Americans Don’t Trust the Police to Treat Them Equally. Most White Americans Do,” PBS NewsHour. NewsHour Productions LLC, June 5, 2020. Accessed March 23, 2022. <https://www.pbs.org/newshour/politics/two-thirds-of-Black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do>.

In the end, restructuring the United States criminal justice system to reflect democratic and egalitarian ideals rather than reflecting financial interests is not a change that will occur overnight. In fact, achieving long-term solutions will necessarily conflict with our current political culture, where politicians under term limits face pressures to address public concerns—often through short-term strategies (i.e., being tough on crime) that appear to be initially successful in combatting issues such as crime. As a result, the achievement of long-term solutions will require years of dedication by lawmakers, law enforcement agencies and the general public to come to fruition. It is my belief, however, that ostensible change for those most effected by the rise and evolution of the carceral state is attainable—change that will create a better and more equitable United States of America.



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