

FROM MASS INCARCERATION TO MASS CONTROL, AND BACK AGAIN:  
HOW BIPARTISAN CRIMINAL JUSTICE REFORM MAY LEAD TO A  
FOR-PROFIT NIGHTMARE

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*Since 2010, advocates on the right and left have increasingly allied to denounce mass incarceration and propose serious reductions in the use of prisons. This alliance serves useful shared purposes, but each side comes to it with distinct and in many ways incompatible long-term interests. If progressive advocates rely solely on this alliance without aggressively building our own vision of what decarceration should look like, the unintended consequences could be serious. This Article describes the current mass incarceration paradigm and current left-right reform efforts. It then outlines how, if progressives do not set clear goals for what should replace mass incarceration, these bipartisan efforts risk creating a nightmare scenario of mass control, surveillance, and monitoring of Black and Brown communities. Finally, the Article explains why this mass control paradigm would lay the groundwork for a heavily-privatized, extraordinarily difficult-to-end resurgence of mass incarceration in subsequent decades.*

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## INTRODUCTION

It is now widely acknowledged that the United States incarcerates far too many people. Though the country has less than 5% of the world’s population, it houses nearly 25% of the world’s prisoners.<sup>1</sup> And despite fierce partisanship on most issues, major actors across the political spectrum agree that something needs to be done about this mass incarceration epidemic.

Every major civil rights organization involved in criminal justice issues (including the ACLU, the NAACP, the NAACP Legal Defense Fund, The Leadership Conference for Civil and Human Rights, the Lawyers’ Committee for Civil Rights Under Law, and others) and major progressive-aligned think tanks like the Sentencing Project, the Center for American Progress and the Brennan Center for Justice have called for an end to mass incarceration.

On the right, think tanks like the Heritage Foundation, the American Conservative Union and conservative thought leaders like Newt Gingrich, Grover Norquist, and Pat Nolan have all called for criminal justice reform. Prominent former elected officials like Rick Perry, Jeb Bush, and Ken Cuccinelli have joined in this call. Even the Koch brothers—perhaps the most infamous financial supporters of ultraconservative causes—are now publicly supporting and funding efforts at criminal justice reform.

In the early stages of the 2016 presidential race, both the Oval Office and its aspirants—from both parties—expressed support for decarceration that would have been unimaginable just a few years ago. In a landmark 2015 speech, President Barack Obama declared, “Mass incarceration makes our country worse off, and we need to do something about it,” and conducted the first-ever visit by a sitting president to a federal prison.<sup>2</sup> Early in the primaries for the 2016

<sup>1</sup> Sari Horwitz, *Holder seeks to avert mandatory minimum sentences for some low-level drug offenders*, WASH. POST, (Aug. 12, 2013), [https://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a\\_story.html](https://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html) [https://perma.cc/2DWY-S72M].

<sup>2</sup> White House, *Remarks by the President at the NAACP Conference* (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [https://perma.cc/CH5P-ANSK]; Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), <http://nyti.ms/1K8ZqX0> [https://perma.cc/V93M-NNN6].

presidential race, both Democratic and Republican candidates issued similar calls for criminal justice reforms.<sup>3</sup>

The left and the right, however, each come to this alliance with distinct and, ultimately, incompatible interests. Recently, the progressive advocacy community has begun to seriously grapple with the limits of the left-right alliance. This includes differences over whether and how to address policing practices and racial disparities in prosecutions, suspicions that conservatives are using decarceration as a Trojan Horse to protect white-collar criminals, and disagreement about whether decarceration should be accompanied by increased societal investment in housing, employment opportunities, health care, and other social services.<sup>4</sup>

Separately, progressive advocates are also examining the negative implications of the general trend toward greater criminal justice privatization.<sup>5</sup> However, there has so far been little effort to connect the dots between the two.<sup>6</sup> Unifying these two lines of thinking illustrates why

<sup>3</sup> Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://nyti.ms/1DERGad> [<https://perma.cc/U42S-WEBC>]. Notably, this did not include Donald Trump. *Id.* Trump said relatively little about criminal justice reform on the campaign trail, but his few statements on the issue were negative. See Eric Levitz, *Donald Trump Warns NRA That 'Heartless Hillary' Will Take Their Guns, Free All Violent Criminals*, N.Y. MAG. (May 20, 2016), <http://nymag.com/daily/intelligencer/2016/05/trump-to-nra-clinton-will-free-all-criminals.html> [<https://perma.cc/8XW9-ND6F>].

<sup>4</sup> See discussion *infra* Section II.D.2. See also David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1507 (2014) (arguing that related efforts to establish criminal “problem-solving courts” are “eerily reminiscent” of earlier bipartisan coalition to establish federal sentencing guidelines, and that each side “must resolve . . . whether their objectives are, in fact, incompatible, and whether cognitive bias may be distorting their expectations of what problem-solving courts will ultimately achieve”).

<sup>5</sup> See, e.g., HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY (2014) [hereinafter PROFITING FROM PROBATION] (describing growth of privatized probation in Alabama, Georgia, and Mississippi); Complaint, Reynolds v. Judicial Correction Services, Inc., No. 2:15-cv-00161-MHT-CSC (M.D. Ala. Mar.12, 2015) (lawsuit filed by SPLC alleging that private probation company is operating as a racketeering enterprise extorting money from poor defendants); Complaint, Thompson v. DeKalb County, No. (N.D. Ga. Jan. 29, 2015) (lawsuit filed by ACLU alleging that county officials and private probation company are unlawfully denying probationers the right to counsel and to an indigency hearing before sentencing them to jail); Brave New Films, *To Prison for Poverty*, Brave New Films, <http://www.bravenewfilms.org/toprisonforpoverty> [<https://perma.cc/6U2R-V9AS>]; Brave New Films, *To Prison for Poverty Part 1*, YOUTUBE (June 4, 2014), [https://www.youtube.com/watch?v=C\\_cIWv9yc3A](https://www.youtube.com/watch?v=C_cIWv9yc3A) [<https://perma.cc/YQ8G-F45H>].

<sup>6</sup> Caroline Isaacs of the American Friends Service Committee (AFSC) has done valuable work by describing how private prison companies are expanding from merely warehousing people into a “treatment industrial complex” that allows them to profit from providing treatment-oriented programs and services. She argues that the profit motive will lead to a “net-widening” effect that will increase the number of people ordered to remain under supervision by these companies. However, Isaacs does not examine how the profit motive would shift as mass supervision becomes established and mass incarceration declines—a key element of my Article. See CAROLINE ISAACS, TREATMENT INDUSTRIAL COMPLEX: HOW FOR-PROFIT CORPORATIONS ARE UNDERMINING EFFORTS TO TREAT AND REHABILITATE PRISONERS FOR CORPORATE GAIN, AFSC ARIZONA, GRASSROOTS LEADERSHIP & SOUTHERN CTR. FOR HUMAN RIGHTS (2014), [https://www.afsc.org/sites/afsc.civicactions.net/files/documents/TIC\\_report\\_online.pdf](https://www.afsc.org/sites/afsc.civicactions.net/files/documents/TIC_report_online.pdf) [<https://perma.cc/UV2K-JNRT>]; CAROLINE ISAACS, COMMUNITY CAGES: PROFITIZING COMMUNITY CORRECTIONS AND ALTERNATIVES TO INCARCERATION, AFSC ARIZONA (2016), <https://afscarizona.files.wordpress.com/2016/08/communitycages.pdf> [<https://perma.cc/5BCJ-7QMA>]. David Dagan and Steven Teles cover similar ground by discussing the differing positions of liberal and conservative decarceration advocates, including the general support of conservatives for criminal justice privatization. However, Dagan and Teles conclude that both liberal and conservative reformers will need to accept, in place of mass incarceration, a supervisory carceral state characterized by paternalistic government action. See David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 271 (2014). Hadar Aviram has explained how the privatization of services within public

relying solely on the bipartisan alliance to decide what comes after decarceration is a dangerous choice. If the United States follows a fiscally conservative plan for decarceration that relies on increased privatization, the unintended consequences could be serious. Accordingly, although progressive advocates should continue working to find common ground with conservatives, we should be working equally as hard to promote our distinct vision of what kind of societal structures (including both the criminal justice system and other forms of public spending) should replace mass incarceration.

Parts I and II of this Article provide context by describing the current mass incarceration paradigm, including the privatization of criminal justice functions and the “user-funded” criminal justice system, as well as describing the current left-right reform efforts. Part III argues that if progressives do not set clear goals for what should replace mass incarceration, these left-right reform efforts risk creating a nightmare scenario of mass control, surveillance, and monitoring of Black and Brown communities. Finally, it argues that this mass control paradigm would lay the groundwork for a heavily-privatized, extraordinarily difficult-to-end resurgence of mass incarceration in subsequent decades.

## I. MASS INCARCERATION AND THE CARCERAL STATE

In this article, I use Marie Gottschalk’s term “carceral state” to refer to the full range of penal punishments and controls, from secure confinement in prisons and jails to various forms of supervision and governmental control.<sup>7</sup> I reserve the narrower term “mass incarceration” for the use of secure confinement. Although mass incarceration is the most visible and inhumane component of the carceral state, it is part of a larger system, and—for the reasons explained in Part III below—criminal justice reform efforts that focus only on the mass incarceration component of the carceral state are unlikely to actually end either the carceral state or mass incarceration in the long term. This section provides context for Parts II and III by describing the origins and contours of our present carceral state. It begins with the origins of mass incarceration, describes the major elements of the carceral state, and then describes the related trends of privatization and the “user-funded” criminal justice system.

### A. *Birth of a Carceral Nation*

From 1925 (when the Bureau of Justice Statistics first began collecting nationwide data) to 1972, the U.S. per-capita incarceration rate remained relatively stable, with prison and jail populations rising in tandem with the overall population.<sup>8</sup> But starting in 1972, the United States

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prisons, as well as the neoliberal economy in which both operate, have the effect of narrowing the distinction between these prisons and their privately-operated counterparts. However, Aviram does not examine how incarceration interacts with supervision, and her policy prescription is merely to change the compensation model for prisons. See Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and its Evils? Prison Conditions, Neoliberalism, and Public Choice*, 42 FORDHAM URBAN L.J. 411, 434-38, 448-49 (2014). Additionally, Sharon Dolovich has examined private prisons (though not other forms of criminal justice privatization) through a liberal legitimacy framework. See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

<sup>7</sup> See MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS, 1-2 (2015).

<sup>8</sup> JEREMY TRAVIS, BRUCE WESTERN & STEVE REDBURN, EDS., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES OF SCIENCES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 34 (2014), [http://johnjay.jjay.cuny.edu/nrc/NAS\\_report\\_on\\_incarceration.pdf](http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf) [<https://perma.cc/S5N2->

embarked on an historically unprecedented prison boom that grew unabated for nearly three decades. By the time the U.S. incarceration rate stabilized in 2009, the United States was incarcerating people at more than four times its historical incarceration rate and seven times the rate of Western European democracies.<sup>9</sup> In absolute numbers, this meant that the United States maintained a total of 2.29 million people in custody in 2009—seven times more people than the United States incarcerated in 1972.<sup>10</sup> As President Barack Obama stated in a July 2015 speech, “For what we spend to keep everyone locked up for one year, we could eliminate tuition at every single one of our public colleges and universities.”<sup>11</sup>

Since 2009, there has been some progress in reducing the incarcerated population. By 2015, the combined prison and jail population had fallen about 5% from its 2009 peak.<sup>12</sup> However, contrary to popular belief, this modest reduction in the national incarceration rate is not the result of a uniform, nationwide decarceration trend. Instead, it is attributable to specific policy changes that reduced prison populations in a handful of states—primarily California, New York, and New Jersey.<sup>13</sup> Meanwhile, the national jail population has changed relatively little since 2011.<sup>14</sup> Additionally, the immigration detention population—though a relatively small part of the overall incarcerated population—consistently exceeded 30,000 from 2007 to 2014.<sup>15</sup> In other words, claims that mass incarceration is clearly or inevitably on its way out have been greatly exaggerated.<sup>16</sup>

This incarceration boom coincided with a similarly stunning increase in the number of people under criminal justice supervision, such as probation and parole. From 1976 to 2010, the probation population grew from 923,000 to 4.06 million.<sup>17</sup> Similarly, from 1975 (the earliest date for which data are available) to 2010, the parole population grew from 143,000 to 841,000.<sup>18</sup>

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PRRH] [hereinafter NAS REPORT].

<sup>9</sup> *Id.* at 34-37. See also TODD D. MINTON AND ZHEN ZENG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2015, NCJ 250394 2, tbl. 1 (June 2015) [hereinafter JAIL INMATES IN 2015] (jail population peaked in 2008, at more than three-quarters of a million people); E. ANN CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015, NCJ 250229 2, tbl. 1 (Dec. 2016) [hereinafter PRISONERS IN 2015] (prison population peaked in 2009, at more than 1.6 million people).

<sup>10</sup> NAS REPORT, *supra* note 8, at 35-37.

<sup>11</sup> Remarks by the President at the NAACP Conference, The White House Briefing Room (July 14, 2015 4:54 PM), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [https://perma.cc/8GK2-KHV8].

<sup>12</sup> See PRISONERS IN 2015, *supra* note 9, at 2, tbl. 1 (prison population); JAIL INMATES IN 2015, *supra* note 9, at 2, tbl. 1 (jail population). The combined prison and jail population fell from 2,382,887 in 2009 to 2,254,992 in 2015.

<sup>13</sup> PETER WAGNER, TRACKING STATE PRISON GROWTH IN 50 STATES, PRISON POLICY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/overtime.html> [https://perma.cc/PBR3-G2US].

<sup>14</sup> See JAIL INMATES IN 2015, *supra* note 9, at 2, tbl. 1.

<sup>15</sup> ICE, WEEKLY DEPARTURES AND DETENTION REPORT, 9 (June 20, 2016). The population briefly dropped below 30,000 in 2015, but rose significantly above 30,000 in 2016. *Id.*; CARL TAKEI, MICHAEL TAN & JOANNE LIN, ACLU, SHUTTING DOWN THE PROFITEERS 8 (Sept. 30, 2016), [https://www.aclu.org/sites/default/files/field\\_document/white\\_paper\\_09-30-16\\_released\\_for\\_web-v1-opt.pdf](https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf) [https://perma.cc/K28R-KGTC] (“In recent months, the average daily detention population has grown to record levels, hitting nearly 37,000 people in June 2016”).

<sup>16</sup> See, e.g., URBAN INSTITUTE, THE PRISON POPULATION FORECASTER // STATE PRISON POPULATION (Aug. 2015) <http://webapp.urban.org/reducing-mass-incarceration/> [https://perma.cc/K5T2-JBKL] (“If the 15 states in our forecaster make no policy changes and current trends hold constant, the prison population in those states is forecasted to decline only 2 percent by the end of 2021”).

<sup>17</sup> NAS REPORT, *supra* note 8, at 40.

<sup>18</sup> *Id.* at 41.

Thus, by 2010, nearly 5 million people were on probation and parole.<sup>19</sup> Because violations of terms of supervision often return people to prison and jail, the growth in probation and parole supervision helped further feed the incarceration boom. As the National Academy of Sciences reported in its comprehensive 2014 study of mass incarceration, parole violations accounted for an increasing share of state prison admissions as mass incarceration became more entrenched—rising from 20% in 1980 to 30% in 1991 and then between 30 and 40% in 2010.<sup>20</sup>

### B. Why Did Mass Incarceration Happen?

As mass incarceration continued to metastasize from the 1970s to the 2000s, many people assumed that rising rates of incarceration were a result of increases in crime, and that if crime rates fell, so would prison populations.<sup>21</sup> However, that turned out not to be the case. While both crime and incarceration rates did rise significantly from the early 1960s to the 1980s, violent crime fell in the 1990s even as the incarceration rate continued to rise, and crime rates stabilized at a relatively low level in the 2000s as incarceration rates hit their peak.<sup>22</sup> For this reason, the National Academy of Sciences flatly stated in 2014 that “the very high rates of incarceration that emerged over the past decades cannot simply be ascribed to a higher level of crime today compared with the early 1970s, when the prison boom began.”<sup>23</sup>

So, what actually caused mass incarceration? The consensus explanation points to changes in law enforcement priorities and sentencing policy that resulted in state and federal authorities putting more people in prison for more reasons and for longer periods of time than at any prior time in U.S. history.<sup>24</sup> Throughout this period, rising incarceration rates were unrelated to trends in crime, and social science evidence had “strikingly little influence on deliberations about sentencing policy.”<sup>25</sup> Instead, these changes in policy and practice were largely a response to racist fear mongering (exemplified by the Willie Horton ad<sup>26</sup> in the 1980s and overblown fears of juvenile “superpredators” in the 1990s stoked by John DiIulio<sup>27</sup>) and the perceived urgency of

<sup>19</sup> *Id.* at 42.

<sup>20</sup> *Id.* at 41.

<sup>21</sup> See, e.g., James Dao, *Pataki Proposes Legislative Plan to Curb Violent Crime by Youths*, N.Y. TIMES (Dec. 10, 1995) (discussing New York Governor Pataki’s plan to fund additional prison construction in response to youth crime); Josh Barbanell, *Koch Recommends Stiffer Penalties and More Prisons*, N.Y. TIMES (Feb. 15, 1985) (reporting New York Mayor Koch’s statement that if forced to choose between improving city schools and expanding prisons, he would expand prisons because only stiff sentences can deter crime).

<sup>22</sup> NAS REPORT, *supra* note 8, at 46-47.

<sup>23</sup> *Id.* at 47.

<sup>24</sup> *Id.* at 48-49 (drug law enforcement efforts); 50-51 (increased likelihood that arrest would lead to prison sentences); 68-69 (“Increased admission rates are closely associated with increased incarceration for drug crimes and explain much of the growth of incarceration in the 1980s, while increased time served is closely associated with incarceration for violent crimes and explains much of the growth since the 1980s. These trends are, in turn, attributable largely to changes in sentencing policy over the period.”) 70-78 (describing first phase of shift from indeterminate to determinate sentencing, aimed at increasing consistency and driven by notions of fairness), 78-85 (describing second phase of shift, aimed at increasing certainty and severity of sentences).

<sup>25</sup> *Id.* at 69 (concluding lack of relationship between crime and incarceration trends), 89 (discussing lack of influence of social science evidence).

<sup>26</sup> See Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> [<https://perma.cc/Z8KT-5PCJ>].

<sup>27</sup> See John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY JOURNAL (Spring 1996). See also Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES: RETRO REPORT (April 6, 2014),

the War on Drugs. At both state and federal levels, legislators responded by approving increasingly harsh sentencing laws, including mandatory minimum sentences, “Truth in Sentencing,” Three Strikes laws, and stiff sentencing guidelines. The same dynamics led legislators to ramp up the size and aggressiveness of the police presence in cities—particularly in Black and Brown neighborhoods.<sup>28</sup> Both liberals and conservatives supported many of these changes—including the shift from indeterminate sentencing to the use of sentencing guidelines, which liberals incorrectly believed would reduce racial disparities and biases in sentencing.<sup>29</sup>

One highly influential theoretical framework for explaining and critiquing mass incarceration is Michelle Alexander’s 2010 book, *The New Jim Crow*, positing that the War on Drugs converted the criminal justice system into a new form of racialized social control.<sup>30</sup> Under this framework, the carceral state functions as a “racial caste system . . . a set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position, effectively creating a second-class citizenship.”<sup>31</sup> In Alexander’s framework, the criminal justice system “is no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed.”<sup>32</sup>

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<http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html>  
[<https://perma.cc/V7FH-EHGD>].

<sup>28</sup> See, e.g., NAS REPORT, *supra* note 8, at 50, 61; Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 428-430 (2013) (suggesting that the war on drugs vastly expanded prosecutions and harsh sentencing, which led to mass incarceration); Heather Schoenfeld, *The War on Drugs, The Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 327-44 (2012) (using Florida as a case study of how state policy changes led to mass incarceration); see generally David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011).

There is a near-universal consensus that these changes in sentencing policy and policing practices are the main causes of mass incarceration. However, John Pfaff recently received public attention by pushing a contrarian explanation that emphasizes prosecutorial aggressiveness rather than sentencing laws (oddly, without seriously exploring how sentencing laws might have contributed to this prosecutorial aggressiveness). See John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARVARD J. ON LEGIS. 173, 175-76 (2015); David Brooks, Opinion, *The Prison Problem*, N.Y. TIMES (Sept. 29, 2015), <http://www.nytimes.com/2015/09/29/opinion/david-brooks-the-prison-problem.html> [<https://perma.cc/7828-MAV7>] (praising Pfaff). Pfaff argues that the War on Drugs had only a limited impact on prison growth because sentences for drug offenses account for only one-fifth of the growth in prison populations since 1980, and claims that the chief cause of mass incarceration is a mysterious, unexplained increase in the aggressiveness of prosecutors. Pfaff, *supra* at 182, 198-99. However, Pfaff inappropriately ignores the ripple effects that the War on Drugs had on the entire criminal justice system, including harsher non-drug sentencing statutes and greater powers for police. These changes massively increased the power and leverage of prosecutors in both drug and non-drug cases, which is why Doug Berman has characterized the Pfaff/Brooks account as “too simplistic and incomplete.” See Doug Berman, *Is the “don’t blame the drug war for mass incarceration” counter-narrative problematically incomplete?*, SENTENCING LAW AND POLICY (Sept. 29, 2015), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2015/09/is-the-dont-blame-the-drug-war-for-mass-incarceration-counter-narrative-problematically-incomplete.html](http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/is-the-dont-blame-the-drug-war-for-mass-incarceration-counter-narrative-problematically-incomplete.html) [<https://perma.cc/694Z-2DQW>].

<sup>29</sup> NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014) (arguing that liberal law-and-order ideologies of this kind entrenched notions of Black criminality, fueled carceral state-building, and fortified the legitimacy of the carceral state); Jaros, *supra* note 4, at 1490-97 (arguing that cognitive biases may have lulled liberals into false solidarity with conservatives).

<sup>30</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>31</sup> *Id.* at 179-80.

<sup>32</sup> *Id.* at 183.

Despite its explanatory power, however, Alexander's framework is a flawed roadmap for reform. For example, James Forman argues that Alexander's focus on the War on Drugs diverts attention from the role that excessive punishment for violent offenses plays in mass incarceration, that the use of the Jim Crow analogy obscures class distinctions among Blacks, and that the analogy may not help to mobilize other racial groups that have also been harmed by mass incarceration.<sup>33</sup> Additionally, Marie Gottschalk argues that "[t]ethering a penal reform agenda too tightly to the goal of reducing racial disparities in incarceration could have a perverse result—smaller disparities but not necessarily more racial or social justice."<sup>34</sup> Gottschalk points out that reducing the number of people in prison for low-level offenses can paradoxically lead to greater, not lesser, racial disparities in their prison populations. Minnesota, for example, has both an incarceration rate well below the national average and an 11:1 Black-white imprisonment ratio—significantly worse than the rest of the country.<sup>35</sup> Thus, Gottschalk warns that the New Jim Crow framework fails to address how complex it will be to dismantle the carceral state in a way that serves the ends of racial justice: focusing exclusively on shrinking the carceral state may actually worsen its racial disparities, and focusing exclusively on its racial disparities may not reduce the size or abusiveness of the carceral state.<sup>36</sup>

### C. *The Modern Carceral State*

Mass incarceration is just one component of the modern carceral state, which is composed not only of federal and state prisons and local jails, but also federal and state community corrections facilities, federal and state forms of supervision like probation and parole, and the federal immigration detention system.

#### 1. Mass Incarceration in Prisons and Jails

In 2015 (the most recent figures available), there were about 1.53 million people in state and federal prisons and 728,000 people in local jails throughout the United States.<sup>37</sup>

Prisons hold people who have already been convicted of a crime and who are serving longer sentences (typically, exceeding one year). Most people in prison (about 1.33 million) are in the custody of state governments for violations of state laws, while a significant minority (196,000 as of 2015) are in federal custody for violations of federal law.<sup>38</sup> Prisons are the primary focus of most efforts at decarceration, both because the absolute number of people in prison are larger than the number of people in jail and because prisons are operated by the state and federal governments rather than local jurisdictions—which makes it easier to reduce prison populations through a combination of changes to state and federal criminal statutes and changes to the policies of state executive agencies and the federal government.

In contrast, the 728,000 people incarcerated in local jails are scattered across some 2,850 jurisdictions nationwide.<sup>39</sup> These jurisdictions are typically city or county entities, run by locally-

<sup>33</sup> James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45-49, 64 (2012).

<sup>34</sup> GOTTSCHALK, *supra* note 7, at 133.

<sup>35</sup> *Id.* at 132-34.

<sup>36</sup> *Id.* at 133.

<sup>37</sup> PRISONERS IN 2015, *supra* note 9, at 2, tbl. 1; JAIL INMATES IN 2015, *supra* note 9, at 2, tbl. 1.

<sup>38</sup> PRISONERS IN 2015, *supra* note 9, at 5, tbl. 2.

<sup>39</sup> JAIL INMATES IN 2015, *supra* note 9, at 10.

elected officials—most often sheriffs. Nationwide, more than 60% of the people in jail are being detained pretrial and have not actually been convicted of a crime; the remainder are typically serving sentences too short to justify transfer to a prison—usually one year or less.<sup>40</sup> This represents a mass sorting of rich defendants from poor defendants, as the vast majority of those detained pretrial are held simply because they cannot afford to pay bail.<sup>41</sup> Those who cannot make bail feel increased pressure to plead guilty because each successive day in jail means lost liberty, lost income, and separation from family.<sup>42</sup> Continued pretrial detention may also mean denial of necessary medical care or even death.<sup>43</sup>

Pretrial detention has also been linked to worse case outcomes. The New York City Criminal Justice Agency found that in nonfelony cases, defendants who were released pending disposition had a 50 percent conviction rate, but detained defendants had a 92 percent conviction rate.<sup>44</sup> Similarly, a recent study funded by the Arnold Foundation found that defendants held during their entire pretrial period were significantly more likely to be sentenced to jail or prison upon conviction, with longer sentences than their non-detained counterparts.<sup>45</sup>

Given the widespread lack of community mental health and drug treatment resources, jails often serve as the de facto first-line institutions for people in need of mental health and drug addiction treatment.<sup>46</sup> Jails are also where people targeted by aggressive policing policies are most

<sup>40</sup> *Id.* at 5, tbl. 4.

<sup>41</sup> Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR. 24-25 (Aug. 2014), <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf> [https://perma.cc/63CJ-8A4F] (estimating that approximately 90% of felony defendants detained pretrial are detained simply due to lack of money to pay bail).

<sup>42</sup> Nick Pinto, *The Bail Trap*, N.Y. TIMES MAGAZINE (Aug. 13, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [https://perma.cc/PRG9-FSTC] (“By encouraging poor defendants to plead guilty, bail keeps the system afloat.”); *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUMAN RIGHTS WATCH 31-32 (Dec. 2, 2010), [https://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf) [https://perma.cc/5L9M-85RP] (“Judges, prosecutors, and defense counsel all know that defendants at arraignments who face the prospect of pretrial detention because they cannot post bail are likely to agree to plea bargains.”).

<sup>43</sup> *See, e.g.*, Order Granting Motion for Preliminary Injunction at 30-33, 39, *Hernandez v. County of Monterey*, No. 5:13-cv-2354-PSG (N.D. Cal 2015), <http://www.clearinghouse.net/chDocs/public/JC-CA-0107-0008.pdf> [https://perma.cc/T8CU-PMGX] (granting preliminary injunction regarding unconstitutional medical care, suicide risks, and barriers to disability access); *Cruel and Unusual Punishment: How a Savage Gang of Deputies Controls LA County Jails*, ACLU & ACLU OF S. CALIF. 1, 4 (Sept. 2011), [https://www.aclu.org/sites/default/files/field\\_document/78162\\_aclu\\_jails\\_r2\\_lr.pdf](https://www.aclu.org/sites/default/files/field_document/78162_aclu_jails_r2_lr.pdf) [https://perma.cc/EM9J-R96Z] (describing jail’s culture of deputy-on-prisoner violence); Mitch Smith, *Sandra Bland’s Mother Files Wrongful-Death Lawsuit*, N.Y. TIMES (Aug. 4, 2015), <http://www.nytimes.com/2015/08/05/us/sandra-bland-family-lawsuit.html> [https://perma.cc/5FU3-NUBK] (describing death of Black motorist in a Texas jail).

<sup>44</sup> Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases*, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC. 56 (Nov. 2007); Mary T. Phillips, *Bail, Detention, & Nonfelony Case Outcomes*, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC. 1, 5-6 (May 2007). This relationship between detention and conviction continued to remain significant even after controlling for the number and severity of arrest charges, the offense type of the arraignment charge, the defendant’s criminal history, demographic characteristics, borough, and length of case processing, and other factors. *Id.* at 6.

<sup>45</sup> *Pretrial Criminal Justice Research*, LAURA AND JOHN ARNOLD FOUND. 3 (Nov. 2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf) [https://perma.cc/4QLF-RSMQ].

<sup>46</sup> *See* Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America*, VERA INSTITUTE OF JUSTICE 11-12 (Feb. 2015),

likely to be incarcerated. “Broken Windows” policing strategies—which target minor public order offenses such as vandalism, panhandling, and public drinking<sup>47</sup>—are a prime example. The chief impact of such strategies is to create a steady number of arrests of poor people of color.<sup>48</sup> Additionally, aggressive efforts to collect criminal justice fines and fees create another source of unnecessary arrests. These arrests result in jail stays.<sup>49</sup> Unnecessary jailing of people arrested for minor offenses can also cut them off from jobs, family, and other financial and social supports—making them more likely to commit crimes than if they had remained connected to these sources of stability. A recent study found that for people identified as low risk for pretrial misconduct, spending as little as two to three days in jail after being charged was associated with significantly increased chances they would commit new crimes within the next two years compared to similar people who had been released within 24 hours.<sup>50</sup>

## 2. Community Corrections Facilities and Supervision

The reach of the carceral state extends far beyond prisons and jails. On any given day, there are an unknown number of people in residential community corrections facilities and nearly 4.7 million people on some form of community supervision, such as probation or parole.<sup>51</sup>

### a. Community Corrections Facilities

There is no concise, generally agreed-upon definition of a community corrections facility. Generally speaking, they are residential facilities in or near population centers where prisoners are assigned either to serve a sentence in lieu of prison or to serve the final portions of their sentence.<sup>52</sup> In the federal system, the Federal Bureau of Prisons (BOP) has broad discretion

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front-door-report.pdf [https://perma.cc/E2QR-ZFF9].

<sup>47</sup> George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, THE ATLANTIC (March 1982).

<sup>48</sup> K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281, 307 (2009) (“[T]he arrests resulting from ZTP are in the hundreds of thousands, are for particularly minor offenses, disproportionately affect people of color, and do not result in more seizures of weapons.”). The consequences of Broken Windows policing can also be deadly. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [https://perma.cc/D3Y5-RSB5].

<sup>49</sup> See discussion *infra* Section I.C.2.d. (discussing criminal justice debt as path to incarceration). See also, e.g., *In for a Penny: The Rise of America’s New Debtors’ Prisons*, ACLU (Oct. 2010), [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf) [https://perma.cc/B7EK-2YLC] [hereinafter ACLU, *In for a Penny*]; *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CENTER 8, 32 (Oct. 2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [https://perma.cc/3RWC-YZTF]; *Investigation of the Ferguson Police Department*, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION 52-58 (March 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/435Z-GHHS].

<sup>50</sup> *Pretrial Criminal Justice Research*, *supra* note 45, at 1, 5.

<sup>51</sup> See Danielle Kaeble & Thomas P. Bonczar, *NCJ 250230, Probation and Parole in the United States*, 2015, BUREAU OF JUSTICE STATISTICS 1 (2016) (community supervision statistics at year-end 2015).

<sup>52</sup> See Ray Knapp & Peggy Burke, *Residential Community Corrections Facilities: Current Practice and Policy Issues*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORRECTIONS 5-7 (Aug. 1992), <http://static.nicic.gov/Library/010938.pdf> [https://perma.cc/94RE-3FVN].

to decide whether to place a person in a secure prison or community corrections facility, regardless of what the sentencing court recommends.<sup>53</sup>

Nobody knows how many community corrections facilities exist in the United States. However, within the federal system, about 10,000 people are in BOP-contracted residential reentry centers on any given day, which represents about five percent of the BOP's custody population.<sup>54</sup> So a rough, back-of-the-envelope estimate would suggest there may be somewhere in the neighborhood of 50,000 to 100,000 people in similar facilities under the jurisdiction of state correctional authorities.<sup>55</sup>

Unlike prisons, community corrections facilities are usually not directly operated by the government. Instead, they are operated by nongovernmental entities—sometimes non-profit, sometimes for-profit—that contract with correctional agencies.

In theory, community corrections facilities are supposed to provide enhanced services and education in a residential, community-based setting. In practice, however, they can become dysfunctional, dangerous places that fail to provide the promised services, allow violence and rape inside their doors to go unchecked, or both, and ultimately fail to ease the difficult transition from prison to the community.<sup>56</sup> A recent Rutgers University study concluded that “very little is known about the effectiveness” of halfway houses and that “[r]esearch has not yet suggested an evidence-based residential reentry model for handling the complex problems of special needs groups on the path to reintegration.”<sup>57</sup> Indeed, one recent study of community corrections centers in Pennsylvania found that spending time in such a facility was “a significant predictor of recidivism,” and that the control group (i.e., people who were simply put on parole supervision after release from prison) generally had better outcomes.<sup>58</sup> Similarly, a recent study of BOP halfway houses concluded that participation in halfway house programs “does not have a more positive influence on offender outcomes,” and that increasing the length of time a person spends in a halfway house has no relationship with positive outcomes.<sup>59</sup>

<sup>53</sup> See 18 U.S.C. § 3621(b).

<sup>54</sup> *Population Statistics*, BUREAU OF PRISONS, [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp) [<https://perma.cc/86VV-PR4L>] (last visited Dec. 21, 2016) (indicating 9,269 people in Residential Reentry Centers).

<sup>55</sup> See PRISONERS IN 2015, *supra* note 9, at 3, tbl. 1 (listing number of prisoners under jurisdiction of federal and state correctional authorities). This is a very rough estimate because it does not account for varying state policies and practices.

<sup>56</sup> See, e.g., Justin Moyer, *To some, D.C. halfway house is more like 'Hopeless Village,'* WASH. POST (Aug. 29, 2013), [https://www.washingtonpost.com/opinions/2013/08/29/cd282a86-f4c1-11e2-9434-60440856fadf\\_story.html](https://www.washingtonpost.com/opinions/2013/08/29/cd282a86-f4c1-11e2-9434-60440856fadf_story.html) [<http://perma.cc/4F2P-8JJQ>]; Sam Dolnick, *At a Halfway House, Bedlam Reigns*, N.Y. TIMES (June 17, 2012), <http://nyti.ms/1wU5IBH> [<https://perma.cc/B8FS-YY54>]; Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2012), <http://nyti.ms/1C0iW5A> [<http://perma.cc/G6ZJ-N8AG>].

<sup>57</sup> RUTGERS UNIVERSITY CTR. FOR BEHAVIORAL HEALTH SERVICES & CRIMINAL JUSTICE RESEARCH, *HALFWAY FROM PRISON TO THE COMMUNITY: FROM CURRENT PRACTICE TO BEST PRACTICE* 8, 2 (2013), <https://cafwd.app.box.com/s/oit9lo07b72124qjjcik> [<http://perma.cc/CJC2-PJLQ>] [hereinafter *HALFWAY FROM PRISON*].

<sup>58</sup> EDWARD J. LATESSA, CHRISTOPHER T. LOWENKAMP, & KRISTIN BECHTEL, CTR. FOR CRIMINAL JUSTICE RESEARCH, UNIV. OF CINCINNATI, *COMMUNITY CORRECTION CENTERS, PAROLEES, AND RECIDIVISM: AN INVESTIGATION INTO THE CHARACTERISTICS OF EFFECTIVE REENTRY PROGRAMS IN PA.*, FINAL REPORT 4-6, 173, (May 2009), [https://www.uc.edu/content/dam/uc/ccjr/docs/reports/project\\_reports/PA\\_ReentryFinal\\_report.pdf](https://www.uc.edu/content/dam/uc/ccjr/docs/reports/project_reports/PA_ReentryFinal_report.pdf) [<http://perma.cc/7Z3D-BY8P>].

<sup>59</sup> JENNIFER LERCH, FAYE S. TAXMAN, & AMY MERICLE, *ADVANCING CORRECTIONAL EXCELLENCE!*, GEORGE MASON UNIV., *WHAT WORKS IN RESIDENTIAL REENTRY CENTERS - REPORT 6: TECHNICAL VIOLATION RATES AND REARREST RATES ON FEDERAL PROBATION AFTER RELEASE FROM AN RRC* 9 (Dec. 2010), <https://www.gmuace.org/documents/publications/2010/Monograph%206.pdf> [<http://perma.cc/XU8L-3W5D>].

Various best practices for community corrections facilities have been proposed, but those best practices also include the caveat that research on these facilities “is in its infancy.”<sup>60</sup> Additionally, there is little uniformity in how government contracts with such facilities are structured.<sup>61</sup>

*b. Supervision*

Supervision can be imposed at three different stages of the criminal justice process: pretrial supervision for people released pending trial, a sentence of probation imposed in lieu of some or all of a prison or jail term, and parole supervision following release from prison or jail.

Pretrial supervision is often the fate of the people “lucky” enough to avoid pretrial detention. In years past, people who successfully paid bail pending trial or who were released without bail were generally not subject to supervision. Now, however, the combination of an ever-expanding carceral state and new technologies that make mass pretrial supervision possible have made it more attractive for jurisdictions to expand pretrial supervision to people who might otherwise have simply been released pending trial. Electronic monitoring—chiefly tracking people with GPS monitors—has become especially common. Between 2005 and 2015, the number of people in the criminal justice system subjected to electronic monitoring grew by nearly 140 percent.<sup>62</sup>

Since the mid-twentieth century, probation supervision has operated as a formalized function of the courts.<sup>63</sup> A probation officer’s role is not limited to merely carrying out court-ordered supervision; they typically also conduct factual investigations and prepare reports that guide the judge’s decisions of whether to release a defendant pending trial, whether to permit a defendant to receive probation instead of a prison sentence, and what conditions to impose on both pretrial release and post-sentence probation.<sup>64</sup>

Probation generally involves severe limitations on a supervisee’s Fourth Amendment rights; the U.S. Supreme Court has held that probation conditions may authorize warrantless searches of a supervisee’s home and person without probable cause, and any law enforcement officer (not just probation officers) may freely take advantage of this warrantless search

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<sup>60</sup> HALFWAY FROM PRISON, *supra* note 57, at 14-15.

<sup>61</sup> *See id.* at 10-13.

<sup>62</sup> PEW CHARITABLE TRUSTS, USE OF ELECTRONIC OFFENDER-TRACKING DEVICES EXPANDS SHARPLY 1 (Sept. 2016), [http://www.pewtrusts.org/~media/assets/2016/10/use\\_of\\_electronic\\_offender\\_tracking\\_devices\\_expands\\_sharply.pdf](http://www.pewtrusts.org/~media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf) [<https://perma.cc/KC7L-3WRG>]. *See* Molly Carney, Note, *Correction through Omniscience: Electronic Monitoring and the Escalation of Crime Control*, 40 WASH. U.J.L. & POL’Y 279, 294 (2012) (contending that electronic monitoring brings new populations under criminal justice supervision, not just those that would otherwise be incarcerated); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1367-68 (2008) (arguing that “the economics of technological control enable the regulation of greater numbers of persons under less stringent conditions for a longer period of time and to a greater degree than an equivalent physical intrusion.”). *But see* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1118, 1378-80 (2014) (conceding that availability of electronic monitoring would likely lead to increased use of monitoring on defendants who would otherwise have been released on bail or personal recognizance, but contending that “the liberty and privacy costs [to these individuals] must be weighed against the benefits to those who would otherwise not be released”).

<sup>63</sup> Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155 (1997) (describing nineteenth-century origins of probation in an informal arrangement between a judge, a bootmaker, and an alcoholic, and describing its later formalization and professionalization).

<sup>64</sup> *Id.* at 159-61.

authority.<sup>65</sup> Additionally, a sentence of probation typically involves numerous behavioral requirements. Within the federal system, for example, all probation supervisees must submit to periodic drug tests regardless of whether or not their crime was drug-related, and standard conditions of probation include not traveling outside a specific geographic area, avoiding places where drugs are illegally sold or used, avoiding associating with “any persons engaged in criminal activity,” avoiding associating with anyone else with a felony record without the probation officer’s permission, and permitting the probation officer to “visit the defendant at any time at home or elsewhere” to observe and seize “contraband.”<sup>66</sup> Other jurisdictions impose similar restrictions as a matter of course, and courts are free to pile on additional conditions with little substantive appellate review.<sup>67</sup> When a person violates any of these conditions, his or her probation officer has discretion to decide whether to bring the violation to the court’s attention and, if so, what sanctions to recommend to the court.<sup>68</sup> Most commonly, a sentence of probation is paired with a suspended prison sentence for the original offense; this enables the judge (at the request of the probation officer) to respond to a violation by continuing or extending probation, modifying the terms of probation, or revoking probation and immediately imposing the original suspended prison sentence.<sup>69</sup> Additionally, some jurisdictions are experimenting with “flash incarceration” programs that empower probation officers to order limited periods in jail without a judicial hearing.<sup>70</sup>

<sup>65</sup> See *United States v. Knights*, 534 U.S. 112, 121-22 (2001) (warrantless police search of probation supervisee’s home supported by less than probable cause was constitutional, even though it had no relationship to his probation officer’s efforts to monitor probation compliance); *Griffin v. Wisconsin*, 483 U.S. 868, 876-88 (1987) (approving warrantless searches of probation supervisees without probable cause). Although the U.S. Supreme Court has not directly addressed whether a probation supervisee may be searched without any individualized suspicion at all, a number of circuit courts of appeal have answered this question in the affirmative. See, e.g., *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (upholding probation supervision condition imposing suspicionless, warrantless searches); *United States v. Monteiro*, 270 F.3d 465, 470-71 (7th Cir. 2001) (same); *United States v. Kingsley*, 241 F.3d 828, 837 (6th Cir. 2001) (same); *United States v. Sharp*, 931 F.2d 1310, 1311 (8th Cir. 1991) (same); *Owens v. Kelley*, 681 F.2d 1362, 1366 (11th Cir. 1982) (same).

<sup>66</sup> UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 5B1.3(a)(5) (drug testing), § 5B1.3(c) (other standard conditions) (Nov. 1, 2015), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf> [<http://perma.cc/6GCM-PADH>] [hereinafter 2015 SENTENCING GUIDELINES MANUAL].

<sup>67</sup> See Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1032-36 (2013) (conditions can range from general admonitions to bizarrely specific and problematic commands); See generally Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000) (describing extremely broad range of conditions that have survived appellate review, including commanding people not to live with their co-defendant spouses or fiances, acts of public shaming such as requiring drunk driver to at all times wear pink bracelet labeled “D.U.I. CONVICT,” and restrictions on freedom of association with only a tenuous relationship to the actual crime of conviction); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEORGETOWN L.J. 291 (2016) (arguing that standard probation conditions construct a definition of recidivism that contributes to overcriminalization).

<sup>68</sup> Petersilia, *supra* note 63, at 159.

<sup>69</sup> *Id.* at 165.

<sup>70</sup> See Hon. Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1033 (2013) (describing California flash incarceration program); See generally Lorenzo Arroyo, Working Paper, *Flash Incarceration: Due Process in an Era of Intermediate Sanctions* (Mar. 1, 2012), [http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/183091/doc/slspublic/Flash\\_Incarceration\\_Arroyo.pdf](http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/183091/doc/slspublic/Flash_Incarceration_Arroyo.pdf) [<http://perma.cc/DQ7Q-8E32>]. AMERICAN PROBATION AND PAROLE ASS’N, INDIVIDUAL STATE PROFILES SUMMIT ON EFFECTIVE RESPONSES TO PROBATION AND PAROLE VIOLATIONS (Dec. 11-12, 2012), <https://www.appa->

Parole enables prisoners to complete their sentences under supervision rather than serving their entire sentences in prison. Although most states restricted the use of parole in the 1970s (and the federal prison system and some states abolished discretionary parole), substantial numbers of people are released from prison to parole supervision each year.<sup>71</sup> Like probation, release on parole involves restrictions on liberty and onerous supervision requirements.<sup>72</sup> Indeed, the Supreme Court has explicitly stated that “parolees have fewer expectations of privacy than probationers” because rather than being part of the original sentence, parole is a conditional release from what would otherwise be continued incarceration.<sup>73</sup> Since the 1970s, parole supervision has also largely shifted from a casework model aimed at “restoring offenders to the community” into a supervision model whose primary goals are to closely monitor parolees and punish them for failing to meet all required conditions.<sup>74</sup>

*c. How Community Corrections and Supervision Feed Back into Mass Incarceration*

According to the Bureau of Justice Statistics, reincarcerations accounted for one-fifth of all exits from probation and more than a quarter of all exits from parole in 2015, most of which occurred because the supervisee had violated one or more probation or parole conditions.<sup>75</sup> As Cecelia Klingele argued in a recent law review article, community supervision often functions more like a “deferred sentence of incarceration” than a true alternative to incarceration.<sup>76</sup> Klingele notes that while conditions like curfews, monthly financial disclosures, restrictions on who the supervisee can socialize with, and required treatment programs may be reasonable when considered individually, the “sheer number of requirements imposes a nearly impossible burden on many offenders.”<sup>77</sup> A study of courts in Wisconsin found that defendants sentenced to community supervision were subject to an average of thirty conditions per person.<sup>78</sup> The more stringent the conditions, the higher the risk that the supervisee will be unable to successfully exit supervision.<sup>79</sup> Additionally, supervisees who are offered rehabilitative interventions, such as counseling or drug treatment, are often more likely to end up having probation or parole revoked

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net.org/eWeb/Resources/SPSP/State-Profiles-Individual.pdf [http://perma.cc/2UF3-6ZY3] (describing flash incarceration authority in Arkansas, Louisiana, Missouri, New Hampshire, North Carolina, Oregon, South Carolina, and Washington); NAT'L CTR. FOR STATE COURTS, ADMINISTRATIVE RESPONSES TO PROBATION VIOLATIONS: DUE PROCESS AND SEPARATION OF POWERS ISSUES (2012), <http://www.ncsc.org/~media/Microsites/Files/CSI/Education/admin%20sanctions%20legal%20memo%2012-18.ashx> [http://perma.cc/TS7W-A2AQ] (analyzing whether flash incarceration is permissible under due process and separation of powers).

<sup>71</sup> Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 433-34 (2011); Klingele, *supra* note 67, at 1027-28.

<sup>72</sup> *See id.* at 435-36 (describing typical conditions, and noting the number and types of conditions have increased over the last fifty years).

<sup>73</sup> *Samson v. California*, 547 U.S. 843, 857 (2006) (upholding police officer's suspicionless, warrantless search of parolee).

<sup>74</sup> Scott-Hayward, *supra* note 71, at 439; Klingele, *supra* note 67, at 1028.

<sup>75</sup> *See* Kaebler & Bonczar, *supra* note 51, at 4, tbl. 3, 6, tbl. 5.

<sup>76</sup> Klingele, *supra* note 67, at 1020.

<sup>77</sup> *Id.* at 1035.

<sup>78</sup> KIT VAN STELLE & JANA GOODRICH, UNIV. WIS. POPULATION HEALTH INST., THE 2008/2009 STUDY OF PROBATION AND PAROLE REVOCATION 158 (2009), <https://uwphi.pophealth.wisc.edu/about/staff/van-stelle-kit/2008-2009-study-of-probation-and-parole-revocation.pdf> [https://perma.cc/UZM5-SR89].

<sup>79</sup> Petersilia, *supra* note 63, at 165.

than those who are not offered treatment services.<sup>80</sup> This makes intuitive sense—the more frequently a person must travel to check in with a probation or parole officer, go to court (which often involves long waits before one’s case is called), and attend required programming, the more difficult it is for that person to maintain a job and keep strong family connections. Yet maintaining employment and supporting one’s family are often themselves set as conditions of supervision—leaving the supervisee caught between the Scylla of failure to check in and the Charybdis of unemployment.<sup>81</sup>

Community corrections facilities suffer from similar issues. For people who are already at a low risk of recidivism, residential “rehabilitation” programs can actually increase the likelihood of future criminal justice involvement.<sup>82</sup> As criminal justice researchers Lowenkamp and Latessa put it, “[w]hen we take lower-risk offenders, who by definition are fairly prosocial (if they weren’t, they wouldn’t be low-risk), and place them in a highly structured, restrictive program, we actually disrupt the factors that make them low-risk” by cutting them off from prosocial contacts such as jobs, family, and peers.<sup>83</sup>

For these reasons, both community supervision and community corrections facilities can function as easy paths back to incarceration.<sup>84</sup> Indeed, one study recently concluded that patterns of probation and incarceration after the mid-1980s are “consistent with the idea of probation as a net-widener that played a role in the build-up of mass incarceration, with both populations expanding throughout the build-up.”<sup>85</sup>

### 3. Criminal Justice Debt as a Further Path into Incarceration

In many places, defendants who cannot afford to pay fines and fees imposed on conviction—which frequently add up to thousands of dollars, and can even accumulate interest while the person is incarcerated—end up being placed on supervision to pay these debts, and then being arrested and re-jailed solely for failing to pay them off. This phenomenon—dubbed “modern-day debtors’ prisons” in 2010 by the ACLU and the Brennan Center for Justice—violates the Equal Protection Clause of the Fourteenth Amendment.<sup>86</sup>

Nevertheless, modern-day debtors’ prisons remain widespread. In 2014 and 2015 alone, the ACLU, Southern Poverty Law Center, and Equal Justice Under Law filed debtors’ prison

<sup>80</sup> Klingele, *supra* note 67, at 1038.

<sup>81</sup> See, e.g., 2015 SENTENCING GUIDELINES MANUAL, *supra* note 66, at § 5B1.3(c) (standard conditions of probation in the federal system include “the defendant shall support the defendant’s dependents and meet other family responsibilities” and “the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons”).

<sup>82</sup> See generally, Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. ST. THOMAS L.J. 521 (2006).

<sup>83</sup> Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMMUNITY CORRECTIONS 7 (2004), [https://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04\\_final\\_complete.pdf](https://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf) [<https://perma.cc/U8L4-8PZ6>].

<sup>84</sup> See Klingele, *supra* note 67, at 1058.

<sup>85</sup> Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL’Y 51, 64 (2013).

<sup>86</sup> ACLU, *In for a Penny*, *supra* note 49, at 81; BRENNAN CENTER, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY, *supra* note 49 at 19. The U.S. Supreme Court held in *Bearden v. Georgia* that courts must inquire into a defendant’s reasons for failing to pay a fine or restitution before sentencing him to prison for that failure; to imprison someone merely because of poverty would be “fundamentally unfair.” *Bearden v. Georgia*, 461 U.S. 660, 668-69, 672 (1983).

lawsuits in Alabama, Louisiana, Mississippi, Missouri, and Washington.<sup>87</sup> While there has never been a comprehensive, national survey of how many people are incarcerated for criminal justice debt, it is clear that debtors' prisons are not restricted to one region of the country; in-depth reports by the U.S. Department of Justice, the ACLU, and others have documented debtors' prisons in states as far-flung as Georgia, Louisiana, Michigan, Missouri, Ohio, and Washington.<sup>88</sup> Moreover, the widespread reliance of the criminal justice system on such fines and fees heightens the risks that local courts will engage in such practices.<sup>89</sup>

#### 4. Immigration Detention

Immigration detention is another component of mass incarceration. It is carried out under the authority of the Immigration and Customs Enforcement ("ICE"), the interior enforcement agency of the U.S. Department of Homeland Security ("DHS"). Its purpose is not to punish, but to hold people while their civil immigration proceedings are pending. In practice, however, immigrants are detained in jails and jail-like facilities.<sup>90</sup>

ICE detention is far smaller than the criminal justice system as a whole: with its daily capacity of 34,000 detention beds, ICE holds about as many people as all of the parish jails in Louisiana.<sup>91</sup> However, the immigration detention system is important to examine because it has been a vanguard of both privatized, for-profit incarceration and privatized, for-profit supervision. It is estimated that more than 60% of immigration detention beds are run by private prison companies.<sup>92</sup> These privately run beds are located both in private prisons dedicated to immigration

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<sup>87</sup> *Shutting Down Debtors' Prisons*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/> [<https://perma.cc/CBJ4-JALZ>] (last visited on Feb. 24, 2016); *SPLC lawsuit closes debtors' prison in Alabama*, SOUTHERN POVERTY LAW CENTER (Aug. 25, 2014), <https://www.splcenter.org/news/2014/08/26/splc-lawsuit-closes-debtors-prison-alabama-capital> [<https://perma.cc/VMK6-BGQD>]; *Kennedy v. City of Biloxi*, ACLU, <https://www.aclu.org/cases/kennedy-v-city-biloxi> [<https://perma.cc/XD82-DRTT>] (last updated Sept. 27, 2016); *Fuentes v. Benton County*, ACLU, <https://www.aclu.org/cases/fuentes-v-benton-county> [<https://perma.cc/FS6A-YSXZ>] (last updated June 1, 2016).

<sup>88</sup> ACLU, *In for a Penny*, *supra* note 49, at 17, 29, 43, 55, 65; *The Outskirts of Hope*, ACLU OF OHIO (Apr. 4, 2014), <http://www.acluohio.org/the-outskirts-of-hope> [<https://perma.cc/Q2BP-DQ79>] (last updated Mar. 14, 2014); US DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (March 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/PR49-V39T>]; See generally Koran Addo, *ArchCity Defenders saw problems with municipal courts before Ferguson turmoil*, ST. LOUIS POST-DISPATCH (Apr. 15, 2015), [http://www.stltoday.com/news/local/metro/archcity-defenders-saw-problems-with-municipal-courts-before-ferguson-turmoil/article\\_f1493907-7c8c-55af-a68b-6e36df0c2cae.html](http://www.stltoday.com/news/local/metro/archcity-defenders-saw-problems-with-municipal-courts-before-ferguson-turmoil/article_f1493907-7c8c-55af-a68b-6e36df0c2cae.html) [<https://perma.cc/7WPN-SEUD>].

<sup>89</sup> See ACLU, *In for a Penny*, *supra* note 49, at 9.

<sup>90</sup> See U.S. COMMISSION ON CIVIL RIGHTS, STATUTORY ENFORCEMENT REPORT: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 184 (Sept. 2015), [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2015.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf) [<https://perma.cc/4KR5-DAPL>]; HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 33 (2011), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> [<https://perma.cc/L7V7-53WQ>].

<sup>91</sup> See TODD D. MINTON ET AL., BUREAU OF JUSTICE STATISTICS, CENSUS OF JAILS: POPULATION CHANGES, 1999-2013, at 15 T.9 (Dec. 2015), <http://www.bjs.gov/content/pub/pdf/cjpc9913.pdf> [<https://perma.cc/86HE-58PX>].

<sup>92</sup> BETHANY CARSON & ELEANA DIAZ, GRASSROOTS LEADERSHIP, PAYOFF: HOW CONGRESS ENSURES PRIVATE PRISON PROFIT WITH AN IMMIGRATION DETENTION QUOTA 6 (Apr. 2015), <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota> [<https://perma.cc/7PNR-SVTY>].

detention and in privatized county jails that contract out some or all of their beds to ICE. (Just 11.8% of ICE beds are actually operated by the agency itself.)<sup>93</sup> Additionally, since 2004, ICE has entirely contracted out the function of supervising immigrants on release—both the contract for intensive supervision (“ISAP”) and a recent family supervision contract have been awarded to subsidiaries of GEO Group, a private prison company.<sup>94</sup> As of February 2016, GEO reported that there were some 44,000 people being supervised under its ISAP contract; the number of people being supervised under the new family case management contract has not yet been publicly reported.<sup>95</sup> The current state of immigration detention—most notably, ICE’s apparent inability to carry out significant functions except through private-prison contractors—is largely a product of the agency’s rapid growth. In 1985, ICE’s predecessor agency held fewer than 5,000 people in immigration detention—but that figure more than quadrupled by the year 2000.<sup>96</sup> When combined with a lack of in-house correctional expertise and a disinclination to build its own detention facilities, these rapidly increasing demands left ICE with a clear path of least resistance: private prisons.

The resulting dependence of ICE on these private-prison contractors should serve as a cautionary tale for criminal justice agencies that are considering greater reliance on such contractors. Depending largely on the detention contractor’s willingness or resistance to adopt new standards, ICE detention contracts may specify no standards at all, standards that date back to the year 2000 (before the creation of DHS and ICE), interim 2008 standards, or the most recent 2011 standards.<sup>97</sup> And these standards are poorly enforced; ICE’s oversight mechanisms often fail to identify and address violations, and do not punish detention contractors even when substandard medical care contributes to preventable deaths in detention.<sup>98</sup> Significant concerns have been

<sup>93</sup> See *id.* at 3; NATIONAL IMMIGRANT JUSTICE CENTER, THE IMMIGRATION DETENTION TRANSPARENCY & HUMAN RIGHTS PROJECT: AUGUST 2015 REPORT 5 (Aug. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf> [https://perma.cc/JUT3-53EW].

<sup>94</sup> RUTGERS SCHOOL OF LAW-NEWARK IMMIGRATION RIGHTS CLINIC, FREED BUT NOT FREE 8 (July 2012), <http://lastradainternational.org/lisidocs/Freed%20but%20not%20Free.pdf> [https://perma.cc/W2JZ-DNR9] (describing 2004 contract award to BI, Inc.); Isaacs, *supra* note 6, at 8 (describing GEO acquisition of BI, Inc.); John Burnett, *As Asylum Seekers Swap Prison Beds For Ankle Bracelets, Same Firm Profits*, NAT’L PUBLIC RADIO (Nov. 13, 2015 4:56 PM), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits> [https://perma.cc/B4WX-44WF] (describing 2015 ICE contract award to GEO Care).

<sup>95</sup> George Zoley, *The GEO Group’s (GEO) CEO George Zoley on Q4 2015 Results - Earnings Call Transcript*, SEEKING ALPHA 8 (Feb. 17, 2016 5:29 PM), <http://seekingalpha.com/article/3904376-geo-groups-geo-ceo-george-zoley-q4-2015-results-earnings-call-transcript?page=8> [https://perma.cc/6JKP-QB96].

<sup>96</sup> See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1466 (2015) (illustrating rapid growth of immigration detention).

<sup>97</sup> GAO, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 30 (Oct. 2014), <http://www.gao.gov/assets/670/666467.pdf> [https://perma.cc/QZ5Y-C5HE]; NATIONAL IMMIGRANT JUSTICE CENTER, THE IMMIGRANT DETENTION TRANSPARENCY AND HUMAN RIGHTS PROJECT: AUGUST 2015 REPORT 6 (Aug. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf> [https://perma.cc/Y4FS-XJWF].

<sup>98</sup> See GAO, *supra* note 97; DETENTION WATCH NETWORK & NATIONAL IMMIGRANT JUSTICE CENTER, THE IMMIGRATION DETENTION TRANSPARENCY AND HUMAN RIGHTS PROJECT, LIVES IN PERIL: HOW INEFFECTIVE INSPECTIONS MAKE ICE COMPLICIT IN IMMIGRATION DETENTION ABUSE (Oct. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf> [https://perma.cc/UHB6-VF6U]; ACLU, DETENTION WATCH NETWORK, & NATIONAL IMMIGRANT JUSTICE CENTER, FATAL NEGLIGENCE: HOW ICE IGNORES DEATHS IN DETENTION (Feb. 2016), [http://immigrantjustice.org/sites/immigrantjustice.org/files/Fatal%20Neglect\\_ACLU](http://immigrantjustice.org/sites/immigrantjustice.org/files/Fatal%20Neglect_ACLU)

raised about over-use of GPS tracking by the GEO Group subsidiary that ICE relies on for ISAP. Such over-use appears to be incentivized by the contract, which both allows the contractor to select the level of supervision for each individual and compensates the contractor more generously when it puts a person on GPS tracking instead of less-intrusive telephone check-ins.<sup>99</sup> However, ICE currently has no choice but to rely on GEO Group or a similar contractor for these tasks because the agency lacks the capacity to carry out these functions itself.

Accordingly, even if ICE ultimately decides to cease relying on private prisons for detention, the agency will have difficulty extricating itself from these relationships without seriously reducing its detention population and implementing a more robust spectrum of alternatives to detention.<sup>100</sup> In December 2016, the Homeland Security Advisory Committee (a panel of experts appointed to advise the Secretary of Homeland Security on policy issues) recommended by a 17-to-5 vote that DHS make “a measured but deliberate shift away from the private prison model,” while noting that moving its current detention population into federally-run facilities would “take years, carry significant costs, and require congressional partnership.”<sup>101</sup>

## 5. The Role of Private Prisons in the Carceral State

Nationwide, about 7% of state prisoners and 18% of federal prisoners are held in private prisons run by for-profit companies.<sup>102</sup> However, there are major variations from state to state. For example, according to the Bureau of Justice Statistics, the State of Alabama houses fewer than 500 prisoners in private prisons—but more than 14,000 Texas prisoners and more than 12,000 Florida prisoners are in the custody of private prisons.<sup>103</sup> Meanwhile, more than 60% of ICE’s 34,000 immigration detention beds are in private prisons.<sup>104</sup> Additionally, the private prison

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<https://perma.cc/5NEV-XY93>].

<sup>99</sup> See, e.g., RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, *supra* note 94 at 13-16; Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 91-92 (2014) (expressing concern that use of risk assessments and electronic supervision will widen and normalize over-supervision of immigrants in removal proceedings); Maria Sacchetti, *Program to track immigrants grows, drawing scrutiny*, BOS. GLOBE (March 17, 2013), <https://www.bostonglobe.com/metro/2013/03/16/monitor/A6e2Hxv3hRAOJufFLqT7QN/story.html> [<https://perma.cc/X69A-7PLH>]. See also OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S ALTERNATIVES TO DETENTION (REVISED), 4 (Feb. 4, 2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf) [<https://perma.cc/W6R6-CYKW>] (ICE contractor is paid \$0.17 a day per participant for telephonic monitoring versus \$4.41 a day per participant for GPS monitoring).

<sup>100</sup> See Takei et al., *Shutting Down the Profiteers*, *supra* note 15, at 15-17.

<sup>101</sup> Carl Takei & Joanne Lin, *In Stunning Reversal, Law Enforcement, Military, and Security Advisors Urge Homeland Security to Shift Away from Private Prisons*, ACLU (Dec. 2, 2016), <https://www.aclu.org/blog/speak-freely/stunning-reversal-law-enforcement-military-and-security-advisors-urge-homeland> (explaining committee vote and findings); HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED DETENTION FACILITIES 2 & n.3, 11 n.14 (Dec. 1, 2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [<https://perma.cc/48G3-T33F>] (noting that the full committee voted to endorse the dissenting subcommittee view in footnote 14 calling for a phase out of private prisons, and to reject the subcommittee’s majority recommendation regarding continued reliance on private prisons).

<sup>102</sup> PRISONERS IN 2015, *supra* note 9, at 28, app. tbl. 2.

<sup>103</sup> *Id.*

<sup>104</sup> Carson & Diaz, *supra* note 92, at 3, 6.

industry is increasingly diversifying into for-profit community corrections facilities and for-profit post-release supervision, as well as supervised release for non-citizens awaiting outcomes in their immigration cases.<sup>105</sup>

While it has historical antecedents in both the Eighteenth-century English “keeper” system and the post-Civil War practice of “convict leasing,” the modern private prison industry did not begin until 1983, with the founding of Corrections Corporation of America<sup>106</sup> (“CCA/CoreCivic”).<sup>107</sup> In the ensuing decades, private prisons grew rapidly—from a population of approximately 7,000 prisoners in 1990, to 87,000 in 2000, to more than 126,000 in 2015<sup>108</sup>—because mass incarceration enabled them to make alluring offers to both their host communities and state correctional officials. To struggling rural towns with few opportunities for economic growth, the private prisons offered the prospect of desperately-needed new jobs—and, with the seemingly limitless growth of the prison population, these jobs seemed like they would be secure for many years to come. In exchange, the host communities eagerly provided generous development subsidies, including tax-free construction bonds, property tax abatements, and subsidized road and sewer connections.<sup>109</sup> To state correctional officials, the private prisons offered new prison space that could rapidly be brought online, did not require the state to commit

<sup>105</sup> See *infra* text accompanying notes 152-159. See also Isaacs, *supra* note 6, at 13.

<sup>106</sup> In October 2016, CCA rebranded itself as “CoreCivic,” citing its expansion into reentry services and other areas beyond traditional prisons. See Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, WALL ST. JOURNAL (Oct. 28, 2016), <http://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800>. However, the nonprofit organization Community Initiatives for Visiting Immigrants in Confinement (“CIVIC”), which provides services and support to detained and incarcerated immigrants, subsequently alleged that CCA’s new CoreCivic mark infringed on CIVIC’s existing mark. *Private Prison Company CCA Has Stolen the Name of a Nonprofit that Advocates Against the Use of Private Prisons*, CIVIC (Dec. 13, 2016), <http://www.endisolation.org/blog/archives/1165> [https://perma.cc/7DMK-J3BY]. Due to the likelihood of confusion with the CIVIC nonprofit organization, this Article refers to the rebranded private prison company as “CCA/CoreCivic” rather than “CoreCivic.”

<sup>107</sup> ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 10, 13 (Nov. 2011), [https://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf) [https://perma.cc/PL2H-FSK9]. Under the old English keeper system, private “keepers” who ran prisons supported themselves by billing prisoners and their families for food and accommodations. Though wealthy prisoners could pay to be held in furnished apartments, buy beer and meals, and receive conjugal visits, those without means were relegated to dungeon-like cells. *Id.*; see also MITCHEL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA, at 188-89 (2006). The U.S. convict leasing began after the end of the Civil War in the states of the former Confederacy. Under this system, tens of thousands of newly-freed African-Americans were arrested on trumped-up charges and then “leased” by local sheriffs to coal mines, plantations, and work camps across the South. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, 53-57, 89-93 (2008). Each business owner paid finder’s fees to the local sheriff and agreed to take custody of the “leased” prisoners in exchange for the right to extract forced labor from the men while they remained in his custody. *Id.* at 127-33. This practice continued well into the twentieth century, and provided a model for monetizing incarceration that the private prison industry would adapt and modernize decades later. *Id.* at 57. See generally DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (describing convict-lease system in Mississippi and subsequent creation of Parchman prison farm).

<sup>108</sup> U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995 iv (Aug. 1997); ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2000 7, tbl. 8 (Aug. 2001); PRISONERS IN 2015, *supra* note 9, at 28, app. tbl 2. Note that this number is underinclusive because it does not include immigration detention facilities, which are heavily privatized.

<sup>109</sup> Phillip Mattera et. al., GOOD JOBS FIRST, JAIL BREAKS: ECONOMIC DEVELOPMENT SUBSIDIES GIVEN TO PRIVATE PRISONS 21-23, 28-29 (Oct. 2001), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/jailbreaks.pdf> [https://perma.cc/FW9V-9RUJ].

to funding construction or being responsible for the entire multi-decade lifecycle of the physical plant (that risk was, instead, borne by the host community), and would use the magic of the free market to increase efficiency and decrease costs to the state.<sup>110</sup>

Yet neither promise was fully realized. For host communities, recent research has concluded that building new private prisons is actually associated with negative local job growth and depressed wages.<sup>111</sup> And there are numerous cautionary tales of rural towns that went deeply into debt to finance new private prisons only to be left with unpaid bills and ruined bond ratings after their prisoner contracts ended. (Meanwhile, the private prison companies were able to simply pack up and leave town.)<sup>112</sup>

As more and more prisoners are housed in private prisons, the early promises of flexibility and freedom give way to vendor lock-in: once a state houses a substantial number of people in private prisons, officials no longer have the ability to quickly cancel contracts and relocate prisoners if they become dissatisfied with the performance of the private prison industry.<sup>113</sup> Take, for example, the infamous Kingman private prison in Arizona. In 2010, three men escaped unnoticed from Kingman and then carjacked and murdered an elderly couple before they were rearrested.<sup>114</sup> A scathing security review by the Arizona Department of Corrections concluded that private prison company MTC's staff were inexperienced, undertrained, and routinely ignored alarms; the state therefore removed 238 high-risk prisoners from Kingman until MTC could address the problems cited in the review.<sup>115</sup> However, the company was unfazed; MTC even threatened to sue state officials, claiming that the state's removal of these prisoners violated a 97% minimum occupancy guarantee in its contract. The state caved, agreeing to compensate MTC an additional \$3 million for the empty prison beds.<sup>116</sup> It was not until 2015,

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<sup>110</sup> JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 15 (2001).

<sup>111</sup> Shaun Genter, Gregory Hooks & Clayton Mosher, *Prisons, jobs and privatization: The impact of prisons on employment growth in rural US counties, 1997–2004*, 42 SOCIAL SCIENCE RESEARCH 596-610, 606-08 (2013).

<sup>112</sup> See, e.g., John Burnett, *Private Prison Promises Leave Texas Towns In Trouble*, NAT'L PUBLIC RADIO (Mar. 28, 2011), <http://n.pr/i1MhWx> [<https://perma.cc/532A-KYL5>] (describing how Littlefield, Texas borrowed \$10 million to build a private prison that went empty after Idaho stopped sending prisoners and the private prison company GEO Group left town); BANKING ON BONDAGE, *supra* note 107, at 22-23 (describing how Hardin, Montana issued \$27 million in municipal bonds to finance a private prison but failed to obtain any contracts for prisoners); See Cristina Costantini & Jorge Rivas, *Texas town strikes private prison deal, then it all goes wrong*, FUSION.NET (Apr. 8, 2015), <http://fusion.net/story/115888/texas-town-strikes-private-prison-deal-then-it-all-goes-wrong/> [<https://perma.cc/9Q69-4NVC>] (describing how Willacy, Texas is struggling to repay \$63 million in bond debt after the Federal Bureau of Prisons cancelled its contract for a private prison in Willacy).

<sup>113</sup> See Dolovich, *supra* note 6, at 495-500 (discussing limited willingness of state agencies to cancel private prison contracts).

<sup>114</sup> Bob Ortega, *Arizona prisons slow to fix flaws in wake of Kingman escape*, ARIZ. REPUBLIC, Jun. 26, 2011, <http://www.azcentral.com/news/articles/2011/06/26/20110626arizona-prison-safety-improvements.html> [<https://perma.cc/JE9R-BE79>].

<sup>115</sup> See Bob Ortega, *Arizona prison oversight lacking for private facilities*, ARIZ. REPUBLIC, Aug. 7, 2011, <http://www.azcentral.com/news/articles/2011/08/07/20110807arizona-prison-private-oversight.html> [<https://perma.cc/UR7D-VDH7>].

<sup>116</sup> IN THE PUBLIC INTEREST, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS, 9 (2013), <http://www.njjn.org/uploads/digital-library/Criminal-Lockup-Quota,-In-the-Public-Interest,-9.13.pdf> [<https://perma.cc/AV9U-WK2L>].

after a riot injured 16 people and badly damaged the facility, that the state finally decided to cancel MTC's contract—and awarded it to a different private prison company (GEO Group, which had contributed \$52,000 to the governor's reelection campaign).<sup>117</sup>

The lock-in problem is even worse when a private prison company both owns and manages the prison: in that situation, cancelling contracts and relocating prisoners would require government officials to either build an entire new prison or identify available space elsewhere (usually out-of-state) owned by another private prison company.<sup>118</sup> In 2010, for example, the Federal Bureau of Prisons was considering whether to renew its contract with the GEO Group's Reeves prison in Texas. Although BOP officials concluded that the prison contractor "did not fulfil [sic] contract terms from [2006] award until Oct. 2010," "Lack of healthcare has greatly impacted inmate health and wellbeing," and "Contractor shows little sign of improvement," they chose to renew the contract because non-renewal would cost time and money and cause BOP to lose its "credibility as a solid customer" with the private prison companies.<sup>119</sup> That "credibility" came at a price. A 2015 contract audit by the U.S. Department of Justice's Inspector General identified numerous subsequent performance and staffing issues at Reeves as well as millions of dollars in "unallowable or unsupported costs" paid to the contractor.<sup>120</sup>

The limited competition in the private prison "market" further worsens the problem of vendor lock-in. The market is often described as an effective duopoly of CCA/CoreCivic and GEO Group.<sup>121</sup> Together, these two companies dominate the market, with combined annual

<sup>117</sup> Craig Harris, *Arizona cuts ties with private-prison operator over Kingman riot*, ARIZ. REPUBLIC, Aug. 27, 2015, <http://www.azcentral.com/story/news/arizona/politics/2015/08/26/arizona-kingman-riot-cause-corrections-department-report/32432963/> [<https://perma.cc/Q27V-YHQ4>]; See Laurie Roberts, *Roberts: Private prison contract goes to Ducey contributor*, ARIZ. REPUBLIC, Oct. 28, 2015, <http://www.azcentral.com/story/opinion/op-ed/laurieroberts/2015/10/28/roberts-private-prison-contract-goes-ducey-contributor/74750596/> [<https://perma.cc/LY75-8VBK>].

<sup>118</sup> In statements to its investors, CCA/CoreCivic states that its owned-and-managed facilities have a greater than 90% contract retention rate because of "high barriers to entry & switching costs;" for its government customers, constructing a replacement prison would require "significant capital" and a "long construction timeline." CCA, FOURTH QUARTER 2015 INVESTOR PRESENTATION, at A-13, (Feb. 2016), <http://www.cca.com/investors/presentations-webcasts-events> [<https://perma.cc/SS6M-ZZZ5>] (click on "Fourth Quarter 2015 Investor Presentation"). Both CCA/CoreCivic and GEO, the two largest private prison companies in the United States, have shifted most of their portfolios to owned-and-managed facilities rather than managed-only facilities. As of December 31, 2015, CCA/Corecivic reported that of its total portfolio of approximately 88,500 beds, only 15,048 (17%) were on management-only contracts and the remainder were owned by the company. CCA, 2015 ANNUAL REPORT ON FORM 10-K FOR THE FISCAL YEAR ENDING DECEMBER 31, 2015, at 53, 65 (Feb. 25, 2016), <http://www.cca.com/investors/financial-information/annual-reports> [<https://perma.cc/D6TM-ZU7M>]. As of the same date, of GEO's portfolio of 86,054 beds, 32,992 (38%) were on management-only contracts and the remainder were owned by the company. GEO, SUPPLEMENTAL INFORMATION, FOURTH QUARTER AND FULL YEAR 2015, at 10 (Feb. 17, 2016), <http://www.sn1.com/irweblinkx/QuarterlyResults.aspx?iid=4144107> [<https://perma.cc/5SRR-7QL2>].

<sup>119</sup> ACLU, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM, 54-55 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>. [<https://perma.cc/LX6V-48EK>].

<sup>120</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T. OF JUSTICE, AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS, i-ii, 17 (2015), <https://oig.justice.gov/reports/2015/a1515.pdf> [<https://perma.cc/KV93-74D3>].

<sup>121</sup> See, e.g., Henry Hoffman, *Corrections Corp. of America Can Help Right Your Profile*, SEEKING ALPHA (Aug. 6, 2010, 10:15 AM), <http://seekingalpha.com/article/219078-corrections-corp-of-america-can-help-right-your-portfolio> [<https://perma.cc/6NVZ-GCKN>]; Joe Weisenthal, *This Investor Presentation For A Private Prison Is One of the Creepiest Presentations We've Ever Seen*, BUSINESS INSIDER (Mar. 12, 2012, 1:06 PM), <http://www.businessinsider.com/>

revenues exceeding \$3 billion and nearly 175,000 facility beds.<sup>122</sup> The third-largest private prison company, privately-held MTC, is markedly smaller; its corrections division consists of about 26,000 beds.<sup>123</sup> CCA/CoreCivic and GEO Group have acquired essentially all other competitors of any size.<sup>124</sup> It is unlikely that the market will become more competitive in the future, because the significant capital requirements for prison construction and the established market advantages held by CCA/CoreCivic and GEO create high barriers to entry.<sup>125</sup>

Evidence of the claimed cost savings from private prisons has been at best mixed. For example, from 2008 to 2010, Arizona's own Department of Corrections repeatedly concluded that the state was paying more money to house prisoners in private prisons than in comparable state prisons.<sup>126</sup> A number of other studies have reached similar conclusions.<sup>127</sup> Meanwhile, the most prominent study to date finding that private prisons offered a better value than public prisons was actually the subject of a university ethics complaint because its authors failed to disclose the

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the-private-prison-business-2012-3 [https://perma.cc/37MX-9MLY]; Matt Kennard, *US states seek to privatize prisons*, FINANCIAL TIMES (Sept. 19, 2011, 6:21 PM), https://www.ft.com/content/6ba2792e-d00b-11e0-81e2-00144feabdc0.

<sup>122</sup> Corrections Corporation of America (CXW) Income Statement, YAHOO! FINANCE, https://finance.yahoo.com/q/iss?s=CXW&annual [https://perma.cc/BB6R-YYUZ] (last visited Apr. 12, 2016); The GEO Group, Inc (GEO) Income Statement, YAHOO! FINANCE, https://finance.yahoo.com/q/iss?s=GEO&annual [https://perma.cc/62V3-TRFV] (last visited Apr. 12, 2016); *supra* note 118 (discussing portfolios of CCA/CoreCivic and GEO).

<sup>123</sup> MANAGEMENT & TRAINING CORPORATION, CORRECTIONS (2015), http://www.mtctrains.com/sites/default/files/1pager\_Corrections.pdf [https://perma.cc/B66E-GDN7].

<sup>124</sup> *See generally*, *GEO to Buy Cornell Companies for \$685 Million*, DEALBOOK (April 19, 2010, 7:32 AM), http://dealbook.nytimes.com/2010/04/19/geo-to-buy-cornell-companies-for-685-million/ [https://perma.cc/D5V6-Z42Y]; *see generally*, *The GEO Group Announces Acquisition of Eight Correctional and Detention Facilities Totaling More Than 6,500 Beds*, BUSINESS WIRE (Jan. 26, 2015, 7:55 AM), http://www.businesswire.com/news/home/20150126005618/en/GEO-Group-Announces-Acquisition-Correctional-Detention-Facilities [https://perma.cc/D3ZD-JJVD].

<sup>125</sup> *See, e.g.*, UNIVERSITY OF OREGON INVESTMENT GROUP, CORRECTIONS CORPORATION OF AMERICA 6 (Nov. 19, 2009), http://uoinvestmentgroup.org/wp-content/uploads/2009/12/Corrections-Corp.-of-America.pdf [https://perma.cc/3B33-ESZX]; Mike Fee, *Corrections Corporation vs. GEO Group: Which Prison Stock Should You Buy?*, THE MOTLEY FOOL (June 16, 2014, 7:03 AM), http://www.fool.com/investing/general/2014/06/16/corrections-corporation-vs-geo-group-which-prison.aspx [https://perma.cc/4XAF-3UTM]; *See also*, CCA, FOURTH QUARTER 2015 INVESTOR PRESENTATION, *supra* note 118, at 14, A-13 (noting high barriers to entry).

<sup>126</sup> AMERICAN FRIENDS SERVICE COMMITTEE, PRIVATE PRISONS: THE PUBLIC'S PROBLEM, 19-21 (Feb. 2012), https://afsc.org/sites/afsc.civicaactions.net/files/documents/AFSC\_Arizona\_Prison\_Report.pdf [https://perma.cc/4CZD-DXCV] (summarizing cost comparisons); Craig Harris, *Arizona faces growing cost of private prisons*, ARIZONA REPUBLIC, Dec. 29, 2013, http://archive.azcentral.com/news/arizona/articles/20131204arizona-private-prisons-growing-cost.html [https://perma.cc/D295-CDLV] (the last such cost comparison was conducted in 2010 because the Arizona legislature repealed the cost comparison statute in 2012). John Kavanagh, *Private prisons really are cheaper for taxpayers*, THE ARIZONA REPUBLIC (Jan. 10, 2014, 10:41AM), http://archive.azcentral.com/opinions/articles/20140111-private-prisons-keep-money-taxpayers-pockets.html [https://perma.cc/52PQ-GVDD].

<sup>127</sup> *See, e.g.*, STATE OF HAWAII, THE AUDITOR GENERAL, REPORT NO. 10-10, MANAGEMENT AUDIT OF THE DEPARTMENT OF PUBLIC SAFETY'S CONTRACTING FOR PRISON BEDS AND SERVICES: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII, 16 (2010) (finding that Hawaii Department of Public Safety "repeatedly misled lawmakers and the public" by reporting inaccurate incarceration costs that favored sending prisoners to CCA/CoreCivic private prisons on the Mainland instead of publicly-operated prisons in Hawaii); GOV'T ACCOUNTABILITY OFFICE, GAO-08-6, COST OF PRISONS: BUREAU OF PRISONS NEEDS BETTER DATA TO ASSESS ALTERNATIVES FOR ACQUIRING LOW AND MINIMUM SECURITY FACILITIES 2, 4 (2007) (finding that BOP failed to collect adequate data to determine whether private federal prisons were more or less expensive than publicly operated federal prisons).

funding they received from the private prison industry.<sup>128</sup> And there is evidence that private prisons are artificially deflating their average costs by cherry-picking young, healthy prisoners who are the least expensive to house.<sup>129</sup>

Additionally, correctional officials and the public slowly realized that handing control of prisons over to for-profit companies has profound human consequences. In slightly more than thirty years of operation, the private prison industry has racked up a long and disturbing record of abuse, neglect and misconduct.

To take just a few examples: In what has become known as the “Kids for Cash” scandal, two Pennsylvania juvenile court judges were convicted of accepting some \$2.6 million in kickbacks in exchange for sending thousands of juvenile defendants to private prisons from 2002 to 2009.<sup>130</sup> One Idaho prison operated by CCA/CoreCivic was so brutal that prisoners nicknamed it “the Gladiator School,” and a study by the Idaho Department of Corrections found that more acts of violence occurred in the Gladiator School than Idaho’s seven other prisons combined. The ACLU sued over the culture of violence and brutality in this prison in 2010 and reached a settlement with CCA/CoreCivic in 2011—but the company broke that agreement and repeatedly falsified security staffing records, leading a federal judge to find the company in contempt of court in 2013.<sup>131</sup> In Ohio, the state sold a public prison to CCA/CoreCivic in 2011; by the end of

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<sup>128</sup> Matt Stroud, *Corporations are using dubious research to take over prisons*, THE VERGE, Aug. 6, 2014; Martha Woodall, *Temple completes probe of profs’ prison study*, PHILADELPHIA INQUIRER, July 18, 2014. The widely-circulated working paper and numerous op-eds published by the authors did not disclose the funding sources. See Simon Hakim & Erwin Blackstone, *Cost Analysis of Public and Contractor-Operated Prisons*, (Apr. 2013) (Working Paper, Temple University); Simon Hakim & Erwin Blackstone, Op-Ed, *Data shows running prisons for profit is a win-win*, DETROIT FREE PRESS (June 7, 2013); Simon Hakim & Erwin Blackstone, Op-Ed, *Private prisons offer big savings for Maine corrections budget*, KENNEBEC JOURNAL (May 23, 2013); Simon Hakim & Erwin Blackstone, Op-Ed, *Temple economics professors: Private prisons make fiscal sense*, NEWSOK (May 17, 2013); Erwin Blackstone & Simon Hakim, Op-Ed, *Blackstone, Hakim: Prison privatization can provide real benefits*, SUN-SENTINEL (May 7, 2013). The final version of the study, published in non-peer-reviewed form by a libertarian think tank, belatedly disclosed the funding the authors received from the private prison industry. See SIMON HAKIM & ERWIN A. BLACKSTONE, PRISON BREAK: A NEW APPROACH TO PUBLIC COST AND SAFETY (June 2014) (“The authors of the study were partially funded by members of the private corrections industry. No other funding was provided.”).

<sup>129</sup> See Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, RADICAL CRIMINOLOGY, No. 3, 81, 82-85 (Dec. 2013) (concluding that people of color are overrepresented in private prisons compared to public prisons, and attributing this to policies that allow private prisons to select for younger, healthier prisoners, who happen to be disproportionately people of color); Richard A. Opiel, Jr. *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES (May 18, 2011), <http://www.nytimes.com/2011/05/19/us/19prisons.html> [<https://perma.cc/9QUG-SWHU>] (quoting Arizona state legislator accusing private prisons of “cherry-picking” by taking the “easy prisoners” and leaving the “most expensive prisoners with the taxpayers”). Indeed, in early 2015, the newly-appointed head of the Florida Department of Corrections candidly admitted to legislators that the private prison companies are allowed to cherry-pick the “least violent and the healthiest inmates,” although she backtracked on the remarks the following day. Sascha Cordner, *Could Florida’s New DOC Head Be Backing Away From Certain Earlier Candid Remarks?*, WFSU (Jan. 21, 2015), <http://news.wfsu.org/post/could-florida-s-new-doc-head-be-backing-away-certain-earlier-candid-remarks> [<https://perma.cc/SA5S-8T6G>].

<sup>130</sup> Craig R. McCoy, *Former Pa. judge gets 28 years in ‘kids for cash’ case*, PHILLY.COM (Aug. 12, 2011), [http://articles.philly.com/2011-08-11/news/29876628\\_1\\_ciavarella-michael-t-conahan-juvenile-court](http://articles.philly.com/2011-08-11/news/29876628_1_ciavarella-michael-t-conahan-juvenile-court) [<https://perma.cc/24CT-EPHN>]; Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES (Mar. 27, 2009), <http://www.nytimes.com/2009/03/28/us/28judges.html> [<https://perma.cc/LP7P-S7QF>].

<sup>131</sup> Press Release, *ACLU Lawsuit Charges Idaho Prison Officials Promote Rampant Violence*, ACLU (Mar. 11, 2010), [www.aclu.org/news/aclu-lawsuit-charges-idaho-prison-officials-promote-rampant-violence](http://www.aclu.org/news/aclu-lawsuit-charges-idaho-prison-officials-promote-rampant-violence) [<https://perma.cc/2SWW-P8T8>]; Carl Takei & Stephen Pevar, *CCA At It Again: Held in Contempt for Understaffing*

2012, the prison had experienced a 300% increase in prisoner-on-staff assaults and a 180% increase in prisoner-on-prisoner assaults since the last state correctional inspection.<sup>132</sup> In 2012, a federal judge described how a private prison operated by GEO Group, Inc. for young men and teenagers in Mississippi had devolved into “a cesspool of unconstitutional and inhuman acts and conditions” and “a picture of such horror as should be unrealized anywhere in the civilized world,” and ordered mass transfers out of the prison.<sup>133</sup> At another private prison in Mississippi (first run by GEO Group and then taken over by MTC, another private prison company), an ACLU lawsuit detailed grisly allegations of abuse and neglect, including rampant rapes, people held in solitary confinement with untreated mental illnesses, guards ignoring fires set in cells, and malnourishment and chronic hunger.<sup>134</sup> An ACLU report, a subsequent investigative report in *The Nation*, and three reports by the Justice Department’s Inspector General detailed how profit-seeking in the BOP’s private prisons for immigrants led to overcrowding, understaffing, and deaths from shockingly bad medical care.<sup>135</sup> These findings were so horrifying that in August 2016, the Justice Department concluded that private prisons “compare poorly to our own bureau facilities” and announced a multi-year phase-out of the BOP’s private prison contracts.<sup>136</sup> (The election of Donald Trump as president has, however, raised questions about the future of this phase-out plan.<sup>137</sup>) Additionally, a number of studies have found that violence is more prevalent in

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*Prison and Lying About It*, ACLU (Sept. 17, 2013), <https://www.aclu.org/blog/cca-it-again-held-contempt-understaffing-prison-and-lying-about-it> [https://perma.cc/2NLK-FWT4]; *Kelly v. Wengler*, No. 1:11-cv-00185-EJL (D. Idaho Sept. 16, 2013) (order finding CCA/CoreCivic in contempt of court), [https://www.aclu.org/legal-document/kelly-v-wengler-memorandum-decision-and-order-finding-cca-civil-contempt](https://www.aclu.org/legal-document/kelly-v-wengler-memorandum-decision-and-order-finding-cca-civil-contempt?redirect=prisoners-rights/kelly-v-wengler-memorandum-decision-and-order-finding-cca-civil-contempt) [https://perma.cc/AQE9-ARQC]. See also Letter from Randy Blades, Warden, Idaho Dep’t of Correction, to Phillip Valdez, Warden, Idaho Correctional Center (Aug. 28, 2008) (on file with the author) (“Since the beginning of 2008, incidents of violence at the Idaho Correctional Center has [sic] steadily increased to the point that there are four incidents for every one that occurs in the rest of the Idaho state operated facilities combined.”).

<sup>132</sup> Another Bad Inspection for CCA-Owned Lake Erie Correctional Institution, ACLU OF OHIO: PRISONERS’ RIGHTS PRESS RELEASE (Feb. 25, 2013), <http://www.acluohio.org/archives/press-releases/another-bad-inspection-for-cca-owned-lake-erie-correctional-institution> [https://perma.cc/7NU8-8V3N].

<sup>133</sup> Order Approving Settlement, *DePriest v. Epps*, et al., No. 3:10-cv-00663-CWR, at 5-6 (S.D. Miss. Mar. 26, 2012). This came not long after the U.S. Department of Justice issued a similar report describing staff sexual misconduct at Walnut Grove as “brazen” and among the worst that DOJ had seen “in any facility anywhere in the nation.” Letter from Thomas E. Perez, Asst. Attorney General Civil Rights Division, to Phil Bryant, Mississippi Governor, Re: Investigation of the Walnut Grove Youth Correctional Facility (Mar. 20, 2012), <http://www.justice.gov/sites/default/files/crt/legacy/2012/04/09/walnutgrovefl.pdf> [https://perma.cc/4KEB-8DYR].

<sup>134</sup> Complaint, *Dockery v. Epps*, Civil Action No. 3:13-cv-00326 (S.D. Miss. May 30, 2013), <http://www.clearinghouse.net/chDocs/public/PC-MS-0007-0001.pdf> [https://perma.cc/MT5U-3ME4].

<sup>135</sup> See generally ACLU, *WAREHOUSED AND FORGOTTEN*, *supra* note 119; Seth Freed Wessler, *Separate, Unequal, and Deadly*, *THE NATION*, Jan. 28, 2016, at 13-21; Office of the Inspector General, *supra* note 120; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T. OF JUSTICE, *REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS* (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [https://perma.cc/9279-SP7V]; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T. OF JUSTICE, *AUDIT OF THE FEDERAL BUREAU OF PRISONS’ CONTRACT WITH CORECIVIC, INC. TO OPERATE THE ADAMS COUNTY CORRECTIONAL CENTER IN NATCHEZ, MISSISSIPPI* (2016), <https://oig.justice.gov/reports/2016/a1708.pdf> [https://perma.cc/48P8-MLLU].

<sup>136</sup> Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, *N.Y. TIMES* (Aug. 18, 2016), [http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?\\_r=0](http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html?_r=0) [https://perma.cc/DLT9-EQJW].

<sup>137</sup> See Jeff Sommer, *Trump’s Win Gives Stocks in Private Prison Companies a Reprieve*, *N.Y. TIMES* (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a>

private prisons, and that recidivism is higher for people held in private prisons than public prisons.<sup>138</sup>

Despite this record, private prisons have grown into a multibillion-dollar industry. The two largest private prison companies—Corrections Corporation of America/CoreCivic and GEO Group—are both publicly traded, with annual revenues of, respectively, \$1.79 billion and \$1.84 billion in 2015.<sup>139</sup> They have developed into a potent lobbying force in both state and federal arenas, with their lobbying and campaign contributions targeted at particular states and particular congressional committees.<sup>140</sup> For example, the *Palm Beach Post* reported that in Florida alone, private prison companies spent more than \$4 million on state political parties, election committees and candidate campaigns between 2000 and 2013.<sup>141</sup> In Oklahoma, private prisons skeptic Justin Jones was forced to resign from his position as Director of the Oklahoma Department of Corrections in 2013, reportedly because private prison lobbyists objected to his resistance to expanding privatization.<sup>142</sup> His successor quickly expressed openness to more private prison contracts.<sup>143</sup>

The industry also exerts influence through indirect means. Arizona’s SB 1070 legislation, which increased the state’s powers to jail immigrants, was based on model legislation

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reprieve.html [https://perma.cc/8CAC-3UW3] (discussing how private prison stocks rebounded after Trump’s election); Seth Freed Wessler, *Donald Trump’s Looming Mass Criminalization*, THE NATION (Nov. 28, 2016), <https://www.thenation.com/article/donald-trumps-looming-mass-criminalization/> [https://perma.cc/CB3K-S3Y2] (describing likely BOP expansion under Trump).

<sup>138</sup> Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons – A Comparison of Select Characteristics*, 68 FED. PROBATION 27, 30 (2004) (concluding that “the private sector is a more dangerous place to be incarcerated,” and reporting that based on national data, “the private sector experienced more than twice the number of assaults against inmates than did the public sector.”); AUSTIN & COVENTRY, *supra* note 110 at 52 (reported that “the privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances” than publicly operated facilities, when institutions of similar security levels are compared.); Anita Mukherjee, *Do Private Prisons Distort Justice? Evidence on Time Served and Recidivism* (Mar. 15, 2015), <http://harris.uchicago.edu/sites/default/files/NLSY97/Paper%20sent%20091715.pdf> [https://perma.cc/UWJ9-CR7X] (finding that, compared to those in public prisons, people held in private prisons end up serving more time without attendant reductions in recidivism).

<sup>139</sup> CXW Income Statement, *supra* note 122; GEO Income Statement, *supra* note 122.

<sup>140</sup> JUSTICE POLICY INSTITUTE, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES (June 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) [https://perma.cc/LV8C-DTWG]; BETHANY CARSON & ELEANA DIAZ, GRASSROOTS LEADERSHIP, PAYOFF: HOW CONGRESS ENSURES PRIVATE PRISON PROFIT WITH AN IMMIGRATION DETENTION QUOTA 6 (Apr. 2015), [http://grassrootsleadership.org/sites/default/files/reports/quota\\_report\\_final\\_digital.pdf](http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf) [https://perma.cc/WP9N-BERJ].

<sup>141</sup> Pat Beall, *Money at the Statehouse? Prison firms pour it on*, PALM BEACH POST (Nov. 16, 2013), <http://www.mypalmbeachpost.com/news/news/money-at-the-statehouse-prison-firms-pour-it-on/nbtPN/> [https://perma.cc/BF7F-F4RC].

<sup>142</sup> Barbara Hoberock, *Corrections professionals connect DOC exec’s resignation to private prison lobbying*, TULSA WORLD (June 19, 2013), [http://www.tulsaworld.com/news/government/corrections-professionals-connect-doc-exec-s-resignation-to-private-prison/article\\_95bcaf7a-2906-5646-bb7f-ed4991af10a2.html](http://www.tulsaworld.com/news/government/corrections-professionals-connect-doc-exec-s-resignation-to-private-prison/article_95bcaf7a-2906-5646-bb7f-ed4991af10a2.html) [https://perma.cc/KK8F-4NVF]; Sean Wallace, *Playing politics with prison*, OKLAHOMA GAZETTE (July 2, 2013), <http://okgazette.com/2013/07/02/playing-politics-with-prison/> [https://perma.cc/8PM9-EUW5].

<sup>143</sup> *New Oklahoma Corrections director willing to use private prisons*, NEWSOK (Feb. 22, 2014), <http://newsok.com/article/3936345> [https://perma.cc/8N9H-84EJ].

drafted by a committee of the American Legislative Exchange Council (“ALEC”), a membership organization of state legislators and corporate interests. CCA/CoreCivic’s representative to ALEC participated in the ALEC meetings that generated this model legislation.<sup>144</sup>

There is a revolving door between correctional agencies and the private prison industry. In 2011, for example, Harley Lappin became an executive at CCA/CoreCivic less than a month after retiring from his position as Director of the Federal Bureau of Prisons.<sup>145</sup> Similarly, Stacia Hylton left the Office of the Federal Detention Trustee—where she was responsible for managing federal detention acquisitions for BOP, ICE, and the U.S. Marshals Service—in 2010 to consult for GEO Group, and then returned to head the U.S. Marshals Service later that year.<sup>146</sup> A host of other high-level corrections officials have followed similar paths into the private prison industry.<sup>147</sup> Additionally, private prison companies foster cozy relationships with corrections officials through sponsorships and contributions to industry associations such as the American Correctional Association, the American Jail Association, the Association of State Correctional Administrators, the Corrections Technology Association, and the National Sheriffs’ Association.<sup>148</sup>

Private prisons suffer from oversight and transparency problems. A 2012 report by the National Council on Crime and Delinquency concluded that oversight and monitoring of private prisons has “proven to be difficult and tends to be lax and ineffective.”<sup>149</sup> Meanwhile, the public remains in the dark because many public records statutes do not reach documents held by private prison companies.<sup>150</sup>

The private prison industry depends on the expansion of the carceral state for its continued profitability. The annual reports that the two largest private prison companies file with

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<sup>144</sup> Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Apr. 4, 2012, 4:12 PM), <http://n.pr/9paAzO>; *How Corporate Interests Got SB 1070 Passed*, NPR: AROUND THE NATION (Feb. 23, 2012, 2:26 PM), <http://n.pr/aNiOnF> [<https://perma.cc/R53S-HZYC>].

<sup>145</sup> James Ridgeway, *Federal Prison Director Defects to Private Prison Company*, MOTHER JONES (June 3, 2011), <http://www.motherjones.com/mojo/2011/06/federal-prison-director-takes-job-private-prison-company> [<https://perma.cc/DG4B-N9TW>].

<sup>146</sup> *Id.*; Jim McElhatton, *Watchdog groups rip marshals nominee*, THE WASH. TIMES (Nov. 10, 2010), <http://www.washingtontimes.com/news/2010/nov/10/watchdog-groups-rip-marshals-nominee/> [<https://perma.cc/AJ8H-PMD3>].

<sup>147</sup> *See, e.g.*, Cristina Costantini & Jorge Rivas, *Shadow Prisons*, FUSION.NET (Feb. 4, 2015), <http://interactive.fusion.net/shadow-prisons/> [<https://perma.cc/Q3WS-EM3L>] (listing former DOJ and DHS officials who obtained executive positions at private prison companies); Jennifer Sullivan, *State Prisons Chief Leaving for Private Corrections Job*, SEATTLE TIMES (Sept. 22, 2015), <http://www.seattletimes.com/seattle-news/state-prisons-head-leaving-for-private-corrections-job/> [<https://perma.cc/84VU-W8EK>]; Zaid Jilani, *NM Corrections Secretary Refusing to Penalize Contract-Breaching Private Prison Company He Used To Work For*, THINKPROGRESS (Sept. 7, 2010, 5:02 PM), <http://thinkprogress.org/politics/2010/09/07/117742/nm-secretary-penalize-prison/> [<https://perma.cc/9HUD-U7EM>].

<sup>148</sup> *See generally* IN THE PUBLIC INTEREST, BUYING ACCESS (Aug. 2015), <https://www.inthepublicinterest.org/wp-content/uploads/Buying-Access-In-the-Public-Interest-PDF.pdf> [<https://perma.cc/BGC6-5DQ3>].

<sup>149</sup> CHRISTOPHER HARTNEY & CAROLINE GLESMANN, NATIONAL COUNCIL ON CRIME & DELINQUENCY, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 15 (MAY 2012), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/prison-bed-profiteers.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf) [<https://perma.cc/YVL8-YURN>]. *See also, e.g.*, WAREHOUSED AND FORGOTTEN, *supra* note 119, at 52-55 (criticizing BOP’s lack of adequate oversight in its private prison contracts); LIVES IN PERIL, *supra* note 98, at 11-13 (criticizing ICE’s lack of adequate oversight in its private prison contracts).

<sup>150</sup> Mike Tartaglia, Note, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1722-32 (2014) (describing limited applicability of public records laws to private prisons).

the SEC describe this relationship in frank terms. For example, CCA/CoreCivic's 2014 annual report states:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage correctional and detention facilities . . . . The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws. 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 facilities to house them. Immigration reform laws are currently a focus for legislators and politicians at the federal, state, and local level. Legislation has also been proposed in numerous jurisdictions that could lower minimum sentences for some non-violent crimes and make more inmates eligible for early release based on good behavior. Also, sentencing alternatives under consideration could put some offenders on probation with electronic monitoring who would otherwise be incarcerated. Similarly, reductions in crime rates or resources dedicated to prevent and enforce crime could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.<sup>151</sup>

As decarceration has become a greater topic of political discussion, the private prison industry has responded by adding community corrections facilities and community supervision to its portfolios, and adopting new messaging designed to accommodate the new bipartisan consensus that the United States holds too many people in prison.

Between 2013 and 2016, CCA/CoreCivic acquired three companies—Correctional Alternatives, Inc., Avalon Correctional Services, and Correctional Management, Inc.—that operate community corrections facilities, and purchased other community corrections facilities in Pennsylvania. As a result, CCA/CoreCivic now has nearly 5,000 community correctional beds in its portfolio.<sup>152</sup> The company sees clear opportunities in what it describes as a “fragmented” market for reentry services—i.e., an environment mainly populated by nonprofit and small, local for-profit entities—and CCA/CoreCivic executives claim the corporation's size and diversification give it a competitive advantage.<sup>153</sup> In August 2014, CCA/CoreCivic's President

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<sup>151</sup> SEC, FORM 10-K, ANNUAL REPORT OF CORRECTIONS CORPORATION OF AMERICA 27-28 (Dec. 31, 2014).

<sup>152</sup> *Corrections Corporation of America (CXW) CEO Damon Hininger on Q1 2016 Results - Earnings Call Transcript*, SEEKING ALPHA (May 5, 2016, 11:00 AM), <http://seekingalpha.com/article/3972006-corrections-corporation-americas-cxw-ceo-damon-hininger-q1-2016-results-earnings-call?part=single> [<https://perma.cc/HL6A-WFRH>]. See also Press Release, *CCA Acquires Correctional Alternatives, Inc.*, CCA (Aug. 5, 2013 12:00 PM), <https://www.cca.com/press-releases/cca-acquires-correctional-alternatives-inc> [<https://perma.cc/4W6G-7F6E>]; Press Release, *CCA Announces Acquisition of Avalon Correctional Services, Inc.*, GLOBENEWSWIRE (Oct. 29, 2015), <https://globenewswire.com/news-release/2015/10/29/781383/0/en/CCA-Announces-Acquisition-of-Avalon-Correctional-Services-Inc.html> [<https://perma.cc/Y2GK-UUYL>]; Press Release, *CCA Acquires Correctional Management, Inc.*, GLOBENEWSWIRE (Apr. 11, 2016), <https://globenewswire.com/news-release/2016/04/11/827544/0/en/CCA-Acquires-Correctional-Management-Inc.html> [<https://perma.cc/YA5X-KB96>].

<sup>153</sup> See *Corrections Corporation of America (CXW) CEO Damon Hininger on Q3 2015 Results - Earnings*

and CEO delivered a speech in which he claimed that “[r]eentry programs and reducing recidivism are 100 percent aligned with our business model,” and stated that thanks to the company’s new acquisitions of community corrections facilities, “[i]f policymakers put a major emphasis on community corrections—and many experts believe they should—CCA/CoreCivic is positioned to help.”<sup>154</sup>

GEO Group has also moved aggressively to expand into providing other types of carceral services. In 2011, GEO acquired Behavioral Interventions, Inc. (“BI”), a provider of GPS tracking services for criminal justice and immigration agencies.<sup>155</sup> GEO has successfully widened the net for BI’s services in the immigration context, with ICE increasingly placing GPS monitors on Central American mothers released from family detention facilities. According to news reports, ICE increased its use of ankle-mounted GPS trackers by about forty percent in just the first half of 2015, with both the equipment and staffing provided by GEO Group.<sup>156</sup>

GEO also provides the same GPS trackers and monitoring services for criminal justice agencies. In February 2016, GEO reported that its BI subsidiary was supervising some 139,000 people, including 89,000 people on GPS supervision and other electronic tracking products.<sup>157</sup> GEO has also been expanding its portfolio of residential community corrections facilities, day reporting centers, and juvenile facilities. In February 2016, the company reported that it had twenty-one residential community corrections facilities with some 3,000 beds, sixty-four day reporting centers supervising more than 4,000 people, and twelve juvenile residential facilities.<sup>158</sup> As a result, the company’s annual reports have begun noting that while the company’s growth is

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*Call Transcript*, SEEKING ALPHA (Nov 6, 2015, 7:10 PM), <http://seekingalpha.com/article/3659136-corrections-corporation-americas-cxw-ceo-damon-hininger-q3-2015-results-earnings-call?part=single> [<https://perma.cc/XZ9R-Q9JW>] (“Since our acquisition of CAI in 2013, we have continued to develop a robust pipeline of acquisition opportunities in this fragmented market and we believe there will continue to be many attractive targets available that can contribute to our future growth.”); CORRECTIONS CORPORATION OF AMERICA, REMARKS AS PREPARED FOR DAMON HININGER, PRESIDENT AND CEO 3 (Aug. 22, 2014), <http://www.cca.com/Media/Default/documents/Social-Responsibility/Providing-Proven-Re-Entry-Programs/Hininger-Reentry-Speech-Transcript.pdf> [<https://perma.cc/LF9C-23TB>] (“We can provide consistency and common standards across facilities. We can serve multiple levels of government on an as-needed basis. And perhaps most importantly, we can scale.”); Carl Takei, *Prisons Are Adopting the Walmart Business Model*, HUFFINGTON POST (Sept. 29, 2014), [http://www.huffingtonpost.com/carl-takei/prisons-walmart-business-model\\_b\\_5900964.html](http://www.huffingtonpost.com/carl-takei/prisons-walmart-business-model_b_5900964.html) [<https://perma.cc/A3E7-SDRQ>].

<sup>154</sup> Hininger, *supra* note 153, at 3-4.

<sup>155</sup> Press Release, *The GEO Group Closes \$415 Million Acquisition of B.I. Incorporated*, (Feb. 11, 2011, 7:37 AM), <http://www.businesswire.com/news/home/20110211005372/en/GEO-Group-Closes-415-Million-Acquisition-B.I> [<https://perma.cc/25VD-JG6Y>].

<sup>156</sup> John Burnett, *As Asylum Seekers Swap Prison Beds for Bracelets, Same Firm Profits*, NAT’L PUBLIC RADIO (Nov. 13, 2015 4:56 AM), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits> [<https://perma.cc/VBH2-7EPD>]; Molly Hennessy-Fiske, *Immigrants Object to Growing Use of Ankle Monitors After Detention*, L.A. TIMES (Aug. 2, 2015, 3:30 AM), <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html> [<https://perma.cc/38R3-XUHN>]. See Julie Turkewitz, *Immigrant Mothers Released From Holding Centers, but With Ankle Monitors*, N.Y. TIMES (July 29, 2014), [http://www.nytimes.com/2014/07/30/nyregion/immigrant-mothers-released-from-holding-centers-but-with-ankle-monitors.html?\\_r=0](http://www.nytimes.com/2014/07/30/nyregion/immigrant-mothers-released-from-holding-centers-but-with-ankle-monitors.html?_r=0). [<https://perma.cc/VV6K-X2EK>]. See also RUTGERS SCHOOL OF LAW IMMIGRATION RIGHTS CLINIC, *supra* note 94 (describing the burdens of immigrants subjected to GPS monitoring).

<sup>157</sup> GEO Group Q4 2015 *Earnings Call Transcript*, *supra* note 95.

<sup>158</sup> *Id.*

“primarily dependent” on prison, jail, and detention contracts, they are also able to grow based on “our ability to obtain new contracts to offer electronic monitoring services, provide community-based re-entry services and provide monitoring and supervision services . . .”<sup>159</sup>

Meanwhile, privatized probation (which is currently entrenched in Alabama, Georgia, and a few other places in the South, but is still mainly performed by small local and regional companies) is a growing business that will become a natural acquisition target for CCA/CoreCivic and GEO in the coming years. Under the privatized probation model, a for-profit company takes over the entire probation function, with corporate “probation officers” exercising the same kinds of broad, discretionary authority as government probation officers. As discussed *infra*, this leads to serious abuses.

#### D. The “User-Funded” Criminal Justice System

Starting in the 1980s, the rising costs of the criminal justice system led a growing number of states to begin billing criminal defendants for the operation of the system that prosecutes them—euphemistically described as criminal justice “user fees.” By 2014, at least forty-three states and the District of Columbia permitted defendants to be billed for a public defender, at least forty-one states permitted prisoners to be charged room and board for jail and prison, and at least forty-four states permitted people to be billed for their own probation and parole supervision.<sup>160</sup>

Funding the criminal justice on the backs of people entangled in the system does not reduce crime. Instead, research indicates that charging such fees harms a person’s ability to reintegrate back into society after a criminal conviction.<sup>161</sup> What the “user-funded” criminal justice system does enable, however, is further growth of the carceral state despite taxpayers’ unwillingness or inability to fund this juggernaut. And once the system is “user-funded,” private, for-profit companies are all too happy to take advantage.

As a result, court-imposed criminal justice debts are hardly the only form of “user fees” charged to people ensnared in the system. Recently, the Federal Communications Commission (“FCC”) began to regulate the exorbitant telephone rates and ancillary fees charged to people in prison (and, by extension, their families and friends) by prison-specific phone companies.<sup>162</sup> In the

<sup>159</sup> See SEC, FORM 10-K, ANNUAL REPORT OF THE GEO GROUP, INC. 36 (Dec. 31, 2014), <http://investors.geogroup.com/Cache/1500077485.PDF?O=PDF&T=&Y=&D=&FID=1500077485&iid=4144107> [<https://perma.cc/9U7H-EWSN>].

<sup>160</sup> Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NAT’L PUBLIC RADIO (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/XW4N-UWRC>].

<sup>161</sup> Douglas N. Evans, *The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration*, RESEARCH & EVALUATION CENTER, JOHN JAY COLLEGE OF CRIMINAL JUSTICE at 9 (August 2014), [https://www.prisonfellowship.org/site/wp-content/uploads/2015/12/The-Debt-Penalty\\_John-Jay\\_August-2014.pdf](https://www.prisonfellowship.org/site/wp-content/uploads/2015/12/The-Debt-Penalty_John-Jay_August-2014.pdf) [<https://perma.cc/92PB-32NC>]; Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CENTER FOR JUSTICE at 2, 4-5 (2015), [https://www.brennancenter.org/sites/default/files/blog/Charging\\_Inmates\\_Mass\\_Incarceration.pdf](https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf) [<https://perma.cc/YH4G-H9AJ>].

<sup>162</sup> Second Report and Order and Third Further Notice of Proposed Rulemaking, *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12 (FCC Nov. 5, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-136A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-136A1.pdf) [<https://perma.cc/6MR4-RS2P>]; Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12 (FCC Sept. 26, 2013), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-13-113A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-113A1.pdf) [<https://perma.cc/2YVQ-D7H9>].

absence of regulation, a corrupt system developed in which phone service providers offer “commission payments”—a form of legalized kickback that prison and jail administrators use to subsidize their operations—that can rise as high as 84.1% of the per-minute rates. As a result, prison and jail administrators typically award phone service contracts to whichever company promises the highest commissions. And the phone companies pass the cost of the commissions onto end-users through inflated per-minute rates, per-connection fees, account deposit fees, account maintenance charges, account refund charges, and other fees.<sup>163</sup> Specialized banking services (which, for security reasons, are typically the only method by which people in prison and jail can purchase goods or services) take similar advantage of prisoners and their families, and are essentially unregulated.<sup>164</sup> Such companies can squeeze a last round of profits from prisoners even after their release, by issuing released prisoners’ remaining money on high-fee debit cards that can charge withdrawal fees of up to three dollars per transaction and account closure fees of up to thirty dollars.<sup>165</sup>

The profiteering continues outside of prison walls. In some states, local jurisdictions have actually contracted out probation to for-profit companies, with disastrous results.<sup>166</sup> These companies do not bill the courts that contract with them; instead, they make their profits by collecting fees from the people they supervise.<sup>167</sup> Take, for example, Elvis Mann, a fifty-five year old man in Childersburg, Alabama, whose monthly income consists of \$800 in disability benefits and approximately \$300 in food stamps, and who was subject to private probation for committing several misdemeanor offenses. The court ordered him to pay \$8,929 in fines and costs, and to go on probation with a company called Judicial Correction Services (“JCS”). Over a seven-year period, Mann paid off more than \$6,500 of his judicial debt, typically in installments of \$50 to \$100 that he dropped off at the JCS office. Often, however, only about half of each installment payment went to pay off his debt to the court. The rest—more than \$3,000—went into JCS’s pockets.<sup>168</sup> Some companies may further inflate the bill; the Southern Center for Human Rights recently filed a lawsuit alleging that one private probation company is requiring defendants to pay for drug tests that the court never actually ordered.<sup>169</sup>

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<sup>163</sup> DREW KUKOROWSKI, PETER WAGNER & LEAH SAKALA, PRISON POLICY INITIATIVE, PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY 3-10 (May 2013).

<sup>164</sup> Daniel Wagner, *Prison bankers cash in on captive customers*, THE CENTER FOR PUBLIC INTEGRITY (Sept. 30, 2014 5:00 AM), <http://www.publicintegrity.org/2014/09/30/15761/prison-bankers-cash-captive-customers> [<https://perma.cc/86A5-LAUE>].

<sup>165</sup> Letter from Stephen Rahe, Pro Bono Legal Analyst, Prison Policy Initiative, to Richard Cordray, Director, Consumer Financial Protection Bureau 4 (March 18, 2015), <http://static.prisonpolicy.org/releasecards/CFPB-comment.pdf> [<https://perma.cc/6X3Q-D5MV>]; see generally Amadou Diallo, ‘Release cards’ turn inmates and their families into profit stream, AL JAZEERA AMERICA (April 20, 2015), <http://america.aljazeera.com/articles/2015/4/20/release-cards-turn-inmates-and-their-families-into-profit-stream.html> [<https://perma.cc/W8ZA-8RBN>].

<sup>166</sup> See Sarah Solon, *Preying on the Poor: For-Profit Probation Edition*, ACLU.org (June 18, 2014), <https://www.aclu.org/blog/preying-poor-profit-probation-edition> [<https://perma.cc/7DFC-F75G>]. PROFITING FROM PROBATION, *supra* note 5. In DeKalb County, Georgia, the ACLU successfully sued to stop debtors’ prison practices involving a private probation company. See *Thompson v. DeKalb County*, ACLU (Mar. 19, 2015), <https://www.aclu.org/cases/thompson-v-dekalb-county> [<https://perma.cc/X93G-KN6F>].

<sup>167</sup> See generally PROFITING FROM PROBATION, *supra* note 5, at 15-16.

<sup>168</sup> *Id.* at 22-23.

<sup>169</sup> See generally Carrie Teegardin, *Low-income women forced into illegal urine screens in traffic cases, suit says*, ATLANTA JOURNAL-CONSTITUTION (Feb. 18, 2016), <http://investigations.blog.ajc.com/2016/02/18/low-income-women-forced-into-illegal-urine-screens-in-traffic-cases-suit-says/> [<https://perma.cc/D4QD-SBPK>].

Like government probation officers, private probation officers have the power to decide whether or not to seek a probation revocation hearing against their supervisees. In Georgia alone, Human Rights Watch found that 124,788 arrest warrants were issued in 2012 for people on private probation.<sup>170</sup> The combination of these powers and the company's desire for profit can turn probation meetings into shakedowns backed up by threats of arrest. One woman interviewed by Human Rights Watch described it this way: "Every time I went down there [to the private probation company's office] they was nasty. They'd threaten me with jail and I said, 'Please, don't throw me in jail. I don't want to lose my kid.'"<sup>171</sup>

Even where probation is not entirely privatized, for-profit companies have taken over key supervision functions like GPS monitoring—and bill criminal defendants for the costs of their own monitoring. These costs can be crippling high; for example, one private, for-profit GPS monitoring company reportedly charges supervisees \$300 per month, plus a \$179.50 setup fee, for their court-ordered GPS monitoring. Supervisees who fail to pay the fees are sent back to jail.<sup>172</sup>

The growth of the user-funded criminal justice system means that a frightening array of companies are able to profit from the continued flow of people into the criminal justice system and the inability of these people to escape the system, regardless of what happens to state or local budgets. And the more that government agencies hand off these functions to private entities, the more these profiteers will be able to block supervisees from exiting the criminal justice system.

## II. REFORM EFFORTS

This section builds on Part I's description of the carceral state by describing the origins and growth of current left-right reform efforts and explaining the divergent interests of the left and right in decarceration. This discussion lays the foundation for Part III's argument that progressives should avoid relying solely on this alliance.

### A. *Voices in the Wilderness*

In the early years of the War on Drugs, liberal leaders—including many Black leaders—initially responded by lining up in support of harsher sentencing and heavier police presences in Black neighborhoods.<sup>173</sup> For example, thirteen of the twenty voting members of the Congressional Black Caucus ("CBC") supported the Anti-Drug Abuse Act of 1986—including the now-infamous 100:1 sentencing disparity between crack and powder cocaine that this bill created.<sup>174</sup>

As the growing carceral state consumed ever more people and neighborhoods from the 1990s to the mid-2000s, a small handful of progressives began trying to raise alarms. But they were marginalized—voices in the wilderness. Although members of the CBC eventually reversed positions and called for an end to the sentencing disparities between crack sales and powder cocaine sales, a moral panic over drugs and urban crime continued to dominate the mainstream liberal discourse. In 1992, then-Governor Bill Clinton ran for president on an explicitly "tough on

<sup>170</sup> PROFITING FROM PROBATION, *supra* note 5, at 51-52.

<sup>171</sup> *Id.* at 50.

<sup>172</sup> Eric Markowitz, Chain Gang 2.0: *If You Can't Afford This GPS Ankle Bracelet, You Get Thrown In Jail*, INT'L BUSINESS TIMES, Sept. 21, 2015, <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> [<https://perma.cc/9N9J-VZ2V>].

<sup>173</sup> NAS REPORT, *supra* note 8, at 140-141.

<sup>174</sup> GOTTSCHALK, *supra* note 7, at 153; Kyle Graham, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 778 (2011).

crime” platform.<sup>175</sup> After Clinton’s election, Sen. Joe Biden (D-DE) and Rep. Charles Schumer (D-NY) spearheaded an effort to develop and pass the 1994 Crime Bill, which—among other things—dramatically ratcheted up mandatory minimum sentences, expanded the federal death penalty, and authorized billions of dollars in funding for new prisons.<sup>176</sup> Democrats in the 1994 midterm congressional elections competed to show who could be the most effective “tough on crime” candidate.<sup>177</sup> In 1996, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act, dramatically curtailing the ability of convicted prisoners to challenge unjust sentences, and slamming the courthouse door on many wrongly-convicted prisoners.<sup>178</sup> This rhetoric and action was replicated in state governments, which adopted numerous policy changes to make the criminal justice system harsher and symbolically denounce people who committed criminal offenses.<sup>179</sup> By the year 2000, the Justice Policy Institute estimated that the United States had put more people behind bars in the 1990s than any other decade in the country’s history.<sup>180</sup>

During this time, mainstream liberals continued to stick to the “tough on crime” mantra.<sup>181</sup> Meanwhile, mainstream civil rights organizations often decried individual instances of unfairness, but did not attack the larger system.<sup>182</sup> The exceptions were relatively few in number and had distressingly little impact on the broader policy landscape.<sup>183</sup> With the publication of Michelle Alexander’s *The New Jim Crow* in 2010, however, these voices broke into the liberal

<sup>175</sup> Gwen Ifill, *THE 1992 CAMPAIGN: The Democrats; Clinton, in Houston Speech, Assails Bush on Crime Issue*, N.Y. TIMES (July 24, 1992) (describing campaign speech in which Clinton, flanked by police officers, intoned, “We cannot take our country back until we take our neighborhoods back . . . You can’t have civil justice without order and safety.”).

<sup>176</sup> Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES: RETRO REPORT (April 6, 2014), <http://nyti.ms/1kgDX5d> [<https://perma.cc/ZWX2-KLM2>]; Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001); *Justice in Focus: Crime Bill @ 20*, VERA INSTITUTE OF JUSTICE, <http://crimebill20.vera.org/justiceinfocus#chapter-119970> [<https://perma.cc/NC7U-K997>] (last visited Feb. 11, 2016); Marc Mauer, *Bill Clinton, Black Lives, and the Myths of the 1994 Crime Bill*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2016/04/11/bill-clinton-black-lives-and-the-myths-of-the-1994-crime-bill#.fatdNO2sy> [<https://perma.cc/37XD-N5VG>].

<sup>177</sup> Paul Waldman, *When Everyone Wanted to Be “Tough on Crime,”* THE AMERICAN PROSPECT (Aug. 13, 2013) (“My firm had about 30 clients, all Democrats, and we did tough-on-crime pieces for every single one . . . [E]very candidate was accusing every other candidate of being soft on crime.”).

<sup>178</sup> Press Release, President William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (April 24, 1996), <http://www.presidency.ucsb.edu/ws/?pid=52713> [<https://perma.cc/JK48-JCNT>]; RONALD WEICH, ACLU, UPSETTING CHECKS AND BALANCES: CONGRESSIONAL HOSTILITY TOWARD THE COURT IN TIMES OF CRISIS 6, 25 (Oct. 2001), <https://www.aclu.org/sites/default/files/FilesPDFs/ACF47C9.pdf> [<https://perma.cc/KG28-9H7T>].

<sup>179</sup> See NAS REPORT, *supra* note 8, at 78-85.

<sup>180</sup> JUSTICE POLICY INSTITUTE, THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM I (May 2000), [http://www.justicepolicy.org/images/upload/00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf) [<https://perma.cc/WX2G-7LXR>].

<sup>181</sup> See Harry A. Chernoff et. al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 551 (1996) (describing the political maneuvering that led to passage of the 1994 Crime Bill). See also GOTTSCHALK, *supra* note 7, at 153.

<sup>182</sup> ALEXANDER, *supra* note 30, at 209-17 (describing this dynamic).

<sup>183</sup> See, e.g., Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006) (describing the carceral state and proposing strategies for dismantling it); Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO STATE J. OF CRIM. LAW 607 (2005) (describing and analyzing mass incarceration as its own phenomenon); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 714 (1995) (arguing that Black jurors should engage in race-based jury nullification as a way to “opt out” of a racist criminal justice system).

and progressive mainstream.<sup>184</sup> As a then-new staff attorney at the ACLU's National Prison Project, I was both excited and surprised to see how quickly mass incarceration became a near-universal topic of discussion.<sup>185</sup>

### B. *The Critique from the Left*

The left has not coalesced around a single critique of mass incarceration or the carceral state. However, advocates on the left have articulated several key goals. Many of these goals have broad support from both mainstream and radical organizations.

Ending the War on Drugs is one such goal. In many cases, this is explicitly linked to a racial justice critique that emphasizes the disparate enforcement of drug laws against people of color.<sup>186</sup> It also typically involves a call to end the hyper-aggressive policing tactics associated with the War on Drugs, including the widespread use of military-style tactics and equipment, mass surveillance, and “jump out” squads.<sup>187</sup>

Another goal is the liberation of Black and Brown communities from the oppressive control of police and the criminal justice system. This is the core of the New Jim Crow critique and a major goal of the Black Lives Matter movement. Black Lives Matter began in 2013 as part of a new burst of Black activism in response to George Zimmerman's acquittal on both murder and manslaughter charges for shooting Trayvon Martin.<sup>188</sup> However, it grew to national prominence in 2014 and 2015, as the movement forced white America and mainstream liberals to acknowledge the sheer number of unarmed Black people killed by police.<sup>189</sup> In the words of one

<sup>184</sup> See, e.g., Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/books/michelle-alexanders-new-jim-crow-raises-drug-law-debates.html> [<https://perma.cc/manage/create>] (describing impact of *The New Jim Crow*); see generally Darryl Pinckney, *Invisible Black America*, THE NEW YORK REVIEW OF BOOKS, Mar. 10, 2011 (praising *The New Jim Crow*).

<sup>185</sup> While the term “mass incarceration” was in use in some circles when *The New Jim Crow* was first published, its frequency of usage in news articles shot upward from 2010 onward. See Oliver Roeder, *A Million People Were In Prison Before We Called It Mass Incarceration*, FIVETHIRTYEIGHT.COM, Sept. 18, 2015, <http://fivethirtyeight.com/features/a-million-people-were-in-prison-before-we-called-it-mass-incarceration/> [<https://perma.cc/G2BG-H8FZ>].

<sup>186</sup> See, e.g., ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE, 17-21 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf) [<https://perma.cc/24SP-ZDEP>]; Press Release, NAACP Passes Historic Resolution Calling For End To War On Drugs, NAACP (July 26, 2011), <http://www.naacp.org/press/entry/naacp-passes-historic-resolution-calling-for-end-to-war-on-drugs> [<https://perma.cc/XB2Y-6AQU>].

<sup>187</sup> See, e.g., ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 41 (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf> [<https://perma.cc/QJR3-ZKE8>]; Rep. Hank Johnson, *The Failed 'War on Drugs' Is Militarizing Law Enforcement, Fueling Police Violence*, HUFFPOST BLACK VOICES: THE BLOG (Dec. 24, 2014), [http://www.huffingtonpost.com/rep-hank-johnson/the-failed-war-on-drugs-i\\_b\\_6043558.html](http://www.huffingtonpost.com/rep-hank-johnson/the-failed-war-on-drugs-i_b_6043558.html) [<https://perma.cc/B77G-SGFZ>]; Nicole Flatow, *If You Thought Stop-And-Frisk Was Bad, You Should Know About Jump-Outs*, THINKPROGRESS (Dec. 10, 2014, 12:49 PM), <http://thinkprogress.org/justice/2014/12/10/3468340/jump-outs/> [<https://perma.cc/5E5C-DDE2>].

<sup>188</sup> Alicia Garza, *A Herstory of the #BlackLivesMatter Movement* by Alicia Garza, THEFEMINISTWIRE.COM (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> [<https://perma.cc/Z9MC-GFGZ>]. See also Ben Baker, *The Politico 50: No. 3: Alicia Garza, Patrisse Cullors, Opal Tometi, The three-word civil rights movement*, POLITICO MAGAZINE (Sept./Oct. 2015), <http://www.politico.com/magazine/politico50/2015/alicia-garza-patrisse-cullors-opal-tometi> [<https://perma.cc/2VDW-YMMA>]; Mychal Denzel Smith, *How Trayvon Martin's Death Launched a New Generation of Black Activism*, THE NATION (Sept. 15, 2014).

<sup>189</sup> See, e.g., Wesley Lowery, *Hillary Clinton to call for ending racial profiling and disparities in crack*

of its founders, Black Lives Matter is “a response to the anti-Black racism that permeates our society and also, unfortunately, our movements.” Black Lives Matter seeks to secure the basic dignity and human rights of Black people, not just in the context of police killings and incarceration, but also in response to Black poverty, disenfranchisement, and other forms of oppression.<sup>190</sup> Other grassroots organizations seek similar goals for Latino and immigrant communities, such as United We Dream and #Not1More.<sup>191</sup>

Ending harsh, arbitrary sentencing regimes such as Three Strikes and mandatory minimum sentencing is another widely-supported goal.<sup>192</sup> Some are extending this critique beyond the most extreme manifestations of arbitrary sentencing. For example, Marc Mauer recently proposed that prison sentences should generally be limited to no more than twenty years—an idea borrowed from Norway and premised on the diminishing public safety returns of each successive year of incarceration.<sup>193</sup>

A further goal is to remove the profit motive from the criminal justice system. This means not just ending prisons operated entirely by for-profit companies, but also dismantling the providers of ancillary services—including medical care, telephone service, and prisoner financial services—that depend on and profit from the criminal justice system.<sup>194</sup> In recent years, this has

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*cocaine sentences*, WASH. POST, Oct. 30, 2015, [https://www.washingtonpost.com/news/post-politics/wp/2015/10/30/hillary-clinton-to-call-for-elimination-of-racial-profiling-and-end-of-crack-cocaine-distinction/?utm\\_term=.ef97f87dacce](https://www.washingtonpost.com/news/post-politics/wp/2015/10/30/hillary-clinton-to-call-for-elimination-of-racial-profiling-and-end-of-crack-cocaine-distinction/?utm_term=.ef97f87dacce) [https://perma.cc/8SK7-XSMN]; Wesley Lowery, *President Obama addresses sentencing reform, lack of policing data and the Black Lives Matter movement*, WASH. POST, Oct. 22, 2015, [https://www.washingtonpost.com/news/post-politics/wp/2015/10/22/president-obama-addresses-sentencing-reform-lack-of-policing-data-and-the-black-lives-matter-movement/?utm\\_term=.e1d11138c61f](https://www.washingtonpost.com/news/post-politics/wp/2015/10/22/president-obama-addresses-sentencing-reform-lack-of-policing-data-and-the-black-lives-matter-movement/?utm_term=.e1d11138c61f) [https://perma.cc/8SR5-JD6G]; Nicholas Quah & Laura E. Davis, *Here's A Timeline Of Unarmed Black People Killed By Police Over Past Year*, BUZZFEED.COM, May 1, 2015, <http://www.buzzfeed.com/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over#.wuplYZ1na> [https://perma.cc/F8HY-MBQU]; Brittney Cooper, *“I am not afraid to die”: Why America will never be the same post-Ferguson*, SALON (Sept. 3, 2014), [http://www.salon.com/2014/09/03/i\\_am\\_not\\_afraid\\_to\\_die\\_why\\_america\\_will\\_never\\_be\\_the\\_same\\_post\\_ferguson/](http://www.salon.com/2014/09/03/i_am_not_afraid_to_die_why_america_will_never_be_the_same_post_ferguson/) [https://perma.cc/YY7Y-ZYLL].

<sup>190</sup> Garza, *supra* note 188. See also Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J. LAW & POLICY 1 (2016) (arguing that Black Lives Matter framework can be used to support more ambitious criminal justice reforms).

<sup>191</sup> About Us, UNITED WE DREAM, <http://unitedwedream.org/about/our-missions-goals/> [https://perma.cc/MCP2-8TTT] (last visited March 1, 2016) (empowering immigrant youth to address inequities and obstacles faced by immigrants); About, #NOT1MORE, <http://www.notonemoredeportation.com/about/> [https://perma.cc/BAN3-HFBZ] (last visited March 1, 2016) (challenging unfair deportations and criminalization through organizing, art, legislation, and action).

<sup>192</sup> See, e.g., Press Release, *ACLU Advocates For Abolition Of Mandatory Minimums Before U.S. Sentencing Commission*, ACLU (May 27, 2010), <https://www.aclu.org/news/aclu-advocates-abolition-mandatory-minimums-us-sentencing-commission> [https://perma.cc/PK2Y-AX8U]; THE LEADERSHIP CONFERENCE, FACT SHEET: SENTENCING AND MANDATORY MINIMUMS, <http://civilrightsdocs.info/pdf/criminal-justice/Sentencing-Fact-Sheet.pdf> [https://perma.cc/Z4PD-AHSD] (last updated July 23, 2015); Reforming California’s “Three Strikes” Policy, NAACP Legal Defense and Educational Fund, <http://www.naacpldf.org/case-issue/reforming-californias-three-strikes-policy> [https://perma.cc/VZK2-QK5D] (last updated Oct. 25, 2013).

<sup>193</sup> Marc Mauer, *A 20-Year Maximum for Prison Sentences*, 39 DEMOCRACY (2016), <http://democracyjournal.org/magazine/39/a-20-year-maximum-for-prison-sentences/> [https://perma.cc/3RSN-QGNZ].

<sup>194</sup> See, e.g., *Private Companies Profit from Almost Every Function of America’s Criminal Justice System*, IN THE PUBLIC INTEREST (Jan. 20, 2016), <http://www.inthepublicinterest.org/private-companies-profit-from-almost-every/> [https://perma.cc/RJ4C-985P]; GRASSROOTS LEADERSHIP, THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA (June 2013), [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Dirty\\_Thirty\\_formatted\\_for\\_web.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf) [https://perma.cc/5S66-3KQ9]; BERNADETTE RABUY &

become a particular rallying cry at universities: in 2013, students at Florida Atlantic University successfully blocked a private prison company from buying the naming rights to the college's football stadium, and in 2015, students at Columbia University and the University of California system successfully campaigned for their schools to divest from private prison companies.<sup>195</sup>

A further goal is to remove barriers to former prisoners who are returning to the community and provide them with what is often described as a “second chance.” At a technocratic level, there is frequent discussion of these topics and a number of efforts have been undertaken to evaluate the impact of reentry programs on recidivism.<sup>196</sup> However, it is important to distinguish between these efforts and a broader critique; as Gottschalk and others have pointed out, the terms “reentry” and “second chance” are deeply misleading in the context of deindustrialization and systemic racial inequality.<sup>197</sup> Fortunately, there are a number of efforts by formerly incarcerated people to create these chances for others, rooted in values of human dignity and equality rather than the narrow goal of recidivism reduction. One example is Glenn Martin, a former prisoner who founded Just Leadership U.S.A. to build a grassroots, social-justice-oriented movement that emphasizes how “America has relentlessly relied on incarceration as a solution to complex social problems.”<sup>198</sup> Critiques that link the carceral state to a broader critique of neoliberalism also play an important role, by reminding us that the carceral state must be understood within the context of larger American political, economic, and social forces that economically disenfranchise large

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PETER WAGNER, PRISON POLICY INITIATIVE, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS (Jan. 2015), [http://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime\\_January2015.pdf](http://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf) [https://perma.cc/4GTP-SV2K]; DREW KUKOROWSKI, PETER WAGNER, & LEAH SAKALA, PRISON POLICY INITIATIVE, PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY (May 2013), [http://static.prisonpolicy.org/phones/please\\_deposit.pdf](http://static.prisonpolicy.org/phones/please_deposit.pdf) [https://perma.cc/CN5X-K6YJ]; ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 10-11 (2011), [https://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf) [https://perma.cc/7WMK-74ND]; CAROLINE ISAACS, AMERICAN FRIENDS SERVICE COMMITTEE—ARIZONA, DEATH YARDS: CONTINUING PROBLEMS WITH ARIZONA’S CORRECTIONAL HEALTH CARE (Oct. 2013), <http://afsc.org/sites/afsc.civicaactions.net/files/documents/DeathYardsFINAL.pdf> [https://perma.cc/35GC-U9EN]; JUSTICE POLICY INSTITUTE, *supra* note 140.

<sup>195</sup> Greg Bishop, *After Protests, Prison Firm Pulls Donation*, N.Y. TIMES (Apr. 2, 2013), <http://www.nytimes.com/2013/04/03/sports/ncaaf/football/stadium-wont-be-named-for-private-prison-company.html> [https://perma.cc/WYU5-Q2L2]; Wilfred Chan, *Columbia becomes first U.S. university to divest from prisons*, CNN (June 24, 2015), <http://www.cnn.com/2015/06/23/us/columbia-university-prison-divest/> [https://perma.cc/28FP-LA3E]; Jason Song, *UC system divests \$30 million in prison holdings amid student pressure*, L.A. TIMES (Dec. 26, 2015), <http://www.latimes.com/local/education/la-me-uc-divestment-prisons-20151226-story.html> [https://perma.cc/CXR7-A3WE].

<sup>196</sup> See, e.g., JEFF MELLOW, ET AL., THE JAIL ADMINISTRATOR’S TOOLKIT FOR REENTRY (May 2008), [http://johnjay.jjay.cuny.edu/files/Jail\\_Admin\\_Toolkit.pdf](http://johnjay.jjay.cuny.edu/files/Jail_Admin_Toolkit.pdf) [https://perma.cc/KET2-WHMS]; NANCY G. LAVIGNE & JAKE COWAN, MAPPING PRISONER REENTRY: AN ACTION RESEARCH GUIDEBOOK (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411250-Mapping-Prisoner-Reentry.PDF> [https://perma.cc/2RC4-A67X].

<sup>197</sup> GOTTSCHALK, *supra* note 7, at 79-97 (arguing that narrowly focusing on reentry as a path out of the carceral state ignores the deeper structural issues and political economy on which the carceral state rests).

<sup>198</sup> Katti Gray, *The Evolution of a Prison Reformer*, THE CRIME REPORT (Nov. 10, 2014, 6:11 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-11-the-evolution-of-a-prison-reformer> [https://perma.cc/ATP7-MV6F]; Eleanor J. Bader, *Formerly Incarcerated Activist Leads Organization to Mobilize Hearts and Minds for Decarceration*, TRUTHOUT (July 29, 2015), <http://www.truth-out.org/news/item/32097-formerly-incarcerated-activist-leads-organization-to-mobilize-hearts-and-minds-for-decarceration> [https://perma.cc/Z47A-3X6P]; Advocacy, JUST LEADERSHIP USA, <https://www.justleadershipusa.org/advocacy/#more> [https://perma.cc/8XZP-VDU5] (last visited March 1, 2016).

swaths of the population.<sup>199</sup> These critiques highlight how ongoing unmet community needs and individual needs help contribute to growth and maintenance of the carceral state.

The most radical and ambitious position on the left, and the one that seeks to unite all of these critiques, is outright abolition of prisons. As described by longtime activist scholar Angela Davis, prison abolitionists urge that rather than seeking out a single alternative to the existing system of incarceration, we should envision a whole range of new institutions to replace it: “demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.”<sup>200</sup> There are a number of local grassroots activists around the country who endorse prison abolition and are working to build individual institutions along these lines.<sup>201</sup> Ultimately, however, prison abolition is inherently a revolutionary project. As *Truthout* editor Maya Schenwar put it, “The monumental shift toward a system structured by connection instead of isolation will be a shift so deep that it will leave this country unrecognizable.”<sup>202</sup>

Even for advocates who believe that prison abolition is an unrealistic goal, the abolitionist critique is important because it forces prison reform advocates to clarify the role that incarceration should play in society: If incarceration must continue to exist, then who should be incarcerated, for how long, in what kind of environment, and for what purposes? Are retribution and incapacitation sufficient justifications for forcibly removing people from their neighborhoods and exerting near-total control over their daily lives? If not, what must a prison accomplish in order to justify its existence? Asking these questions allows us to radically rethink our model of incarceration. The prison systems of various western European countries offer useful ideas that U.S. reformers can draw upon. Germany and the Netherlands, for example, treat rehabilitation and resocialization as the primary goals of incarceration. Rather than constantly dehumanizing the people in their custody, German and Dutch prisons rely on positive reinforcement, seek to maintain the connection between prisoners and the larger society, and consider their goal to be to help prisoners lead more productive, independent lives in society once they return to the communities.<sup>203</sup>

The abolitionist critique also raises difficult, important questions about what the societal response should be to poverty, substance abuse, mental illness, and other factors that contribute to crime and social disorder. By identifying answers to these questions that do not involve prosecution, we can chart out real alternatives to the criminal justice system instead of defaulting to dehumanizing “alternatives to incarceration” that merely function as prisons without walls.

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<sup>199</sup> GOTTSCHALK, *supra* note 7, at 10-22; *see also* Jeremy Kaplan-Lyman, Note, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177 (2012). Neoliberalism is an ideology of privileging market-based measures and values over democratic demands, and has been described as a dominant paradigm for modern law and politics. *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2-3 (2014); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71, 72 (2014).

<sup>200</sup> ANGELA Y. DAVIS, ARE PRISONS OBSOLETE?, 107 (2003) (describing and defending prison abolition).

<sup>201</sup> *See* MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK AND HOW WE CAN DO BETTER, 185-98 (2014) (chronicling a range of local advocates who are advocating for prison abolition).

<sup>202</sup> *Id.* at 196.

<sup>203</sup> *See* RAM SUBRAMANIAN & ALISON SHAMES, VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 11-14 (Oct. 2013), <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf> [<https://perma.cc/6ED6-LXB3>].

### C. *The Right Speaks Out*

#### 1. Right on Crime, the Heritage Foundation, the Cato Institute, and the Koch Brothers

Much like the mainstream left, mainstream conservatives spent the 1980s, 1990s and early 2000s contributing to the explosion of mass incarceration.<sup>204</sup> During this time, a handful of libertarians—primarily at the Cato Institute—were raising alarms about both the War on Drugs and mass incarceration, but were largely ignored by mainstream conservatives.<sup>205</sup> Additionally, Chuck Colson was a lonely voice among evangelicals calling for prison reform.<sup>206</sup> By the mid-2000s, Pat Nolan, David Keene, Richard Viguerie, and Grover Norquist had joined this small cadre of criminal justice skeptics.<sup>207</sup> In 2010, after Newt Gingrich joined the cadre, they agreed that the time was ripe for them to launch a public campaign to rally conservatives to end mass incarceration, and announced the “Right on Crime” campaign late that year.<sup>208</sup> Supported by the staff of the Texas Public Policy Foundation (an Austin-based libertarian and conservative think tank), Right on Crime rolled out its reform agenda in 2011 with a series of op-eds from Gingrich, Norquist, and Nolan.<sup>209</sup>

Right on Crime frames criminal justice reform in terms of familiar conservative ideas: “constitutionally limited government, transparency, individual liberty, personal responsibility, free enterprise, and the centrality of the family and community.”<sup>210</sup> Right on Crime’s statement of principles devotes significant attention to fiscal conservative principles, such as evaluating the criminal justice system on whether it provides “the best possible results at the lowest possible

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<sup>204</sup> See, e.g., Adam Clymer, *A G.O.P. Leader Aims At ‘Welfare State’ Values*, N.Y. TIMES (Jan. 5, 1992) (quoting Newt Gingrich as calling on U.S. to “build enough prisons so that there are enough beds that every violent criminal in America is locked up, and they will serve real time and they will serve their full sentence and they do not get out on good behavior.”); NAS REPORT, *supra* note 8, at 113-17 (discussing Republican use of crime to appeal to white racial anxieties).

<sup>205</sup> See, e.g., DAVID BOAZ, CATO INSTITUTE, DRUG LEGALIZATION, CRIMINALIZATION, AND HARM REDUCTION, TESTIMONY BEFORE SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY, AND HUMAN RESOURCES COMMITTEE ON GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES (June 16, 1999), <http://www.cato.org/publications/congressional-testimony/drug-legalization-criminalization-harm-reduction> [<https://perma.cc/P46A-DDQZ>]; DAVID B. KOPEL, CATO POLICY ANALYSIS NO. 208, PRISON BLUES: HOW AMERICA’S FOOLISH SENTENCING POLICIES ENDANGER PUBLIC SAFETY (May 17, 1994), <http://www.cato.org/pubs/pas/pa-208es.html> [<https://perma.cc/KE5M-QD8T>].

<sup>206</sup> DAVID DAGAN & STEVEN TELES, NEW AMERICA FOUNDATION, HOW CONSERVATIVES TURNED AGAINST MASS INCARCERATION: PART OF NEW AMERICA’S STRANGE BEDFELLOWS SERIES, 5 (Sept. 2015), <https://static.newamerica.org/attachments/9631-how-conservatives-turned-against-mass-incarceration/CriminalJusticeReform-Final.0f577974be1d404e8626ec758b71ba6e.pdf> [<https://perma.cc/RWC6-8SE9>].

<sup>207</sup> *Id.* at 6.

<sup>208</sup> *Id.* at 7-10; TPPF launches ‘Right on Crime’ campaign, GRITS FOR BREAKFAST (Dec. 13, 2010), <http://gritsforbreakfast.blogspot.com/2010/12/tppf-launches-right-on-crime-campaign.html> [<https://perma.cc/7VGP-MRDB>].

<sup>209</sup> Newt Gingrich & Pat Nolan, Opinion, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> [<https://perma.cc/F6E8-B2UJ>]; Grover Norquist, *Conservative Principles and Prison*, NAT’L REVIEW (Feb. 10, 2011), <http://www.nationalreview.com/article/259263/conservative-principles-and-prison-grover-norquist> [<https://perma.cc/TN9K-ZDYR>].

<sup>210</sup> *Statement of Principles*, RIGHT ON CRIME, available in archived format at <http://rightoncrime.com/wp-content/uploads/2010/11/ROC-Statement-of-Principles11.pdf> [<https://perma.cc/SL3X-9PNA>] (as visited Feb. 26, 2016).

cost” and being “tough on criminal justice spending.”<sup>211</sup> It also includes a strong emphasis on the rights of crime victims, identifying them as “key ‘consumers’” of the criminal justice system along with the general public and taxpayers (but, notably, not criminal defendants).<sup>212</sup> It appeals to religious and conservative values by emphasizing rehabilitation through “harnessing the power of families, charities, faith-based groups, and communities”—a list that conspicuously omits the government’s potential role in rehabilitation.<sup>213</sup> And finally, it suggests limits on white-collar prosecutions: “Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.”<sup>214</sup>

Right on Crime exhibits no discomfort with private prisons. In fact, although Right on Crime later removed all references to privatization from its website, its original website explicitly endorsed private prisons as part of the “Conservative Solution” for criminal justice:

For those instances when prisons are necessary, explore private prison options. A study by The Reason Foundation indicated that private prisons offer cost savings of 10 to 15 percent compared to state-operated facilities. By including an incentive in private corrections contracts for lowering recidivism and the flexibility to innovate, private facilities could potentially not just save money but also compete to develop the most cost-effective recidivism reduction programming.<sup>215</sup>

From 2011 onward, Right on Crime gained momentum and conservative credibility. By late 2015, Right on Crime had collected an impressive roster of mainstream conservatives who supported its principles, including former Texas governor Rick Perry, former Florida governor Jeb Bush, former Virginia Attorney General Ken Cuccinelli, the Heritage Foundation’s Stephen Moore, and ALEC’s Lisa B. Nelson.<sup>216</sup>

Right on Crime soon attracted the support of the Heritage Foundation. However, the Heritage Foundation has no deep ideological commitment to decarceration. For example, the Heritage Foundation never expressed opposition to the prison boom of the 1980s and 1990s, continues to oppose drug law reform, and its stances on criminal justice issues give short shrift to principles of redemption and forgiveness.<sup>217</sup> During the 1980s and 1990s, Heritage Foundation’s

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*Id.*

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*Id.*

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*Id.*

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*Id.*

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*Priority Issues: Prisons*, RIGHT ON CRIME, available in archived format at <https://web.archive.org/web/20110514100747/http://www.rightoncrime.com/priority-issues/prisons/> [https://perma.cc/N2W7-7PSJ] (as visited May 14, 2011).

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*Statement of Principles*, RIGHT ON CRIME, available in archived format at <https://web.archive.org/web/20151214022833/http://rightoncrime.com/statement-of-principles/> [https://perma.cc/G2XG-6NN7] (as visited Dec. 14, 2015).

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See John M. Broder, *No Hard Time for Prison Budgets*, N.Y. TIMES (Jan. 19, 2003), <http://www.nytimes.com/2003/01/19/weekinreview/no-hard-time-for-prison-budgets.html> [https://perma.cc/JFE2-WJLY] (opposing cost-driven sentencing reform); Charles D. Stimson, *Legalizing Marijuana: Why Citizens Should Just Say No*, THE HERITAGE FOUNDATION (Sept. 13, 2010), <http://www.heritage.org/research/reports/2010/09/legalizing-marijuana-why-citizens-should-just-say-no> [https://perma.cc/96JN-297V] (opposing marijuana legalization); Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, THE HERITAGE FOUNDATION (Aug. 2009), <http://www.heritage.org/Research/Reports/2009/08/Adult-Time-for-Adult-Crimes-Life-Without-Parole-for-Juvenile-Killers-and-Violent-Teens> [https://perma.cc/99QH-6K46] (arguing that the United

main contributions to the criminal justice policy debate were to endorse prison privatization and harsher sentences, including expansion of mandatory minimum sentencing.<sup>218</sup> Nevertheless, in the past five years, the Heritage Foundation has eagerly promoted itself as a supporter of bipartisan criminal justice reform—on the condition that such reform include efforts to protect white collar defendants from “overcriminalization.”<sup>219</sup>

Separately, the Koch brothers have thrown their weight—and financial support—behind various decarceration initiatives. Their interest in the criminal justice system reportedly began in the 1990s, when federal prosecutors pursued criminal charges against Koch Industries for violating environmental laws.<sup>220</sup> The Kochs’ interest in criminal justice issues, however, extends beyond white-collar offenses. Since 2004, the Kochs have made annual donations to the National Association of Criminal Defense Lawyers (“NACDL”) that have addressed issues including indigent legal defense and “ban the box” initiatives for people attempting to find jobs after being released from prison.<sup>221</sup> And since February 2015, when Koch Industries committed more than \$5 million toward the Coalition for Public Safety, a bipartisan push for federal sentencing reform, they have played an increasing role in left-right advocacy for decarceration.<sup>222</sup>

#### D. The New Bipartisanship

##### 1. Early Progressive Efforts to Ally with the Right

As soon as Right on Crime launched, a handful of progressive and liberal-aligned advocates and criminal justice researchers (initially including the ACLU, the Brennan Center for

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States should continue to sentence juveniles to life without parole).

<sup>218</sup> See Dana Joel, *A Guide to Prison Privatization*, THE HERITAGE FOUNDATION, (May 24, 1988), <http://www.heritage.org/research/reports/1988/05/bg650-a-guide-to-prison-privatization> [https://perma.cc/H2PY-VH5A]; Mary Kate Cary, *How States Can Fight Violent Crime: Two Dozen Steps to a Safer America*, THE HERITAGE FOUNDATION (June 7, 1993), <http://www.heritage.org/research/reports/1993/06/bg944-how-states-can-fight-violent-crime> [https://perma.cc/W3UL-FY9N].

<sup>219</sup> See, e.g., John G. Malcolm, *What’s Missing From the Washington Debate on Criminal Justice Reform*, THE DAILY SIGNAL (Sept. 14, 2015), <http://dailysignal.com/2015/09/14/whats-missing-from-the-washington-debate-on-criminal-justice-reform/> [https://perma.cc/N7RA-YTA7]; John Malcolm, *The Pressing Need for Mens Rea Reform*, THE HERITAGE FOUNDATION, (Sept. 1, 2015), <http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform> [https://perma.cc/38X4-DQQJ]; Jordan Richardson, *Shining a Light on Overcriminalization* THE HERITAGE FOUNDATION, (June 1, 2015), <http://www.heritage.org/research/reports/2015/06/shining-a-light-on-overcriminalization> [https://perma.cc/Z8SC-TXXJ].

<sup>220</sup> Jane Mayer, *New Koch: The billionaire brothers are championing criminal justice reform. Has their formula changed?*, NEW YORKER (Jan. 25, 2016), <http://www.newyorker.com/magazine/2016/01/25/new-koch> [https://perma.cc/8WJK-MYAR]; Alex Altman, *Koch Brother Teams Up with Liberals on Criminal Justice Reform*, TIME (Jan. 29, 2015), <http://time.com/3686797/charles-koch-criminal-justice/> [https://perma.cc/455X-LC5B]. See also U.S. *Indicts Koch Industries on Pollution Violations in Texas*, N.Y. TIMES (Sept. 29, 2000), <http://www.nytimes.com/2000/09/29/business/us-indicts-koch-industries-on-pollution-violations-in-texas.html> [https://perma.cc/Z3NC-SHZX] (describing indictment).

<sup>221</sup> Altman, *supra* note 220, at 6.

<sup>222</sup> Wesley Lowery, *The bipartisan push for criminal justice gets a Koch-funded boost*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/02/19/the-bipartisan-push-for-criminal-justice-gets-a-koch-funded-boost/> [https://perma.cc/Z7AR-9FZP]. See also Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, THE ATLANTIC (Mar. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/> [https://perma.cc/T732-J96E].

Justice, and the Sentencing Project) and non-aligned groups like Families Against Mandatory Minimums (“FAMM”) and the Constitution Project, recognized that Right on Crime had opened the door to an effective “strange bedfellows” partnership between progressive and conservative criminal justice reform advocates. Vanita Gupta, who led the ACLU’s criminal justice work from 2010 to 2014, was an early mover in cultivating ties with these conservative advocates. Under Gupta’s leadership, the ACLU shifted its criminal justice messaging to focus on cost savings, efficiency, and other ideas that appeal to conservatives. For example, a 2011 ACLU document laying out the organization’s critique of mass incarceration emphasized that “in order for our system to do a good job, it must be cost-effective by using our taxpayer dollars and public resources wisely” and concluded with the statement, “It’s time to improve our criminal justice system by making it more cost-effective and fair.”<sup>223</sup>

Other progressive advocates soon pursued the same strategy. The NAACP’s Ben Jealous launched a “Smart and Safe” criminal justice reform campaign in 2011 alongside David Keene, Grover Norquist, and other Right on Crime members.<sup>224</sup> The Drug Policy Alliance later joined the roster of progressive organizations in the #Cut50 partnership.<sup>225</sup> Most recently, the Koch-affiliated bipartisan Coalition for Public Safety has brought together the ACLU, Center for American Progress, Leadership Conference on Civil and Human Rights, and the NAACP with a range of conservative groups including Americans for Tax Reform, Faith and Freedom Coalition, FreedomWorks, and Right on Crime.<sup>226</sup> By the time President Obama tapped Gupta to lead the Civil Rights Division of the U.S. Department of Justice in October 2014, conservative advocates identified her as a trusted partner.<sup>227</sup>

The decision of Gupta, Jealous, and other progressive advocates to ally with the right was politically savvy and the correct choice for the time. When Right on Crime first launched, an accusation of being “soft on crime” was still dangerous for politicians.<sup>228</sup> And despite some signs that state government austerity measures forced by the 2008 fiscal crisis had created an opening for criminal justice reform,<sup>229</sup> the risk of retrenchment was high. In April 2011, for example,

<sup>223</sup> *Mass Incarceration Problems*, ACLU, 1, 2 (May 24, 2011), [https://www.aclu.org/files/assets/mass\\_incarceration\\_problems.pdf](https://www.aclu.org/files/assets/mass_incarceration_problems.pdf) [<https://perma.cc/23NB-G9QU>] (also on file with the author).

<sup>224</sup> Adam Serwer, *The NAACP Joins Forces With Grover Norquist*, THE AMERICAN PROSPECT (Apr. 6, 2011), <http://prospect.org/article/naacp-joins-forces-grover-norquist> [<https://perma.cc/9REQ-YSAS>].

<sup>225</sup> *Partners, #CUT50*, <http://www.cut50.org/partners> [<https://perma.cc/WWY8-WDQH>] (last visited Feb. 17, 2016).

<sup>226</sup> THE COALITION FOR PUBLIC SAFETY, <http://www.coalitionforpublicsafety.org> [<https://perma.cc/SUN7-6VLH>] (last visited Feb. 17, 2016).

<sup>227</sup> Sari Horwitz, *Obama to nominate ACLU lawyer to lead Justice Department’s civil rights division*, WASH. POST, (Oct. 15, 2014), [https://www.washingtonpost.com/world/national-security/obama-to-nominate-aclu-lawyer-to-lead-justice-departments-civil-rights-division/2014/10/15/3630985e-5472-11e4-892e-602188e70e9c\\_story.html](https://www.washingtonpost.com/world/national-security/obama-to-nominate-aclu-lawyer-to-lead-justice-departments-civil-rights-division/2014/10/15/3630985e-5472-11e4-892e-602188e70e9c_story.html) [<https://perma.cc/23E2-LNZ6>].

<sup>228</sup> Jonathan Simon, *Crime as a welcome distraction and respite from reality for politicians*, THE BERKELEY BLOG (Oct. 19, 2010), <http://blogs.berkeley.edu/2010/10/19/crime-as-a-welcome-issue-and-respite-from-reality-for-politicians/> [<https://perma.cc/2Q7S-MF64>] (noting that the fear of being called “soft on crime” was a decades-long hangover from the 1988 presidential election, when the infamous Willie Horton ad turned the tide against Democratic presidential nominee Michael Dukakis.). See Schwartzapfel & Keller, *supra* note 26, at 1; Eric Benson, *Dukakis’ Regret: What the onetime Democratic nominee learned from the Willie Horton ad*, NEW YORK MAGAZINE, (June 17, 2012), <http://nymag.com/news/frank-rich/michael-dukakis-2012-6/> [<https://perma.cc/LKS2-L6KS>].

<sup>229</sup> See, e.g., Christine S. Scott-Hayward, *The Fiscal Crisis in Corrections: Rethinking Policies and Practices*, VERA INSTITUTE OF JUSTICE, 13, (July 2009), [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf) [<https://perma.cc/S33X-UZ65>] (examining recession-driven changes to corrections policies, including

California's Democratic governor and a Democratic majority of the state legislature responded to the Supreme Court's prison overcrowding order in *Brown v. Plata*<sup>230</sup> with a timid plan that one commentator described as being developed by "all the stakeholders except for prisoners and their advocates."<sup>231</sup> Rather than adopting sentencing reforms or directly releasing people from prison, this "realignment" plan shifted large numbers of prisoners to county custody and had the unfortunate effect of triggering not widespread decarceration, but a combination of jail overcrowding and new jail construction.<sup>232</sup> Meanwhile, California's Republican legislators engaged in familiar fear-mongering and actually called for harsher sentencing laws.<sup>233</sup> In October 2011, Gallup concluded that despite a sharp decline in the violent crime rate since the mid-1990s, Americans' perceptions of crime had "edged back to a more highly negative outlook," with a majority of respondents saying "the nation's crime problem is extremely or very serious" and two-thirds saying "it is getting worse."<sup>234</sup> Moreover, as state tax revenues rebounded from the recession, this reduced the fiscal pressure to decarcerate.

In this tough environment, Gupta and other progressive advocates who built ties with the right helped convert criminal justice reform from a pie-in-the-sky dream to an idea that was taken seriously in both liberal and deeply conservative circles. Meanwhile, the Justice Reinvestment Initiative ("JRI"), which began in 2002 and is funded by the Pew Charitable Trusts and the Bureau of Justice Assistance, provided a model for identifying and adopting bipartisan reforms. JRI bills itself as "a data-driven approach to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and reduce recidivism."<sup>235</sup> By the end of 2011, states as varied as Texas, South Carolina, Kentucky, Arkansas, Ohio, and Connecticut had adopted bipartisan criminal justice reforms that promised to reduce prison populations.<sup>236</sup> By early 2013, criminal justice reform ideas had become part of the

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operational efficiencies, recidivism reduction strategies, and early release policies); Sasha Abramsky, *Is This the End of the War on Crime? The era of "Lock 'em up and throw away the key" seems, slowly, to be drawing to a close*, THE NATION (June 16, 2010), <http://www.thenation.com/article/end-war-crime/> [<https://perma.cc/MH6Z-SDF6>] ("For the first time in more than forty years, criminal justice trends are starting to move in a sensible direction. At the local and state levels, fiscal necessity is forcing a rethink when it comes to incarceration strategies.").

<sup>230</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>231</sup> Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 184 (2013).

<sup>232</sup> See Allen Hopper, James Austin & Jolene Forman, *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527, 554-80 (2014).

<sup>233</sup> Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. 685, 709-11 (2014).

<sup>234</sup> Lydia Saad, *Most Americans Believe Crime in U.S. is Worsening*, GALLUP, Oct. 31, 2011, <http://www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx> [<https://perma.cc/H8PT-MZ4K>].

<sup>235</sup> COUNCIL OF STATE GOVERNMENTS, JUSTICE CENTER, <https://csgjusticecenter.org/jr> [<https://perma.cc/HE5W-FHSS>] (last visited Nov. 28, 2015).

<sup>236</sup> See generally Marc Levin, *Adult Corrections Reform: Lower Crime, Lower Costs*, CENTER FOR EFFECTIVE JUSTICE, (Sept. 2011), <http://www.rightoncrime.com/wp-content/uploads/2011/09/Texas-Model-Adult.pdf> (describing reforms in Texas) [<https://perma.cc/VGX7-VKA7>]; *South Carolina's Public Safety Reform: Legislation Enacts Research-based Strategies to Cut Prison Growth and Costs*, THE PEW CENTER ON THE STATES, (June 2010), [http://www.pewtrusts.org/~media/assets/2010/06/10/pspp\\_south\\_carolina\\_brief.pdf](http://www.pewtrusts.org/~media/assets/2010/06/10/pspp_south_carolina_brief.pdf) [<https://perma.cc/CFT6-XN86>] (describing reforms in South Carolina); *2011 Kentucky Reforms Cut Recidivism, Costs: Broad Bill Enacts Evidence-Based Strategies*, THE PEW CENTER ON THE STATES (July 2011), [http://www.pewtrusts.org/~media/legacy/uploaded\\_files/pcs\\_assets/2011/2011kentuckyreformscurcidivismpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploaded_files/pcs_assets/2011/2011kentuckyreformscurcidivismpdf.pdf) [<https://perma.cc/6R29-CEQA>] (describing reforms in Kentucky); *Justice Reinvestment in Arkansas*, JUSTICE CENTER, COUNCIL OF STATE GOVERNMENTS (Jan. 2016),

Republican mainstream and were touted at the annual CPAC conference.<sup>237</sup> And in 2013, the U.S. Department of Justice announced new initiatives like its “Smart on Crime” effort to prioritize federal prosecutions for certain categories of more serious cases, limit sentences for low-level nonviolent drug offenses, pursue alternatives to incarceration for low-level nonviolent offenses, focus more attention to reentry, and reallocate resources to focus on violence prevention.<sup>238</sup> In announcing this policy initiative, U.S. Attorney General Eric Holder explicitly repudiated the further growth of mass incarceration in bold terms: “‘We must face the reality that, as it stands, our system is, in too many ways, broken,’” Holder said. ‘And with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, to deter and to rehabilitate—not merely to warehouse and to forget.’”<sup>239</sup> And in November 2014, California voters approved a ballot measure that adopted more significant sentencing reforms than anything their legislators were able to agree upon.<sup>240</sup>

## 2. More Recent Reform Efforts and the Limits of the Left-Right Alliance

Since 2014, the new bipartisan criminal justice reform alliance has continued to accelerate. In March 2015, a bipartisan summit sponsored by individuals and organizations across the ideological spectrum—ranging from Newt Gingrich and the Koch brothers to Van Jones and the ACLU—discussed the immediate need for criminal justice reform.<sup>241</sup> In November 2015, the Koch Institute hosted a conference of some 500 advocates, public defenders, prosecutors, judges, correctional officers, former prisoners, and others to discuss a “transideological” agenda for criminal justice reform.<sup>242</sup> In Congress, bipartisan sentencing reform measures made significant

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<https://csgjusticecenter.org/wp-content/uploads/2016/01/JusticeReinvestmentinArkansasOverview.pdf> [<https://perma.cc/GE8Z-8CAW>] (describing reforms in Arkansas); *Ohio*, BUREAU OF JUSTICE ASSISTANCE: JUSTICE REINVESTMENT INITIATIVE, <https://www.bja.gov/programs/justicereinvestment/ohio.html> [<https://perma.cc/6PW3-78ZE>] (last updated Sept. 2015) (describing reforms in Ohio); *Connecticut*, THE COUNCIL OF STATE GOVERNMENTS: JUSTICE CENTER, <https://csgjusticecenter.org/jr/ct/> [<https://perma.cc/DHN8-QE8X>] (last visited March 2, 2016) (describing reforms in Connecticut).

<sup>237</sup> See Alex Seitz-Wald & Elahe Izadi, *Criminal-Justice Reform, Brought to You by CPAC*, NAT’L J. (Mar. 7, 2014), <http://www.nationaljournal.com/congress/2014/03/07/criminal-justice-reform-brought-you-cpac> [<https://perma.cc/V248-32X3>] (describing a discussion of criminal justice reform at the Conservative Political Action Conference).

<sup>238</sup> See generally U.S. DEP’T OF JUSTICE, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century*, 2-7 (Aug. 2013), <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/D7UH-RKVZ>] (describing the Justice Department’s review of the criminal justice system and its proposed reform efforts).

<sup>239</sup> Horwitz, *supra* note 1, at 1.

<sup>240</sup> See Paige St. John, *Prop. 47 passes, reducing some crime penalties*, L.A. TIMES (Nov. 4, 2014), <http://www.latimes.com/local/political/la-me-ff-prop-47-drug-possession-20141103-story.html> [<https://perma.cc/4ZAN-GP6U>] (discussing Proposition 47); see generally Paige St. John, *Prop. 47 puts state at center of a national push for sentencing reform*, L.A. TIMES (Nov. 1, 2014), <http://www.latimes.com/local/politics/la-me-ff-pol-1101-proposition47-20141101-story.html> [<https://perma.cc/CTR5-XD7B>] (describing campaign to revise sentencing laws in California).

<sup>241</sup> See Van Jones, *Opinion, A cause that unites the left and right*, CNN, March 26, 2015, <http://www.cnn.com/2015/03/26/opinions/van-jones-bipartisan-prison-reform/> [<https://perma.cc/42NS-MN5L>] (discussing the Bipartisan Summit on Criminal Justice Reform); Pat Nolan, *Conservative and Liberals Join Together for Criminal Justice Reforms*, HUFFPOST IMPACT: THE BLOG (Apr. 16, 2015 11:15 AM), [http://www.huffingtonpost.com/pat-nolan/conservative-and-liberals\\_b\\_7057184.html](http://www.huffingtonpost.com/pat-nolan/conservative-and-liberals_b_7057184.html) [<https://perma.cc/TUZ4-F6VW>].

<sup>242</sup> Katy Reckdahl, *Criminal Justice Reform Without Borders*, THE CRIME REPORT, Nov. 5, 2015, <http://www.thecrimereport.org/news/articles/2015-11-criminal-justice-reform-without-borders> [<https://perma.cc/A8PF-TS2J>].

progress in 2015. This included the CORRECTIONS Act, S.467 and the Smarter Sentencing Act of 2015, S.502, both of which had broad bipartisan support and sought to reduce a wide range of drug sentences.<sup>243</sup> A somewhat less ambitious bill giving courts more discretion to reduce drug sentences even won the blessing of U.S. Senator Chuck Grassley, a longtime proponent of harsh mandatory-minimum sentencing regimes.<sup>244</sup>

This progress has, however, exposed some of the limits of such consensus-driven, bipartisan criminal justice reform and raised concerns about whether liberal and conservative goals are truly aligned.<sup>245</sup> JRI's outcomes represent an early warning sign of the limits of consensus-driven reform. The JRI model depends on a bipartisan working group of government officials to analyze data, develop policy options based on a consensus within the working group members, and implement them.<sup>246</sup> By 2013, however, a group of leading researchers, analysts, and advocates concluded that the initiative had generally failed to reduce prison populations in JRI states and risked institutionalizing present rates of incarceration: "If the goal [of JRI] is to reduce mass incarceration, there is scant evidence of success. More alarming, there is little indication that historic rates of incarceration will be reduced in the future."<sup>247</sup> They attributed this failure to a shift in JRI's goals and orientation, driven in part by the need to win support and consensus for JRI among a wide range of legislators and other public officials.<sup>248</sup> The data in the Urban Institute's 2014 evaluation of JRI gave credence to this critique. Of the 17 JRI states, seven are expected to experience prison population *growth* despite JRI reforms, six are expected to experience modest drops in prison population of between 0.6% and 8%, and only four are expected to experience larger drops in prison population (i.e., 10% or more).<sup>249</sup> Such single-percentage changes are too small to significantly affect, let alone end, mass incarceration.<sup>250</sup>

<sup>243</sup> See Russell Berman, *Can the Senate Reform Criminal Justice?*, THE ATLANTIC (Oct. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/10/will-criminal-justice-actually-be-reformed/408538/> [<https://perma.cc/86EL-2L49>]; Lauren Fox, *The Story Behind a Breakthrough: How a Team of Senators Convinced Chuck Grassley on Justice Reform*, NAT'L JOURNAL (Oct. 1, 2015), <http://www.nationaljournal.com/s/74193/story-behind-breakthrough-how-team-senators-convinced-chuck-grassley-justice-reform> [<https://perma.cc/9AML-A9CF>].

<sup>244</sup> *Id.*

<sup>245</sup> See *infra* text accompanying notes 253-264.

<sup>246</sup> See Nancy LaVigne, Samuel Bieler, Lindsey Cramer, Helen Ho, Cybele Kotonias, Deborah Mayer, David McClure, Laura Pacifici, Erika Parks, Bryce Peterson & Julie Samuels, *Justice Reinvestment Initiative State Assessment Report*, URBAN INSTITUTE, 13-17 (Jan. 2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF> [<https://perma.cc/HR9G-SZEJ>] [hereinafter URBAN INSTITUTE JRI ASSESSMENT].

<sup>247</sup> James Austin, Eric Cadora, Todd R. Clear, Kara Dansky, Judith Greene, Vanita Gupta, Marc Mauer, Nicole Porter, Susan Tucker & Malcolm C. Young, *Ending Mass Incarceration: Charting a New Justice Reinvestment* 11 (2013), <http://sentencingproject.org/doc/Charting%20a%20New%20Justice%20Reinvestment%20FINAL.pdf> [<https://perma.cc/9A7J-FQHT>].

<sup>248</sup> *Id.* at 7. According to Austin et al., JRI originated as an ambitious strategy to reduce incarceration, but was weakened by shifting its focus from explicit decarceration to a more generic focus on adopting cost-saving reforms that protected public safety. *Id.* at 5-7. This enabled JRI to lower the goal from reducing the *number* of prisoners to merely reducing the rate of prison *growth*. *Id.* at 1.

<sup>249</sup> URBAN INSTITUTE JRI ASSESSMENT, *supra* note 246, tbl. 6. Though defenders of JRI may argue that the increases in prison population are smaller than they would have been absent JRI reforms, Austin et al. contend that "these conclusions are often based on a misunderstanding of the available data on prison admissions, populations, and projections," and that many of the pre-JRI projections overestimated the baseline prison population because prison admissions had already begun to slow or decline between calculation of the baseline projections and the adoption of JRI reforms. Austin et al., *supra* note 247, at 11.

<sup>250</sup> See discussion *supra* Section I.A. (discussing the U.S. incarceration boom).

JRI's disappointing results are partly attributable to politically timid decisions to focus entirely on cutting sentences for low-level, nonviolent drug offenses without reexamining sentences for more serious or violent offenses—something for which both liberals and conservatives share the blame.<sup>251</sup> Liberals, in particular, tend to grossly overestimate the modest impact that reducing sentences for nonviolent drug offenses would have on prison populations.<sup>252</sup> However, JRI's limited results are also attributable to decisions that reflect deeper left-right divides: in particular, shifting averted correctional spending mainly to other correctional programs rather than—as the left advocates, and as JRI initially contemplated—reinvesting that money in community institutions.<sup>253</sup> Moreover, the JRI process allows “reforms” that actually contribute to economic inequalities: Arkansas’ JRI legislation, for example, increased the fees charged to people on criminal justice supervision by 40% to support the state’s “Best Practices Fund.”<sup>254</sup> JRI documents also carefully avoid linking racial justice issues to criminal justice reform.<sup>255</sup>

These left-right fissures will only become more difficult to ignore as time goes on. The conflict over whether to address racial justice concerns is already obvious.<sup>256</sup> Additionally, many on the left—particularly within the Black Lives Matter movement—explicitly reject the notion that funding corrections and law enforcement programs is equivalent to community reinvestment.<sup>257</sup> There is considerable support on the left for government investments in low-

<sup>251</sup> AUSTIN & COVENTRY, *supra* note 247, at 4 (“Current JRI efforts that focus on crafting legislation often incorporate statutory reforms that will not significantly reduce admissions and lengths of stay – especially for people convicted of serious and violent crimes.”). *See also* Gottschalk, *supra* note 7, at 169 (“Releasing low-level drug offenders or diverting more of them from prison will not dramatically reduce the state and federal prison population.”).

<sup>252</sup> *See, e.g.*, ALEXANDER, *supra* note 30, at 220 (connecting ending the War on Drugs to ending mass incarceration); The Editorial Bd., *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html> [https://perma.cc/JT8B-BXLR]; DRUG POLICY ALLIANCE, THE DRUG WAR, MASS INCARCERATION AND RACE (June 2015), [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [https://perma.cc/VCCR-L7LW] (“[T]he United States imprisons more people than any other nation in the world – largely due to the war on drugs.”); Barack Obama, *Remarks by the President at the NAACP Conference* (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [https://perma.cc/82V5-2CHM] (“Over the last few decades, we’ve also locked up more and more nonviolent drug offenders than ever before, for longer than ever before. (Applause.) And that is the real reason our prison population is so high.”). For a sobering illustration of the limits of merely reducing prison stays for people convicted of drug or other nonviolent offenses, see URBAN INSTITUTE, THE PRISON POPULATION FORECASTER // STATE PRISON POPULATION (Aug. 2015) <http://webapp.urban.org/reducing-mass-incarceration/> [https://perma.cc/C4SQ-DEGT] (indicating that reducing prison stays by 50% for all drug offenses would only reduce state prison populations by about 7% from December 2012 to December 2021).

<sup>253</sup> URBAN INSTITUTE JRI ASSESSMENT, *supra* note 246, at 44-45, tbl. 9; AUSTIN & COVENTRY, *supra* note 247, at 3-4, 7.

<sup>254</sup> *See* URBAN INSTITUTE JRI ASSESSMENT, *supra* note 246, at 59; Public Safety Improvement Act, 2011 Arkansas Laws Act 570 (S.B. 750), § 85(a)(2)(B)(i) (codified at ARK. CODE ANN. § 16-93-104).

<sup>255</sup> Joseph Margulies, *Shhh! It's Time for Criminal Justice Reform. Keep Race Out of It*, VERDICT (Apr. 6, 2015), <https://verdict.justia.com/2015/04/06/shhh-its-time-for-criminal-justice-reform-keep-race-out-of-it> [https://perma.cc/KYX7-A6M4].

<sup>256</sup> *See generally* ALEXANDER, *supra* note 30.

<sup>257</sup> *See, e.g.*, Brendan McQuade, *Against Community Policing*, JACOBIN (Nov. 18, 2015), <https://www.jacobinmag.com/2015/11/obama-chicago-black-lives-matter-police-brutality/> [https://perma.cc/E66Z-PTG D]; Mychal Denzel Smith, *The Movement Against Police Violence Isn't Ignoring 'Black-on-Black Crime'*, THE NATION (Oct. 29, 2015), <http://www.thenation.com/article/the-movement-against-police-violence-isnt-ignoring-black-on-black-crime/> [https://perma.cc/M3ZB-DCYA]; Marianne Kaba, Opinion, *Police "Reforms" You Should Always Oppose*,

income housing, employment, health care, and community-based mental health treatment that could address the root causes of crime and social disorder—but little such agreement on the right.<sup>258</sup>

Many in the left also harbor suspicions about the motives of conservative criminal justice reform advocates. The Koch brothers and the Heritage Foundation frequently claim that companies and businesspeople are “overcriminalized” and need protection from white-collar regulatory offenses with loose *mens rea* requirements.<sup>259</sup> As a result, some have accused conservatives of using criminal justice reform as a “Trojan Horse” to advance corporate interests and weaken environmental regulations.<sup>260</sup> The conflict came to a head in late 2015 and early 2016, when Sen. Orrin Hatch (R-UT) and Rep. Bob Goodlatte (R-VA) insisted that any bipartisan

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TRUTHOUT (Dec. 7, 2014), <http://www.truth-out.org/opinion/item/27852-police-reforms-you-should-always-oppose> [<https://perma.cc/35ZY-E6RT>].

<sup>258</sup>

See, e.g., Karen Workman, *D.C. Crime Bill Would Pay People to Avoid Committing Crimes*, N.Y.

TIMES (Feb. 4, 2016), <http://www.nytimes.com/2016/02/05/us/dc-crime-bill-would-pay-people-to-avoid-crime.html> [<https://perma.cc/Q2RY-5WE4>] (describing progressive D.C. Council member’s legislation to target root causes of crime, including poverty); Bernie Sanders on Criminal Justice, FEELTHEBERN.ORG, [feelthebern.org/Bernie-sanders-on-criminal-justice/](http://feelthebern.org/Bernie-sanders-on-criminal-justice/) [<https://perma.cc/6W75-U666>] (last visited March 2, 2016) (tying crime to lack of economic opportunity); Hillary Clinton, Remarks on Criminal Justice Reform at Columbia University (Apr. 29, 2015) (transcript available at <http://www.vox.com/2015/4/29/8514831/hillary-clinton-criminal-justice-transcript> [<https://perma.cc/JV8R-WHK6>]) (arguing that discussions of criminal justice reform must also “talk about what’s needed to provide economic opportunity, better educational chances for young people, more support to families . . .”). Cf., e.g., THE HERITAGE FOUNDATION, *THE REAL ROOT CAUSES OF VIOLENT CRIME: THE BREAKDOWN OF MARRIAGE, FAMILY, AND COMMUNITY* (March 17, 1995), [http://thf\\_media.s3.amazonaws.com/1995/pdf/bg1026.pdf](http://thf_media.s3.amazonaws.com/1995/pdf/bg1026.pdf) [<https://perma.cc/V3Q8-GYNF>] (claiming that breakdown of the nuclear family is the root cause of violence); Paul Ryan *Laments Inner-city Culture of Not Working*, HUFF. POST (March 13, 2014), [http://www.huffingtonpost.com/2014/03/12/paul-ryan-inner-cities\\_n\\_4949165.html](http://www.huffingtonpost.com/2014/03/12/paul-ryan-inner-cities_n_4949165.html) [<https://perma.cc/3WDL-C3GF>] (suggesting that federal safety net programs should be rolled back because they “trap” people in poverty).

<sup>259</sup>

See Richardson *supra* note 219 (discussing interest in mens rea and criminal justice reform); see also Mayer, *supra* note 220 (discussing Koch interest in mens rea and criminal justice reform). Notably, NACDL and some liberal criminal defense attorneys agree that this is a problem. See *Overcriminalization*, NAT’L ASS’N CRIM. DEF. LAW., <http://www.nacdl.org/overcrim/> [<https://perma.cc/Z3JX-Z5ZF>] (last visited Feb. 23, 2016); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011). However, most progressive organizations see the concept of white-collar “overcriminalization” as, at best, at odds with more significant criminal justice reform issues. See, e.g., Zach Carter, *Kochs Embedded In Major Rift On Bipartisan Criminal Justice Reform*, HUFFINGTON POST (Nov. 25, 2015), <http://huff.to/1p1KJQ1> [<https://perma.cc/KG79-NJHL>]; *STATEMENT: CAP President on Criminal Code Improvement Act of 2015*, CENTER FOR AMERICAN PROGRESS (Nov. 18, 2015), <http://ampr.gs/21oIB2L> [<https://perma.cc/68LX-CGJV>]; Anthony Romero, Letter to the Editor, *Criminal Justice Reforms*, N.Y. TIMES (Feb. 16, 2016), <http://nyti.ms/1QluxW1> [<https://perma.cc/8JEW-38TV>]; Letter from Wade Henderson & Nancy Zirkin, The Leadership Conference on Civil and Human Rights, to Members of Senate Judiciary Committee (June 19, 2016), <https://justicroundtable.org/wp-content/uploads/2016/01/Letter-on-Mens-Rea-Reform-Act-of-2015-1-19-16-Senate.pdf> [<https://perma.cc/GJ7T-EZMP>].

<sup>260</sup>

Matt Apuzzo & Eric Lipton, *Rare White House Accord with Koch Brothers on Sentencing Frays*, N.Y. TIMES (Nov. 24, 2015), <http://nyti.ms/1IaQof6> [<https://perma.cc/EN2R-ZRTZ>]; Zach Carter, *Kochs Embedded In Major Rift On Bipartisan Criminal Justice Reform*, HUFFINGTON POST (Nov. 25, 2015), <http://huff.to/1p1KJQ1> [<https://perma.cc/5T48-ADE6>]; Dan Froomkin, *Koch “Alliance” on Criminal Justice Reform Exposed as Trojan Horse*, THE INTERCEPT (Nov. 25, 2015), <https://theintercept.com/2015/11/25/koch-alliance-on-criminal-justice-reform-exposed-as-trojan-horse/> [<https://perma.cc/95MR-BPER>]; Lee Fang, *Koch Brothers Talk Criminal Justice Reform, but Pay for “Tough on Crime” Political Ads*, THE INTERCEPT (Nov. 3, 2015), <https://theintercept.com/2015/11/03/soft-on-crime-ads/> [<https://perma.cc/9V4E-GJJF>]. See also Katy Reckdahl, “We Agree on the Bigger Issue,” THE CRIME REPORT (Nov. 6, 2015), <http://www.thecrimereport.org/news/inside-criminal-justice/2015-11-we-agree-on-the-bigger-issue> [<https://perma.cc/9V4E-GJJF>].

criminal justice legislation must include provisions that stiffen *mens rea* requirements for white-collar crimes.<sup>261</sup>

For their part, conservatives are wary of Black Lives Matter,<sup>262</sup> and continue to have serious disagreements with progressives about what to do with the money saved by reducing incarceration levels. Many times, they simply tout the cost savings without any mention of reinvesting it in anything.<sup>263</sup> Other times, they emphasize reinvesting the money in crime control, rather than building positive institutions.<sup>264</sup>

### III. THE NIGHTMARE FUTURE OF MASS CONTROL AND A NEW PARADIGM OF MASS INCARCERATION

The left is not lacking for vision. The Black Lives Matter movement, the growing network of grassroots organizations built by formerly incarcerated people, and other elements of the left are each defining goals for how to build principles of racial justice, community participation, and human value into a decarcerated future.<sup>265</sup> Other progressive advocates must actively incorporate these principles into our own advocacy rather than letting everything be framed by the right-left alliance. Decarceration that is not grounded in such a vision, and that relies primarily or solely on the left-right alliance for its rhetoric and implementation, will naturally slide into serving the right's interests—and this slide could ultimately foreclose the future that the left hopes to create.

The following section describes the inherent limits of the left-right alliance, and how those limits will combine with the interests of for-profit prison companies and other carceral profiteers. If progressive advocates are not careful, the left-right alliance will lead to decarceration that is dominated by cost-cutting rather than a desire to reduce the overall size of the criminal justice system, which will in turn replace mass incarceration with an even larger carceral state, characterized by for-profit mass control. That system of for-profit mass control will in turn set the stage for a final nightmare: a return to mass incarceration in an even more tenacious form.

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<sup>261</sup> Mike DeBonis, *The issue that could keep Congress from passing criminal justice reform*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/01/20/the-issue-that-could-keep-congress-from-passing-criminal-justice-reform/> [<https://perma.cc/62DS-B4TR>]. Interestingly, the Kochs themselves broke with their supporters and indicated that they would still support a criminal justice reform bill that did not include *mens rea* reform. *Id.*

<sup>262</sup> See Sabrina Siddiqui, *Republicans 'Cautious' About Confronting Black Lives Matter on Campaign Trail*, GUARDIAN (Nov. 2, 2015), <http://www.theguardian.com/us-news/2015/nov/02/black-lives-matter-republicans-democrats-2016> [<https://perma.cc/7TZP-FKVP>].

<sup>263</sup> See, e.g., Andrew Gargano, *Federal Sentencing Reform Can Reduce Prison Crowding and Save Money*, THE HILL BLOG (April 29, 2015, 6:00 AM), <http://thehill.com/blogs/congress-blog/judicial/240340-federal-sentencing-reform-can-reduce-prison-crowding-and-save> [<https://perma.cc/3DSR-LDA5>], Gingrich & Nolan, *supra* note 209.

<sup>264</sup> See, e.g., VIKRANT REDDY, CONSERVATIVE REFORM NETWORK, ROOM TO GROW SERIES: CRIMINAL JUSTICE REFORM, A NEW AGENDA FOR CRIMINAL JUSTICE 20 (2015), [http://conservativereform.com/wp-content/uploads/2016/02/CriminalJusticeReform\\_v2.pdf](http://conservativereform.com/wp-content/uploads/2016/02/CriminalJusticeReform_v2.pdf) [<https://perma.cc/7CFU-GSZY>] (savings from reduced incarceration should be reinvested in prisons that reduce recidivism); Richard Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html> [<https://perma.cc/G7DZ-DVET>] (arguing for savings to be reinvested in alternative punishments).

<sup>265</sup> See *supra* Section II.B.

### A. *Conservative Decarceration*

The right's push to decarcerate comes from three main sources: fiscal conservatives, libertarians, and religious conservatives. For fiscal conservatives, the chief goal of decarceration is to reduce the costs to the government associated with incarceration.<sup>266</sup> In many cases, fiscal conservatives who support decarceration chide their fellow conservatives for failing to look at prosecutors and prisons with the same distrust that they apply to other government functions, such as social welfare programs. Grover Norquist puts it this way: "Today's criminal justice system is big government on steroids, and the responsibility for taming its excesses falls to those committed to smaller government: conservatives."<sup>267</sup> The fiscal conservative push to close prisons is not about safeguarding personal autonomy; instead, they are comfortable with applying coercive methods of control and supervision to large populations as long as such coercion achieves short-term behavior modification and is less expensive than incarceration.<sup>268</sup> Fiscal conservatives frequently endorse privatization as a way of making the criminal justice system more efficient.<sup>269</sup> Additionally, they tend to emphasize limited narratives of holding individuals accountable, rather than examining the broader social structures that funnel people into criminal justice involvement.<sup>270</sup>

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<sup>266</sup> See, e.g., Jon Coupal & Leonard Gilroy, Opinion, *Cutting Costs for State Prisons*, ORANGE COUNTY REG. (Apr. 8, 2010), <http://www.oregister.com/articles/state-243090-prisons-california.html> [https://perma.cc/BXW9-72ZF]; Newt Gingrich & B. Wayne Hughes, Jr., Opinion, *What California Can Learn from the Red States on Crime and Punishment*, L.A. TIMES (Sept. 16, 2014, 5:27 p.m.), <http://www.latimes.com/opinion/op-ed/la-oe-0917-gingrich-prop-47-criminal-justice-20140917-story.html> [https://perma.cc/S26Z-9H6V]; Jerry Madden, Opinion, *Texas Criminal Justice Reform a Model for U.S.*, WASH. TIMES (Feb. 17, 2013), <http://www.washingtontimes.com/news/2013/feb/17/madden-texas-criminal-justice-reform-model-us/> [https://perma.cc/H3TE-6XKA].

<sup>267</sup> Grover Norquist, Opinion, *Conservatives Must Police Bottom Line on Criminal Justice*, ORANGE COUNTY REG. (Feb. 18, 2011), <http://www.oregister.com/articles/prison-288870-government-criminal.html> [https://perma.cc/B7CF-WTQW].

<sup>268</sup> See, e.g., Vikrant P. Reddy & Marc A. Levin, *The Conservative Case Against More Prisons*, AM. CONSERVATIVE (Mar. 6, 2013), <http://www.theamericanconservative.com/articles/the-conservative-case-against-more-prisons/> [https://perma.cc/DKV2-XVKX] (advocating use of electronic monitoring and specialized institutions like Hawaii's "HOPE" court, which requires supervisees to call the court each day to find out whether they have been randomly selected to report to court the same day to take a drug test, without regard for job scheduling or other demands on the supervisee's time); Viguier, *supra* note 264 ("The solution lies not only inside prisons but also with more effective community supervision systems using new technologies, drug tests and counseling programs. We should also require ex-convicts to either hold a job or perform community service.").

<sup>269</sup> See Leonard Gilroy & Adrian Moore, *Why Bernie Sanders is Wrong About Private Prisons*, REASON (Sept. 29, 2015), <http://reason.com/archives/2015/09/29/why-bernie-sanders-is-wrong-about-privat> [https://perma.cc/HP3T-45BQ] (arguing that private prison contracts offer more vehicles for accountability than government-run prisons); Rachel Lu, *How Conservatives Are Getting Right on Crime*, FEDERALIST, (Feb. 3, 2015), <http://thefederalist.com/>

2015/02/03/how-conservatives-are-getting-right-on-crime/ [https://perma.cc/6XUZ-AJGX] ("Private prisons may be a promising alternative to state or federally-run prisons, since they can be more easily incentivized to explore evidence-based methods for diminishing recidivism."); Leonard C. Gilroy et. al., *Public-Private Partnerships for Corrections in California: Bridging the Gap Between Crisis and Reform*, REASON FDN. & HOWARD JARVIS TAXPAYERS ASSN. 33-34 (Apr. 2010, rev. Apr. 2011) [http://reason.org/files/private\\_prisons\\_california.pdf](http://reason.org/files/private_prisons_california.pdf) [https://perma.cc/5YNX-N27P] (arguing that California should address prison overcrowding by signing private prison contracts).

<sup>270</sup> See Lu, *supra* note 269 ("We value personal responsibility. Individuals should be held accountable for what they do, regardless of their childhood. Accountability is essential to justice, but also to moral improvement."); Reddy & Levin, *supra* note 268 ("[J]ust as policymakers should scrutinize government expenditures on social programs and

For libertarians, the motivation to decarcerate stems from a general hostility to government powers and large bureaucracies. In certain powerful respects, this intersects with the left's concern about police and prosecutorial abuses of power.<sup>271</sup> However, the libertarian critique is equally suspicious of institutions like a social safety net, community medical and mental health care, and anti-poverty programs that could carry out the functions presently performed (albeit poorly) by the carceral state.<sup>272</sup> Taken together, these positions suggest that rather than fill the void created by prison closures, libertarians would prefer to live in a country that maximizes individual freedom for those with the means to enjoy it, while offering little assistance or comfort to the rest.

Meanwhile, religious conservatives view decarceration through a moral lens. They believe that rather than attempting to mete out increasingly severe punishments, the criminal justice system should save people from being defined solely by their worst moments, offer second chances, and seek to redeem criminals in the same way that converting to evangelical Christianity redeems sinners.<sup>273</sup> While this vision is in many ways more compatible with progressive visions of justice than the fiscal conservative or libertarian visions, it is not identical. In particular, the conservative worldview strongly emphasizes individual narratives of redemption and a focus on religious community over broad notions of social justice.<sup>274</sup> This focus tends to ignore or gloss over the central elements of the New Jim Crow critique and the Black Lives Matter movement.

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demand accountability, they should do the same when it comes to prison spending.”)

<sup>271</sup> See generally Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INSTITUTE (2006) [http://object.cato.org/sites/cato.org/files/pubs/pdf/balko\\_whitepaper\\_2006.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf) [<https://perma.cc/H299-P8NB>] (criticizing police militarization); Terrance G. Reed, *American Forfeiture Laws: Property Owners Meet the Prosecutor*, CATO INSTITUTE (Sept. 29, 1992), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa179.pdf> [<https://perma.cc/95XE-DNM8>] (criticizing asset forfeiture by police and prosecutors); Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO INSTITUTE (Oct. 2, 1992), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa180.pdf> [<https://perma.cc/7NXT-FVU8>] (warning of War on Drugs infringing on civil liberties).

<sup>272</sup> See generally Kent Masterson Brown, *The Freedom to Spend Your Own Money on Medical Care: A Common Casualty of Universal Coverage*, CATO INSTITUTE (Oct. 15, 2007), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa601.pdf> [<https://perma.cc/Z57Z-NQJW>] (criticizing universal health care coverage for limiting the “unfettered right” to spend one’s own money on health care); Tad DeHaven, *The Rising Cost of Social Security Disability Insurance*, CATO INSTITUTE (Aug. 6, 2013), [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa733\\_web.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa733_web.pdf) [<https://perma.cc/46HT-4464>] (calling for cuts to disability insurance); Jeffrey A. Schaler, *Strategies of Psychiatric Coercion*, CATO UNBOUND (Aug. 6, 2012), <http://www.cato-unbound.org/2012/08/06/jeffrey-schaler/strategies-psychiatric-coercion> [<https://perma.cc/R3JS-SCSB>] (opposing a public health approach to mental illness); Michael Tanner, *The American Welfare State: How We Spend Nearly \$1 Trillion a Year Fighting Poverty—and Fail*, CATO INSTITUTE, (Apr. 11, 2012), <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA694.pdf> [<https://perma.cc/BXR2-H722>] (criticizing welfare programs).

<sup>273</sup> See, e.g., Galen Carey, *An Evangelical Perspective on Criminal Justice Reform*, NAT’L ASSOC. OF EVANGELICALS (Oct. 11, 2012), <http://nae.net/an-evangelical-perspective-on-criminal-justice-reform/> [<https://perma.cc/USS8-7K8N>] (“When we see prisoners as fellow human beings made in God’s image, we can no longer just lock them up and throw away the key.”); Mike Lee, Opinion, *The Conservative Case for Criminal Justice Reform*, FEDERALIST (Oct. 7, 2015), <http://thefederalist.com/2015/10/07/the-conservative-case-for-criminal-justice-reform/> [<https://perma.cc/JSY6-YXKC>] (using Christian rhetoric of forgiveness and second chances).

<sup>274</sup> See, e.g., Carey, *supra* note 273 (emphasizing role of chaplains, volunteers, and community groups); Lee, *supra* note 273 (criticizing “government-run or government-funded correctional institutions” and praising religious community institutions).

Additionally, their focus on private charity over public action leaves little role for the government in addressing root causes of crime such as poverty, residential segregation and the accompanying community underinvestment, and lack of job opportunities.<sup>275</sup>

There are three chief problems with allowing any of these conservative, anti-government, individual-focused worldviews to drive how decarceration proceeds: (1) they fail to address the racial disparities in the criminal justice system; (2) they fail to address the underlying social problems that trap people in a cycle of criminal justice involvement; and (3) they exhibit a preference for replacing government programs with private entities, in both the criminal justice system and other contexts.

Reducing the total number of people incarcerated will not automatically reduce the racial disparities in who gets arrested, prosecuted, and sentenced to prison. Indeed, recent experience suggests that a decarceration strategy that does not explicitly address these disparities may actually make them worse. Minnesota has one of the lowest incarceration rates in the country, but has some of the greatest racial disparities in incarceration, probably because of wealth disparities between Black and white Minnesotans.<sup>276</sup> Similarly, when New York City announced that NYPD would shift away from arrests and toward issuing summonses for marijuana possession, arrest rates fell across the city but summonses were issued far more frequently in Black and Latino neighborhoods than in white neighborhoods—a situation that *Vice News* described thusly: “Weed Is Basically Legal in New York City Now, but Only If You’re White.”<sup>277</sup> Accordingly, adopting a conservative, raceblind decarceration strategy means that the burdens of the criminal justice system will continue to fall overwhelmingly and disproportionately on impoverished communities of color. Rather than becoming truly liberated, these communities will continue to be subjected to what Michelle Alexander describes as a racialized caste system or system of social control—albeit in a different form than today. Some would argue that having large numbers of people under supervision in communities of color is better than having large numbers of people removed from these communities through incarceration. But as Black Lives Matter activists have so effectively argued since the 2014 shooting of Michael Brown, the racially disparate application of police violence and other forms of social control is itself a serious societal harm that impedes the full participation of Black people in civic life.<sup>278</sup> Moreover, as discussed *supra*, supervision all too often serves as a path back into incarceration.

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<sup>275</sup> See Mark Oppenheimer, *With Prison Ministry, Colson Linked Religion and Reform*, N.Y. TIMES (Apr. 27, 2012), <http://nyti.ms/20TM4Ef> [<https://perma.cc/6PMX-YF6W>].

<sup>276</sup> GOTTSCHALK, *supra* note 7, at 133. See also JONATHAN M. ROSE, COUNCIL ON BLACK MINNESOTANS, DISPARITY ANALYSIS: A REVIEW OF DISPARITIES BETWEEN WHITE MINNESOTANS AND OTHER RACIAL GROUPS (2013), <http://mn.gov/cobm/pdf/COBM%20-%202013%20Research%20Report%20on%20Disparities.pdf> [<https://perma.cc/3P6B-Y2H5>] (describing Black-white economic, educational, and other disparities in Minnesota).

<sup>277</sup> Theodore Hamm & Alex S. Vitale, *Weed Is Basically Legal in New York City Now, but Only If You’re White*, VICE (Oct. 23, 2015), <http://www.vice.com/read/weed-is-basically-legal-in-new-york-city-now-but-only-if-youre-white-1023> [<https://perma.cc/KJW4-6SGY>].

<sup>278</sup> See, e.g., Mychal Denzel Smith, *A Q&A With Opal Tometi, Co-Founder of #BlackLivesMatter*, THE NATION (June 2, 2015), <http://www.thenation.com/article/qa-opal-tometi-co-founder-blacklivesmatter/> [<https://perma.cc/P9ZK-ZJ76>]; Mychal Denzel Smith, *A Q&A With Alicia Garza, Co-Founder of #BlackLivesMatter*, THE NATION (Mar. 24, 2015), <http://www.thenation.com/article/qa-alicia-garza-co-founder-blacklivesmatter/> [<https://perma.cc/5KQS-JGRJ>]; Van R. Newkirk II, *The Permanence of Black Lives Matter*, THE ATLANTIC (August 3, 2015) <http://www.theatlantic.com/politics/archive/2016/08/movement-black-lives-platform/494309/> [<https://perma.cc/R5EY-HNRC>]. See also Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (October 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/A4TK-SF5J>].

Similarly, failing to address the underlying social problems and community underinvestment that trap people in a cycle of criminal justice involvement will prevent these individuals from being able to escape future involvement in that system. As Marie Gottschalk has written, “The terms reentry, rehabilitation, and ‘second chance’ are gross misnomers . . . many former offenders never got a first chance, let alone a second one.”<sup>279</sup> Decarceration that prioritizes cost-cutting and rugged individualism will fail to address the structural causes of crime, such as poverty, lack of quality formal education, lack of living-wage job opportunities, lack of wealth, social exclusion, unaddressed mental health issues, and drug addiction.<sup>280</sup>

Thus, in a conservative-driven decarceration, the criminal justice system will continue to serve as society’s main response to the unmet needs of these populations. And many conservatives believe that components of the criminal justice system can operate fairly and efficiently if delegated to private entities. This pro-privatization bias is where the nightmare begins.

### B. *Private Interests Move In, and the Net Widens*

Consistent with the principles described above, the criminal justice reform proposals that have emerged from recent bipartisan alliances tend to focus exclusively on decarceration without attempting to reduce the broad net cast by the criminal justice system generally. For example, the major criminal justice reform bill introduced with bipartisan congressional support in 2015—the CORRECTIONS Act (S.467), the Smarter Sentencing Act of 2015 (S.502), and Sentencing Reform and Corrections Act of 2015 (S.2123)—focused on reducing mandatory minimum sentences and, in the case of the CORRECTIONS Act, increasing the use of home confinement and community supervision.<sup>281</sup> Similarly, criminal justice reform legislation sponsored by the Pew/BJA JRI often functioned by shifting certain populations from prisons into supervision programs like parole and probation.<sup>282</sup> And in general, politicians calling for sentencing reform tend to link less use of prison to greater use of supervision. There are two risks associated with such proposals. First, the incentives they create for prosecutors may inadvertently result in net-widening by shifting people onto more intensive supervision regimes than those people may have

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<sup>279</sup> GOTTSCHALK, *supra* note 7, at 81.

<sup>280</sup> See GOTTSCHALK, *supra* note 7, at 79-97 (arguing that narrowly focusing on reentry as a path out of the carceral state ignores the deeper structural issues and political economy on which the carceral state rests).

<sup>281</sup> See CORRECTIONS Act, S. 467, 114th Cong. (2015); Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015); Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015).

<sup>282</sup> See URBAN INSTITUTE JRI ASSESSMENT, *supra* note 246, at 74 (Kansas JRI reforms involved strong emphasis on community corrections, including requiring post-release supervision for individuals reincarcerated for probation revocations); 23, 78 (Kentucky JRI reforms included increasing GPS monitoring and other alternative sanctions for low-level, nonviolent offenses); 82 (Louisiana JRI reforms focused on expansion of early release and parole for people in prison); 90 (New Hampshire JRI reforms focused on increasing use of parole); 24, 94 (North Carolina JRI reforms focused on reducing prison sentences, creating an option for an early shift from prison to supervision, increasing the length of post-incarceration supervision for serious offenses, and shifting misdemeanants from prison to jail or probation); 23, 98 (Ohio JRI reforms included making greater use of community corrections, requiring GPS monitoring for certain people released from prison, and increasing probation options); 102 (Oklahoma JRI reforms included requiring supervision after release from prison); 122 (West Virginia JRI reforms included mandatory supervision for all felony offenders).

otherwise received.<sup>283</sup> Second, they create opportunities for rent-seeking by companies that profit from reentry and supervision services.

As described *supra*, the two major private prison companies have already begun to acquire community corrections facilities and electronic monitoring firms.<sup>284</sup> If bipartisan criminal justice reform efforts result in a large-scale shift from incarceration to community corrections and supervision, the now-diversified private prison companies will be poised to capture that business. As one GEO executive put it on a recent earnings call, “We believe that the emphasis on offender rehabilitation and community reentry programs as part of criminal justice reform will create growth opportunities for our company.”<sup>285</sup> Additionally, privatized probation firms represent a natural acquisition target for CCA/CoreCivic and GEO in the coming years—particularly for GEO, which already has a GPS monitoring subsidiary with complementary capabilities. If such acquisitions are completed, then in certain states, the two companies could achieve vertically integrated control over every non-judicial step in the criminal justice system, from pretrial supervision to incarceration to community corrections to probation and parole supervision.

This vertical integration would incentivize CCA/CoreCivic and GEO not just to keep people in prison, but to keep people involved in the criminal justice system generally, whether through expanding the populations subject to probation, extending probation terms, or returning people to prison through probation revocations. For any individual who enters such a vertically-integrated system, there is only one outcome that would not feed corporate revenue: a successful exit from the criminal justice system.

Additionally, because supervision is cheaper on a per-person basis than incarceration, any shift from prisons to supervision would tend to incentivize these companies to boost revenue by widening the net of criminal justice system involvement. Statistics compiled by the Administrative Office of the U.S. Courts indicate that incarcerating a person in a federal prison costs \$30,621 per year, while keeping a person on post-sentencing community supervision costs \$3,909 per year.<sup>286</sup> Thus, assuming that both activities yield the same 10% profit margin,<sup>287</sup> a private prison company would have to keep more than 7,800 people on probation for a year to make the same profits that they would have made from incarcerating 1,000 people for a year.

Indeed, even without vertical integration, private probation firms are incentivized to widen the net of people on supervision and keep people on supervision rather than allow them to

<sup>283</sup> See DON STEMEN & ANDRES F. RENGIFO, NAT’L CRIMINAL JUSTICE REFERENCE SERV., ALTERNATIVE SENTENCING POLICIES FOR DRUG OFFENDERS: EVALUATING THE EFFECTIVENESS OF KANSAS SENATE BILL 123, FINAL REPORT at 204-5 (March 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238012.pdf> [<https://perma.cc/G6NQ-GY3V>] (Kansas decarceration legislation that mandated community-based supervision and drug treatment for low-level, nonviolent drug offenses inadvertently resulted in net-widening because “more drug possessors are now subject to stricter conditions and greater surveillance than prior to implementation of SB 123; a situation that may be leading to higher rates of revocation.”).

<sup>284</sup> See *supra* text accompanying notes 152-159.

<sup>285</sup> The GEO Group’s (GEO) CEO George Zoley on Q3 2015 Results - Earnings Call Transcript, SEEKING ALPHA (Nov. 5, 2015 5:27 PM), <http://seekingalpha.com/article/3653896-geo-groups-geo-ceo-george-zoley-q3-2015-results-earnings-call-transcript?part=single> [<https://perma.cc/PQ6W-VJR5>].

<sup>286</sup> *Did You Know? Imprisonment Costs 8 times More Than Supervision*, UNITED STATES COURTS (June 18, 2015), <http://www.uscourts.gov/news/2015/06/18/did-you-know-imprisonment-costs-8-times-more-supervision> [<https://perma.cc/S547-ZA8T>].

<sup>287</sup> In 2014, CCA/CoreCivic’s gross revenue was \$1,646,867 and its net income was \$195,022, yielding a profit margin of 11.8%. See CXW Income Statement, *supra* note 122. Similarly, GEO’s gross revenue was \$1,691,620 and its net income was \$143,930, yielding a profit margin of 8.5%. See GEO Income Statement, *supra* note 122. Thus, a 10% profit margin is a fair ballpark estimate.

successfully complete it. This dynamic has already been documented in the private, for-profit probation firms that operate in Georgia. Thanks to the existence of private probation companies, many people who would not otherwise be on probation are placed on indeterminate sentences of “pay only” probation solely to pay off outstanding court fines and fees.<sup>288</sup> The longer it takes for a person to pay off the underlying court debt, the more fees the probation company collects—and HRW documented multiple instances of people being trapped in pay-only probation arrangements for years after being convicted.<sup>289</sup>

### C. Mass Control Supplants Mass Incarceration

Fueled by these incentives, it is likely that a successful left-right alliance to end mass incarceration would rearrange the carceral state rather than shrinking it—replacing the paradigm of mass incarceration with a new paradigm of mass control. Take, for example, the 50% reduction in the prison population that has been set as a goal by Van Jones’ #cut50 alliance.<sup>290</sup> If successful, this effort would result in widespread prison closures. However, replacing half of all prison sentences with equivalent terms of supervision would increase the supervision population to nearly 5.5 million people.<sup>291</sup>

Closing prisons and replacing them with mass control would carry obvious appeal for fiscal conservatives, given the lower per-person costs of mass control. Viewed through the lens of racial justice, however, the results would be decidedly less impressive. Black and Brown people would continue to be arrested and prosecuted at rates far out of proportion to their numbers in the population.<sup>292</sup> And even with fewer people in prison, pervasive supervision would further harm impoverished Black and Brown communities.<sup>293</sup>

Under a mass control paradigm, young Black men and women would remain in the community but be marked and tracked by the criminal justice system—perhaps with the literal shackle of an electronic ankle monitor, or perhaps with the invisible but pervasive eye of probation and parole supervision. Indeed, in neighborhoods where most young Black men are subject to the diminished rights of probation and parole supervision, police tactics could further escalate in aggressiveness and intrusiveness on the streets, in houses, and in businesses and places of worship without running afoul of any legal boundaries. Given the extremely limited Fourth Amendment rights of people on probation and parole, this could go far beyond the already

<sup>288</sup> PROFITING FROM PROBATION, *supra* note 5, at 25-27.

<sup>289</sup> *Id.* at 29.

<sup>290</sup> See *Our Mission & Work*, #CUT50, <http://www.cut50.org/mission> [<https://perma.cc/F49A-P26E>] (last visited Feb. 27, 2016).

<sup>291</sup> See Kaoble & Bonczar, *supra* note 51, at 1 (approximately 4.65 million people on community supervision at year-end 2015); PRISONERS IN 2015, *supra* note 9, at 2, tbl. 1 (approximately 1.53 million people in prison at year-end 2015).

<sup>292</sup> See THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 3-12 (Aug. 2013), [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) [<https://perma.cc/M5HC-ZH85>] (describing racial disparities in police activity, access to counsel, prosecution, and decisions by judges and juries).

<sup>293</sup> In fact, making greater use of supervision could worsen the racial disparities in who is incarcerated and who is not. Currently, states that indiscriminately imprison people for both serious and minor offenses tend to have lesser racial disparities in imprisonment, while states that reserve their prisons mainly for people who have committed serious offenses tend to have greater racial disparities in imprisonment. GOTTSCHALK, *supra* note 7, at 133-34.

significant intrusions justified under stop-and-frisk policies.<sup>294</sup> A recent proposal by Washington, D.C. Mayor Muriel Bowser to crack down on probationers and parolees illustrates what kinds of powers could be unleashed on Black and Brown communities: police empowered to carry out random searches of supervisees at any time of the day or night, and granted discretion to immediately jail people for up to 72 hours in response to minor infractions of conditions of supervision.<sup>295</sup> The more people who are on supervision in any given community, the more confident that police officers would be in freely conducting suspicionless body searches of random people on the streets, warrantless house raids, and mass sweeps in local stores, churches, and other places where people on supervision would congregate. The situation for Black people in these neighborhoods is already bad enough when police are not legally privileged to engage in such abuse—as Black Lives Matter has so persistently highlighted since the movement began. But mass control would make it even worse.

Mass control would be similarly distressing from an economic justice perspective. Instead of addressing issues of concentrated poverty and disenfranchisement, it would expand the number of people burdened with criminal records. Research shows that having a criminal record—even one that did not result in prison time—can lead to serious barriers in seeking employment, housing, public assistance, and education and training.<sup>296</sup> Being arrested during one’s lifetime decreases employment opportunities more than long-term unemployment, receipt of public assistance, or having a GED instead of a high school diploma.<sup>297</sup> Additionally, like the current systems of privatized probation and privatized electronic monitoring, the new mass control measures would probably be financed on the backs of those supervised. They would thus perpetuate a two-tiered system of justice, in which people of financial means can complete their terms of supervision within the originally allotted time, but poor people would be subject to longer periods of supervision to pay off their supervision debts (and thereby further add to those debts) and likely be subject to the same kinds of high fees and debtors’ prison collection practices that already characterize criminal justice debt collection in many jurisdictions.

Mass control would also be distressing from a good-government perspective. Based on our three decades of experience with private prison companies, we should expect similar problems of performance, accountability, and transparency from privatized reentry and supervision.<sup>298</sup> Indeed, the abuses documented in the nascent private probation industry—a “user-

<sup>294</sup> See *Samson v. California*, 547 U.S. 843, 850 (2006) (upholding police officer’s suspicionless and warrantless search of parolee); *United States v. Knights*, 534 U.S. 112, 121-22 (2001) (warrantless police search of probation supervisee’s home supported by less than probable cause was constitutional, even though it had no relationship to his probation officer’s efforts to monitor probation compliance); *Griffin v. Wisconsin*, 483 U.S. 868, 876-88 (1987) (approving warrantless searches of probation supervisees without probable cause). Cf. CENTER FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (July 2012) <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [<https://perma.cc/3X9U-V6CM>] (describing individual and community impacts of stop-and-frisk policies).

<sup>295</sup> See Aaron C. Davis & Peter Hermann, *D.C. Mayor to Ask for Expanded Police Powers Amid Homicide Spike*, WASH. POST, Aug. 25, 2015, [https://www.washingtonpost.com/local/dc-politics/dc-mayor-to-ask-for-expanded-police-powers-amid-homicide-spike/2015/08/25/f7e57656-4b64-11e5-84df-923b3ef1a64b\\_story.html?utm\\_term=.3976ba4fce5c](https://www.washingtonpost.com/local/dc-politics/dc-mayor-to-ask-for-expanded-police-powers-amid-homicide-spike/2015/08/25/f7e57656-4b64-11e5-84df-923b3ef1a64b_story.html?utm_term=.3976ba4fce5c) [<https://perma.cc/NKH8-48SQ>].

<sup>296</sup> See REBECCA VALLAS & SHARON DIETRICH, CENTER FOR AMERICAN PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS, 9-28 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [<https://perma.cc/G32A-EW5T>].

<sup>297</sup> *Id.* at 9.

<sup>298</sup> See *supra* Section I.D. (discussing private prison industry).

funded” model kept afloat by abusive debt collection and unnecessary requirements imposed by private probation officers that increase corporate revenue— suggest the new types of profit-driven abuses that will come from privatized mass control.<sup>299</sup>

The most worrisome aspect of mass control is, however, the ease with which it could pave the way to new and even worse form of mass incarceration.

*D. Prisons Expand Once Again—But Now with an Entrenched Privatized Apparatus of Mass Control, Surveillance, and Monitoring*

If cost-based decarceration is successful at effecting a large-scale shift of people from incarceration to supervision, we will know it from the prison closures. Rendered obsolete by the new mass control paradigm, many of these expensive, heavily-staffed public institutions will shut down—maybe converted into museums like Alcatraz<sup>300</sup> and Eastern State Penitentiary,<sup>301</sup> maybe converted into hotels or condos like Boston’s Charles Street Jail<sup>302</sup> or Washington DC’s Lorton Reformatory,<sup>303</sup> or maybe simply left to rot.<sup>304</sup>

One might think these constraints on prison capacity would create a natural barrier to putting more people in prison again: there would simply not be enough prison space to safely incarcerate as many people as before. However, rapid growth in the incarcerated population that outstripped public prison capacity is exactly what fostered the birth of the private prison industry in the 1980s. As a 2001 report funded by the U.S. Department of Justice put it, “the pressure of increased incarceration rates, combined with rising correctional costs” enabled the rise of private prisons in the 1980s and 1990s largely because of “the overriding desire of many states and local governments to rapidly increase desperately needed prison bed capacity and to reduce prison operational costs.”<sup>305</sup>

As in the original prison boom, the private prison industry would benefit from its ability to bring new private prisons online faster and with less political hassle than building new public prisons. Compared to the alternative of building new public prisons—which typically requires voters to approve prison construction bonds and other obvious, long-term investments in mass incarceration—contracting with the private prison industry merely requires legislative approval to expand a correctional agency’s operating budget.<sup>306</sup>

<sup>299</sup> See *supra* at Section I.E. (discussing “user-funded” criminal justice system and privatized probation).

<sup>300</sup> *Alcatraz Island*, NATIONAL PARK SERVICE, <http://www.nps.gov/alca/index.htm> [https://perma.cc/EW33-PTE9] (last visited Feb. 11, 2016).

<sup>301</sup> EASTERN STATE PENITENTIARY, <http://www.easternstate.org/home> [https://perma.cc/9MVE-R9LB] (last visited Feb. 11, 2016).

<sup>302</sup> THE LIBERTY: A STARWOOD LUXURY COLLECTION HOTEL, [http://www.libertyhotel.com/the\\_hotel/history.html](http://www.libertyhotel.com/the_hotel/history.html) [https://perma.cc/W6ZY-TPMJ] (last visited Feb. 11, 2016).

<sup>303</sup> Antonio Olivo, *Former Lorton Prison Site Will Get \$188 Million Overhaul Starting in October*, WASH. POST (June 3, 2014), [https://www.washingtonpost.com/local/2014/06/03/1ab73b0a-eb36-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/local/2014/06/03/1ab73b0a-eb36-11e3-9f5c-9075d5508f0a_story.html) [https://perma.cc/EU3Y-F9EP].

<sup>304</sup> *Rutland Prison Camp*, ATLAS OBSCURA, <http://www.atlasobscura.com/places/rutland-prison-camp> [https://perma.cc/5M6V-TPE6] (last visited Feb. 11, 2016); *Kansas City Workhouse*, ATLAS OBSCURA, <http://www.atlasobscura.com/places/kansas-city-workhouse> [https://perma.cc/JAS7-AVJ5] (last visited Feb. 11, 2016).

<sup>305</sup> JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS, 13 (NCJ 181249, 2001), <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf> [https://perma.cc/N2WY-E6E7].

<sup>306</sup> *Id.* (“[T]he construction costs of a privately operated facility can be lumped together in the state’s prison operating budget whereas the state must seek voter approval on a construction bond for a publicly operated facility,

Unlike the original prison boom, private prison companies would additionally benefit from their now-substantial operating capital, the sophisticated lobbying and public relations infrastructure they built in the first prison boom, and their deep political connections. In 1983, CCA/CoreCivic was such a small, ad hoc operation that its first “prison” was actually a converted motel that the company hurriedly leased and fenced to fulfill the terms of their first contract for immigrant detention.<sup>307</sup> Thirty-three years later, CCA/CoreCivic has grown into a frighteningly large and sophisticated publicly-traded company, with 66 corrections and detention facilities around the country, over 5,500 acres of land, and annual revenues of \$1.79 billion.<sup>308</sup> Today, both CCA/CoreCivic and its chief competitor, GEO Group, have developed close relationships with state and federal policymakers.

Furthermore, the private prison companies would benefit from their preexisting relationships with correctional agencies. In the 1980s, private prison companies were a new, unknown quantity for correctional officials, and contracting with them was seen as unusual.<sup>309</sup> In a future of privatized mass control, private prison companies would already be longtime “government partners” in a range of settings thanks to their expansion into prison, community corrections, and supervision contracts. This would make private prisons the path of least resistance for correctional officials seeking to address new overcrowding. Moreover, the revolving door from federal and state correctional agencies would tend to reward the officials who play ball with the industry—as in the current environment, such officials could expect offers to join private prison companies as senior executives with higher salaries than those available in the public sector. (For example, when Harley Lappin moved from the Federal Bureau of Prisons to CCA/CoreCivic, his salary jumped from about \$180,000 to \$1.51 million.<sup>310</sup>) The industry could therefore be confident not only in their ability to quickly offer new prison space to these existing government partners, but in the willingness of correctional officials to take the industry up on these offers.

As a result of these factors, any post-decarceration prison boom would likely be heavily privatized—much more so than the prison system is today, and probably similar to the high degree of privatization in ICE detention.<sup>311</sup> As CCA/CoreCivic frequently reminds its investors,

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as is usually the case.”).

<sup>307</sup> See Damon Hinger, *T. Don Hutto – The Mettle of the Man Behind Our Proud Facility*, INSIDE CCA (Jan. 19, 2010), <https://www.cca.com/insidecca/t.-don-hutto---the-mettle-of-the-man-behind-our-proud-facility> [<https://perma.cc/G9ZZ-KVAJ>] (describing how CCA/CoreCivic converted a Houston motel into an immigration detention facility in 1983, and describing co-founder T. Don Hutto’s actions as “bold and often misunderstood at the time”); GRASSROOTS LEADERSHIP, *supra* note 194, at 1 (noting that according to CCA/CoreCivic promotional video, company co-founder T. Don Hutto hired the former hotel owner’s family as staff members and fingerprinted detainees himself).

<sup>308</sup> CORRECTIONS CORP. OF AMERICA, FOURTH QUARTER 2015 INVESTOR PRESENTATION 5, 16 (February 24, 2016), <http://www.cca.com/investors/presentations-webcasts-events> [<https://perma.cc/27LK-HDLM>]; CXW Income Statement, *supra* note 122.

<sup>309</sup> See Martin Tolchin, *As Privately Owned Prisons Increase, So Do Their Critics*, N.Y. TIMES (Feb. 11, 1985), <http://www.nytimes.com/1985/02/11/us/as-privately-owned-prisons-increase-so-do-their-critics.html> [<https://perma.cc/C668-HXPP>] (quoting reactions of public officials to private prisons in 1985); Austin & Coventry, *supra* note 305, at 13 (describing controversy).

<sup>310</sup> Costantini & Rivas, *supra* note 112.

<sup>311</sup> See discussion *supra* Section I.C.3. (discussing ICE privatization).

only about 10% of prisons are currently privatized, leaving significant “[o]ppportunity to gain market share” by private prison companies.<sup>312</sup> A second prison boom would present an unparalleled opportunity for this “market penetration” to take place.

A second prison boom is, of course, not inevitable. Prison populations would remain static or fall without increased numbers of prosecutions, longer stays in prison or jail, or increased numbers of people reincarcerated for violating their terms of supervision. However, mass privatized monitoring would enable private prison companies to affect the third factor by manipulating the mass control paradigm. Merely by changing their internal practices, they could increase rates of probation and parole violations and thereby send more people to prison. Probation officers have tremendous discretion to decide whether to respond formally or informally to minor rule violations by their supervisees, as well as to determine whether or not probation should be revoked in response to the violation.<sup>313</sup> Additionally, in states with flash incarceration programs, probation officers can send a person to jail without judicial intervention.<sup>314</sup> As Joan Petersilia observed in her comprehensive 1997 article on probation, “the probation population is so large that revoking even a few percent of them or revoking all those who are rearrested can have a dramatic impact on prison admissions.”<sup>315</sup>

This dynamic will create an enticing profit-making opportunity for vertically-integrated private prison companies. Probation and parole are imposed for limited periods of time—if someone successfully completes their term of supervision, then they will no longer be a source of income for the company supervising them. So, by granting a private prison company the power to decide whether to allow a supervisee to complete her term of supervision, extend the term of supervision, or convert the supervisee back into a prisoner, the state gives that company tremendous power to shape the demand for its own services. In non-vertically-integrated companies that solely provide probation supervision, these powers have already led to abuses.<sup>316</sup> But a vertically-integrated private prison company would be able to take this one step further. Similar to Enron’s manipulation of energy markets in the early 2000s, the company could create a problem—prison overcrowding caused by increased rates of probation and parole revocation—and then profit from “solving” that overcrowding problem by renting new prison bedspace to the state.<sup>317</sup> Given the evidence that private prison companies already manipulate demand for prison beds, it would be surprising if they abstained from this new market manipulation opportunity.<sup>318</sup>

<sup>312</sup> CCA, FOURTH QUARTER 2015 INVESTOR PRESENTATION, *supra* note 308, at 3.

<sup>313</sup> Klingele, *supra* note 67, at 1038-39, 1040-41.

<sup>314</sup> See *supra* text accompanying note 70 (discussing flash incarceration).

<sup>315</sup> Petersilia, *supra* note 63, at 166.

<sup>316</sup> PROFITING FROM PROBATION, *supra* note 5, at 5-6.

<sup>317</sup> The Enron market-manipulation strategy that presents the closest analogy is probably its “load shift” strategy. Under this strategy, Enron deliberately submitted fake bids to generate more electricity than a single transmission line could carry, which triggered congestion relief bonuses for any company that could provide a competing generation bid on another transmission line; Enron would then capture the bonuses by submitting its real bids, which appeared to relieve the fake congestion. See Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUSTON BUS. & TAX L. J. 1, 42-46 (2004) (describing how load shift operated).

<sup>318</sup> See Justin Jones, *How to Starve the For-Profit Prison Beast*, ACLU (Apr. 24, 2014, 3:27 PM), <https://www.aclu.org/blog/how-starve-profit-prison-beast> [<https://perma.cc/QT4W-PQGF>] (describing how Oklahoma increased sentences for possession of a cell phone in prison, which can be stacked on top of the original sentence, after private prison lobbyists advocated for this legislation); Mukherjee, *supra* note 138, at 31 (finding that prisoners in private prisons serve about 4 to 7 percent more time than those in public prisons, and attributing this to private prisons “distort[ing] release policies . . . by conferring infractions, or prison conduct violations, at higher rates than public prisons.”).

Believers in privatization may respond that shifting from pure bed-day or supervision-day compensation to a “pay-for-success” (“PFS”) model—for example, setting compensation for prisons or supervision regimes based on whether their populations reach certain recidivism-reduction targets—would eliminate this kind of perverse incentive.<sup>319</sup> However, this is a dubious proposition. PFS is poorly-suited to address the complex root causes of crime and social disorder, and efforts by investors to minimize their risk would likely influence both the metrics and the interventions selected in ways that would favor their interests over good policy outcomes.<sup>320</sup> Additionally, a vertically-integrated private prison industry would be able to defeat the incentives built into any particular contract by transferring people in their custody to whichever contract or set of contracts offered the most profitable terms—essentially, engaging in arbitrage with human bodies. And taken as a whole, the only way for the industry to continue growing would be to continue increasing the number of people in its custody—no matter how much individual contracts seek to disincentivize that growth.

In addition to the company’s general interest in continuing each supervisees’ criminal justice system involvement, there may be a further incentive for reincarceration instead of merely extending the term of supervision. Privatized probation is a low-margin business that depends on high volumes of supervisees to turn a profit.<sup>321</sup> Assuming that the company exacts the same percentage profit from incarceration and supervision, converting a person from an \$11/day supervision contract to an \$84/day incarceration contract<sup>322</sup> would yield nearly eight times the net revenue. Multiplied across tens of thousands of supervisees, this reincarceration could translate to tens or even hundreds of millions of dollars in new annual profits.

Mass control would thus be only the beginning of the nightmare. Once mass control is established and extensively privatized, the imperative to satisfy shareholders through further growth will incentivize more incarceration—and thanks to their role in supervision, the private prison industry will be able to generate more demand for their incarceration services.

This second age of mass incarceration would be even more difficult to end than the current age of mass incarceration. During the 1980s, private prison companies, prison telephone and financial services providers, and other prison profiteers were new players that did not yet have a track record of campaign contributions or a sophisticated lobbying presence in Congress and state legislatures. They grew organically and developed these capabilities as mass incarceration continued to metastasize in the 1990s and early 2000s. This is very different from what the situation will be if a second age of mass incarceration emerges from the mass control paradigm. In that scenario, the industry will already have strong ties to elected officials and a powerful lobbying presence. In addition, as described above, the initial shift from mass

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<sup>319</sup> See Julia Bowling, *Do Private Prison Contracts Fuel Mass Incarceration?*, BRENNAN CENTER FOR JUSTICE (Sept. 20, 2013), <https://www.brennancenter.org/blog/do-private-prison-contracts-fuel-mass-incarceration> [<https://perma.cc/43PL-MZBC>] (arguing that PFS contracts could reduce incarceration by encouraging private prisons to reduce recidivism).

<sup>320</sup> See IN THE PUBLIC INTEREST, *EVALUATING PAY FOR SUCCESS PROGRAMS AND SOCIAL IMPACT BONDS*, 4-5 (Dec. 2015) (explaining why the theory of PFS “looks better on paper than in reality”); Nathaniel Popper, *Success Metrics Questioned in School Program Funded by Goldman*, N.Y. TIMES (Nov. 4, 2015), [http://www.nytimes.com/2015/11/04/business/dealbook/did-goldman-make-the-grade.html?\\_r=0](http://www.nytimes.com/2015/11/04/business/dealbook/did-goldman-make-the-grade.html?_r=0) [<https://perma.cc/5M4D-KWTW>] (discussing how student eligibility criteria for Goldman Sachs kindergarten PFS project may have skewed results).

<sup>321</sup> PROFITING FROM PROBATION, *supra* note 5, at 17.

<sup>322</sup> See U.S. Courts, *supra* note 286 (indicating that incarcerating a person in a federal prison costs \$30,621 per year, while keeping a person on post-sentencing community supervision costs \$3,909 per year). On a per-day basis, this works out to about \$84 per day for incarceration and \$11 per day for supervision.

incarceration to mass control will set the stage for large-scale prison privatization as mass incarceration returns and the demand for prison beds increases. This will create broad reliance on the private prison industry by correctional agencies that may have lost the capability to carry out these functions in-house—much like the situation ICE finds itself in today. And like ICE today, these agencies will likely find it difficult to impose uniform standards, negotiate contracts that protect the public interest, and prevent these companies from violating the rights and human dignity of those in their custody.<sup>323</sup>

There would also be new political obstacles to ending the second age of mass incarceration that go beyond the new power of private prison companies and other for-profit service providers. The return of mass incarceration would sow discord and distrust between liberal elites and grassroots organizations like Black Lives Matter, who would correctly blame liberal elites for wreaking more havoc on communities of color. And for these liberal elites, knowing that decarceration led to a mass control paradigm, which in turn spawned a new prison boom, could dampen political will to attempt decarceration a second time. On the conservative side, while libertarians could be relied on to continue objecting to high incarceration rates, many pro-business, pro-privatization conservatives would be less likely to join any coalition to end the new mass incarceration; for them, a large but extensively privatized prison system would actually be a desirable result.

#### IV. CONCLUSION

Over the past half-decade, the growing left-right alliance to end mass incarceration has played a crucial role in opening up a broader national conversation about ending our current prison boom. This shared sentencing reform agenda can and should play an important role in present and near-term efforts to end the War on Drugs and roll back the extreme, irrational sentencing practices that have accumulated over the past three decades, such as mandatory minimum sentencing and Three Strikes laws. However, even as we rely on this alliance for certain goals, progressives must not mistake these reforms for what is necessary to build a stable decarcerated future.

Decarceration that proceeds according to a conservative worldview will merely shift large numbers of people from prison sentences to supervision, without addressing racial justice concerns or building the positive social institutions that could enable us to shrink the overall size of the carceral state. This will lead to a mass control paradigm characterized by heavy privatization of reentry and supervision, further harms to Black and Brown communities, the perpetuation of a two-tiered system of justice for rich and poor, and significant incentives to further widen the net of criminal justice supervision.

Mass control will also pave the way for a new and even worse form of mass incarceration, because vertically-integrated private prison companies will be able to use their reentry and supervision roles to manipulate the mass control paradigm. Merely by changing their internal practices, they could rapidly increase demand for prison beds—and then “solve” the resulting prison overcrowding by renting new prison bedspace to the government. This second prison boom would be more heavily privatized than the first prison boom. Unlike in the 1980s, private prison companies would benefit from their now-substantial operating capital, deep political connections, preexisting relationships with correctional agencies, and the revolving door for public corrections officials. The power of these companies and other factors would make this

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<sup>323</sup> See discussion *supra* Section I.C.3. (discussing ICE).

second age of mass incarceration even more difficult to end than the current one.

There is a better path. Rather than focusing narrowly on the goal of decarceration and shifting people from prisons to punitive forms of supervision, we can chart out an alternative future that shrinks the entire carceral state. We can radically rethink who should be incarcerated, for how long, in what kind of environment, and for what purposes. We can develop non-punitive alternatives to incarceration, and develop strategies for addressing root causes such as poverty, substance abuse, and mental illness, and other root causes. We can prioritize racial justice, community participation, and human value. Indeed, these ideas are already circulating in Black Lives Matter and elsewhere in the grassroots left. Those of us in mainstream progressive organizations ought to listen carefully to what they are saying.

The United States is in a rare political moment where we may be able to begin a real, fundamental shift away from the carceral paradigm. We should not squander the opportunity by narrowing our horizons in a way that locks us into an even more nightmarish future.

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