

## ABSTRACT

### A Nation Behind Bars: The Past, Present and Future of Mass Incarceration in the United States

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Prior to the 1970's, the total number of incarcerated Americans had scarcely ever risen above two-hundred thousand. Today there are over two million Americans behind bars. The United States of America incarcerates more people than any other nation on earth. In fact, while the U.S. accounts for only five percent of the global population, twenty-five percent of the world's prisoners are held by the United States. This thesis uses several different techniques to study mass incarceration within the United States. First, U.S. prison numbers and incarceration rates are compared to those of other nations from around the world, and the social impacts of various systems of mass incarceration are compared. This paper also examines the history of executive and legislative initiatives which have allowed the U.S. to develop the world's largest prison network. Next, this thesis examines the interplay between corporate interest and the perpetuation of a system of mass incarceration. Finally, propositions for downsizing America's prison system are examined.

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A NATION BEHIND BARS:  
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UNITED STATES

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## PREFACE

I first became interested in mass incarceration and criminal justice reform during my junior year at Baylor. Elizabeth Cano, who was then the Pre-Law coordinator, encouraged me to apply for an internship with the Public Defender Service for the District of Columbia. Neither she nor I really expected that I would be offered a spot at this much sought after internship. At the time I accepted the invitation to spend a semester in D.C. working for PDS I really had no idea what I was getting myself into. That semester I worked as an intern investigator for two staff attorneys. Alongside my intern partner, I spent my days in the projects that surround our nation's capital taking statements from witnesses and canvassing apartments for anyone who might have information regarding one of our cases. While I immediately fell in love with the nature and pace of the work, it took me well over a year to appreciate the significance of the problem that PDS attorneys work every day to correct.

Every day I went to work at PDS I worked on behalf of young black or brown clients, many of whom were my same age. I spoke with them in prison, I visited their families. I learned their life stories. Every day I saw what life was like for those who are born into the poorest neighborhoods of our nation. I walked their streets, and I heard their stories. I grew to care about the people, and I worked hard to vindicate the clients I was assigned to work for—many of whom were innocent. Yet, despite my love for the clients, I did not believe that there really existed an institutional system that preyed on young black or brown males in America today. I believed that there were some corrupt police officers; I saw that first hand. I knew that most of the poor, even in D.C. did not receive the caliber of representation in court that my clients received. I learned about the judicial process that favored the prosecution over defense, and I saw just how defeated so many defendants looked every day in court. All of this I saw firsthand, and I still didn't believe that American institutions functioned with incredible efficiency to incapacitate, incarcerate, disenfranchise and handicap for life black and brown men. I read books by Michelle Alexander, Marc Mauer and Angela Davis, who had herself once been an attorney at PDS. I read their books, but their arguments did not penetrate. It took me a year of reading and rumination to finally begin to understand the true nature of the problem that mass incarceration represents in contemporary society.

I wrote this thesis because I want to help others come to the same realization that took me so long to process. I wrote this paper so that hopefully a few more people will take this problem just a little more seriously. It is my hope that by spreading the truth just a little farther I can make a minor contribution towards ending mass incarceration. After all, America will never rid itself of a system of mass incarceration until everyone acknowledges its existence and accurately perceives the injustices that it represents.

## CHAPTER ONE

### Mass Incarceration

In the United States, the issue of mass incarceration has garnered increasing political and media attention in recent years. Many scholars and activists believe it to be one of the greatest blights on the country. But, despite the attention this issue has received, a clear and concise definition of mass incarceration has yet to emerge. Thus the question arises: What is mass incarceration? Instead of immediately attempting to construct a definition of the broad sociological phenomena that is a system of mass incarceration, a better starting point is a simple investigation into the data gathered on incarcerated peoples from various world nations.

#### *The Global Perspective*

Data collected on incarcerated populations is displayed in two different formats. The first way the data is presented is with a single number. For instance, Poland has 71,765 incarcerated individuals within its borders. The second way that the data is given is by calculating the number of incarcerated individuals per one-hundred thousand citizens. Poland has an incarceration rate of 189 per 100,000 (*World Prison Brief*). Both of these measurements are useful, and they often need to be used in comparison with one another to give an accurate depiction of a nation's prison numbers.

Numbers alone do not adequately portray the effects that a particular prison system has upon a nation, and they can even be misleading. Examine a hypothetical nation whose total number of incarcerated people is seventy-six hundred. This figure



initially seems quite low. Though, on its own, it tells us very little. If we then learn that the general population of this hypothetical country totals only twenty-two thousand, our perspective on this country shifts drastically. Such a ratio would yield an unimaginable incarceration rate of 34,545 per 100,000. Incarceration totals that initially seem high can be mitigated by large general populations leading to a low incarceration rate. Likewise, incarceration totals that initially seem low can be deceptive when the general population is small. Thirty thousand incarcerated individuals bears different implications in a population of one-hundred thousand than it does in a population of one-hundred million.

A practical place to begin looking at incarceration statistics is by examining the number of people various nations incarcerate. The World Prison Brief, a database published by the Institute for Criminal Policy Research, provides data on incarceration levels for nearly every nation in the world. Table 1 displays WPB data for the ten nations with the largest number of inmates.

Table 1: Global Incarceration Totals

Rank	Nation	Prison Population
1	United States	2,217,947
2	China	1,649,804
3	Russian Federation	633,826
4	Brazil	622,202
5	India	419,623
6	Thailand	304,090
7	Mexico	233,469
8	Iran	225,624
9	Indonesia	197,630
10	Turkey	187,609

Source: *World Prison Brief*; Institute for Criminal Policy Research, Oct. 2016; Web; 14 Nov. 2016

As has been stated, these statistics alone do not paint a full picture, but a few poignant observations can be made. First, one can see that this list is not evenly incremented. There is a sharp drop off in incarceration numbers when moving from the U.S. and China down to Russia and beyond. Second, the number of people held prisoner in these nations is staggering. Again, large totals can be mitigated by large general populations, but the enormity of a number such as 2,217,947 ought to be appreciated. To give some perspective on what two and a quarter million prisoners looks like, envision the following. The biggest stadium in the United States is Michigan Stadium in Ann Arbor, “The Big House”. Ironically, this moniker also serves as a nickname for federal prison. This gigantic stadium can hold just under 110,000 if it is packed to occupancy. If every person who is currently incarcerated in the U.S. were given a seat in that stadium, not only would the stadium be filled, but it would require the construction of 19 more stadiums of identical size to accommodate all the inmates and there would still be some left without a seat.

The next set of data which ought to be examine is incarceration rates. Global incarceration rates provided by WPB for the ten nations with the largest rates are given in Table 2. The figures listed represent the number of incarcerated per 100,000 total citizens.

Table 2: Global Incarceration Rates

Rank	Nation	Incarceration Rate
1	Seychelles	799

Table 2—*Continued*

Rank	Nation	Incarceration Rate
2	United States	693
3	Turkmenistan	583
4	El Salvador	568
5	Virgin Islands	542
6	Cuba	510
7	Thailand	450
8	Russian Federation	439
9	Guam	438
10	Rwanda	434

Source: *World Prison Brief*; Institute for Criminal Policy Research, Oct. 2016; Web; 14 Nov. 2016

This list is mostly comprised of nations that did not appear on the top ten list for total incarceration. The only three nations to appear on both lists are the United States ranked first then second, the Russian Federation ranked third and eighth and Thailand ranked sixth and seventh. One striking feature of Table 2, but one that is not altogether surprising, is the fact that Guam and the Virgin Islands both rank among the nations with the highest rates of incarceration. Both Guam and the Virgin Islands are U.S. territories. More surprising is the fact that China drops off the list entirely when it comes to incarceration rates; incarcerating only 118 per 100,000, China is ranked 135th according to WPB.

The world leader in incarceration rates is a little known chain of islands called the Seychelles. This is due, not in small part, to a statistical anomaly. Whereas the incarceration rate for the Seychelles is listed as 799 per 100,000, the total number of incarcerated people, at last count, was only 735. Due to a population of only 92,000 the Seychelles incarceration rate is slightly inflated (*World Prison Brief*). Other factors that

have led to such a high rate of incarceration include the island nation's proximity to the coast of Somalia, a region infamous for piracy, and the fact that the nation's "Security forces committed human rights abuses... includ[ing] police brutality...prison overcrowding; prolonged pretrial detention; [and] inefficient judiciary" (*Seychelles 2013 Human Rights Report*, 1). There has also been significant reform in the Seychelles since the WPB data was collected. In 2016, 158 prisoners who were convicted of offenses under the "Misuse of Drugs Act 1990" were released as a new "Misuse of Drugs Act 2016" came into effect (Athanse and Uranie). Thus, since the WPB list was published, the Seychelles have reduced their total prison population by over twenty percent.

The first nation that is statistically comparable to the U.S. in terms of incarceration rates is the Middle Eastern nation of Turkmenistan. Turkmenistan, whose population totals roughly 5.24 million citizens, has an incarceration rate of 583 per 100,000—16% less than that of the United States (*World Prison Brief*). Turkmenistan trails the U.S. considerably in its incarceration rate, but in order to fairly judge how its justice system compares to ours it is useful to have more information on the nation itself. It seems natural that a nation with fewer incarcerated people would have a justice system that places a higher value on individual liberty and personal freedom.

In the U.S. State Department's Human Rights Report, Turkmenistan is described as having an authoritarian government which has orchestrated a litany of human rights abuses:

Although the constitution declares Turkmenistan to be a secular democracy and presidential republic, the country has an authoritarian government controlled by the president, Gurbanguly Berdimuhamedov, and the Democratic Party...The three most important human rights problems were arbitrary arrest; torture; and disregard for civil liberties, including restrictions on freedoms of speech, press, assembly, and

movement. Other continuing human rights problems included citizens' inability to change their government; interference in the practice of religion; denial of due process and fair trial; arbitrary interference with privacy, home, and correspondence; discrimination and violence against women; trafficking in persons; and restrictions on the free association of workers. Officials in the security services and elsewhere in the government acted with impunity. There were no reported prosecutions of government officials for human rights abuses. (*Turkmenistan 2013 Human Rights Report*, 1-2)

Turkmenistan's human rights violations are appalling, yet their incarceration rate is 16% less than the United States and their total prison population is 2,187,379 prisoners fewer than the United States'. This is not to say that Turkmenistan is a preferable place to live in comparison to the U.S., but the dichotomy between ideological liberty and actual incarceration rates is shocking. It hardly seems possible that the U.S. would have an incarceration rate anywhere near that of an oppressive regime such as the Turkmenistan government.

Of the three nations that appear on both the top ten list for incarceration rates and incarceration totals, the United States is clearly the pack leader. As Figure 1 and Figure 2 depict, the U.S. towers over Russia and Thailand in terms of overall incarceration numbers and rate of incarceration. In fact, the United States prison population more than doubles that of Russia and Thailand put together. In global comparisons of systems of incarceration, the United States stands alone; however, it can still prove useful to examine what similarities these three nations share.

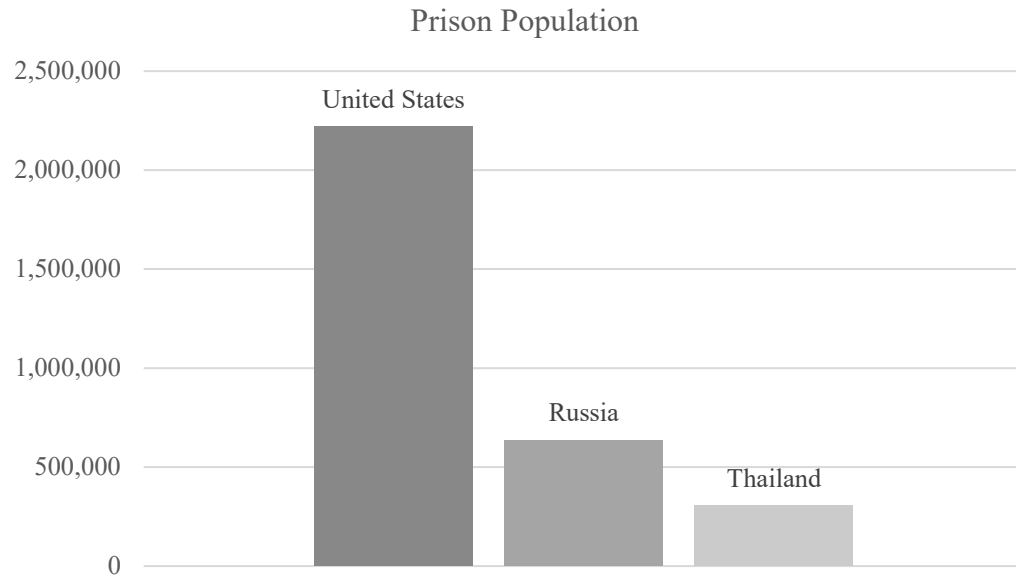


Figure 1: Comparison of prison populations in the United States, Russia and Thailand

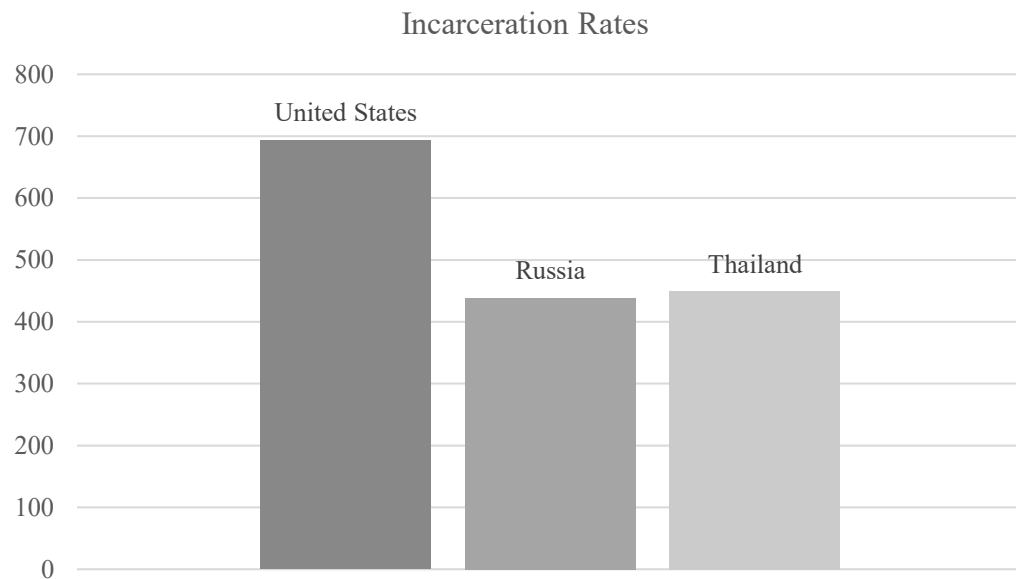


Figure 2: Comparison of incarceration rates in the United States, Russia and Thailand

The Russian Federation “has a highly centralized, weak multi-party political system dominated by President Vladimir Putin. The bicameral Federal Assembly consists of a directly elected lower house and appointed upper house” (*Russia 2013*

*Human Rights Report*, 1). While Russia is no longer a Communist nation, neither is it entirely free from its authoritarian tendencies. Russia is not considered to be a liberal democracy. The U.S. Department of State Human Rights Report identified three main intrusions on human rights committed by the Russian Government:

1. Restrictions of Civil Liberties: The government continued its crackdown on dissent that began after Vladimir Putin's return to the presidency. The government selectively employed the law on "foreign agents," the law against extremism, and other means to harass, pressure, discredit, and/or prosecute individuals and entities that had voiced criticism of the government, including nongovernmental organizations (NGOs), independent media outlets, and the political opposition....
2. Government Discrimination against Racial, Ethnic, Religious, and Sexual Minorities: The country adopted several laws that discriminated against lesbian, gay, bisexual, and transgender (LGBT) persons, including a ban on the so-called propaganda of nontraditional sexual relations to minors, which effectively criminalizes public expression and assembly for anyone who would advocate LGBT equality. The government continued to use laws against extremism to prosecute some religious minorities and made "offending the religious feelings of believers" a criminal offense. Authorities in many cities also discriminated against ethnic minorities, arbitrarily detaining thousands of migrant workers amid a wave of anti-immigrant sentiment. Laws, actions, and official rhetoric restricting the rights of the LGBT community, migrants, and other minorities coincided with a marked increase in violent attacks against these groups.
3. Administration of Justice: Officials denied due process in politically motivated cases initiated by the Investigative Committee, including the continued detention and trial of protesters arrested following the May 2012 demonstration on Bolotnaya Square in Moscow; the sentencing of Bolotnaya demonstrator Mikhail Kosenko to indefinite psychiatric detention; the detention, trial, and sentencing of anticorruption blogger and opposition leader Alexey Navalnyy; and the searches of, and criminal cases opened against, several other political activists and human rights advocates. (*Russia 2013 Human Rights Report*, 1-2)

Based in this information it seems that the Russian Federation uses incarceration as a means of social control in order to prohibit certain groups from gaining political power.

Thailand also employs a method of government that is dissimilar to the United States': "Thailand is a constitutional monarchy. The King serves as head of state and has

traditionally exerted strong influence. A coalition government led by Prime Minister Yingluck Shinawatra and her Puea Thai (For Thais) Party came to power in 2011 following National Assembly lower house elections that were generally viewed as free and fair” (*Thailand 2013 Human Rights Report*, 1). Some of Thailand’s recurring civil liberties violations have included, “abuses by government security forces and local defense volunteers in the context of the continuing Malay-Muslim separatist insurgency in the three southernmost provinces; occasional excessive use of force by security forces...and continued government limits on freedom of speech and press” (*Thailand 2013 Human Rights Report*, 1). A separatist insurgency coupled with government attempts to limit freedom of speech helps explain Thailand’s high incarceration rates.

The governments of Russia and Thailand are both involved in active campaigns to eliminate dissent among factions of their populations and to limit freedom of speech in general; therefore, it makes sense that both nations currently imprison large amounts of their citizenry as a means of social control. It is much less clear why the United States—which is not undergoing any separatist uprisings and maintains a strong commitment to freedom of speech—incarcerates more people than either of those nations.

At this point it is now prudent to circle back to questions raised at the outset of this chapter. Namely: What exactly is mass incarceration? All nations hold some prisoners, and most people agree that jails are necessary to maintain a functioning modern society. Even among the prison abolitionists there are not many who want to see Charles Manson released back into the general public. The task at hand, then, is to differentiate between simple incarceration and mass incarceration. The term mass incarceration seems to imply that some of the incarceration going on is gratuitous, that



some of the punishment exceeds the demands of justice. It is easier to apply the term to some nations than others. For instance, if one examines Thailand it is clear that mass incarceration has resulted from conflicts between insurgent forces and police as well as government attempts to limit free speech. In Russia, mass incarceration is, at least partially, a symptom of politically motivated arrests. In the case of these two nations, there is an explanation for large numbers of gratuitous arrests. It is more difficult to apply the term mass incarceration to the United States. While it certainly fits from a sheer numbers perspective, there are few—if any—obvious sources of arbitrary arrest within the United States that could have led to such astronomical incarceration numbers.

It seems a paradox that the United States, champion of civil liberties and the free market, would be the world leader in incarceration. How can the nation which claims to be the freest in all the world hold more people in cages than any other political state? How is it that even the most oppressive totalitarian governments have not found a way to incarcerate as many of their people as the United States? The answers to these questions are complex and will be addressed in the upcoming chapters, but for now suffice it to say that it is not because the United States values personal liberty less than totalitarian regimes. The desire to incarcerate a large number of people does not automatically translate into successful action. If the government of Thailand were able to incarcerate more insurgents in order to pacify the rebellion then it probably would; however, in order to do so it would need to build more prisons, hire more policemen and expand their judiciary. All of those measures require a government that is efficient enough to plan such projects and has the money to fund them. In order to put two million people in cages a nation must first build and pay for two million cages.

If for no other reason than the fact that the United States leads the world both in incarceration totals and incarceration rates, it seems fair to say that a system of mass incarceration exists within the United States. In order to gain a deeper understanding of this system of mass incarceration, it is now necessary to turn away from comparisons between the U.S. and foreign nations and investigate the characteristics of mass incarceration within U.S. society.

### *Mass Incarceration within the United States*

The two million people currently sitting in cages represent a key element in the larger framework that is mass incarceration within the United States, but they do not define the issue in totality. Michele Alexander describes the vast reach of mass incarceration:

This larger system, referred to here as mass incarceration, is a system that locks people not only behind actual bars in actual prisons, but also behind virtual bars and virtual walls—walls that are invisible to the naked eye but function nearly as effectively as Jim Crow laws once did at locking people of color into a permanent second-class citizenship. The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of America's new undercaste. (Alexander, 12-13)

The remainder of this chapter will provide a brief examination of this system of mass incarceration in the United States.

The number of U.S. citizens who are currently incarcerated has already been discussed, but this number does not incorporate all the individuals who are free from the physical bonds of a jail cell yet still beholden to the state. According to the Department of Justice Statistics at yearend 2014, there were 2,224,400 individuals locked in federal,

state and local jail. When this statistic is opened up to include all individuals under state correctional supervision this number rose to an estimated 6,851,000 persons. The difference between these two figures is the difference between those people who are held in jail versus those who are still beholden to the courts but released back to their communities. The Department of Justice Statistics defines persons under the supervision of U.S. adult correctional systems as, “offenders living in the community while supervised by probation or parole agencies and those under the jurisdiction of state and federal prisons or held in local jails”. Statistically this breaks down to “about 1 in 36 adults in the United States [being] under some form of correctional supervision at yearend 2014" (Kaeble et al., 1).

One out of every thirty-six people being under correctional supervision is a staggering figure, and it expands the reach mass incarceration far beyond the physical confines of a jail cell. For every one person sitting in jail there are two more living within the community who are similarly controlled by specific confines of the state. As massive as this system already is, it represents only those who are currently under some form of correctional supervision. When past and future offenders are added to this equation the reach of mass incarceration widens still further. If a person’s overall likelihood to spend at least some time in prison is taken into account, on average for U.S. residents born in 2001, 1 out of every 56 women and 1 out of every 9 men will spend at least some time in prison (Mauer, “Trends in U.S. Corrections” 5). To examine this information in a different light, in modern America, over 10% of all male citizens will be held against their will in a cage for at least a brief portion of their life.

This latest statistic brings to light another key element in the U.S. system of mass incarceration: vast disparity between incarceration numbers in different demographics. While some demographic disparities are natural and tolerable, others are more sinister. For instance, it is not all too shocking that there are far more twenty year olds in prison than eighty year olds. This disparity exists because twenty year olds are more prone to crime. But, within other demographics it is less clear whether propensity towards crime is the cause of disparity or if it is a matter of inequality in enforcement. With respect to the overall U.S. population, black men are the group most at risk of becoming incarcerated. One out of every three black men will go to prison at some point in their lives compared to one out of every six Latinos and one out of every seventeen white men (Mauer, "Trends in U.S. Corrections" 5). There are competing theories as to the cause of this disparity, but regardless of the explanation, such disparity is cause for concern.

Many people in the U.S. are uneasy with the vast disparity in the incarceration of minorities, but few embrace Michele Alexander's claim that mass incarceration has replaced Jim Crow laws as a means of social control. It can often be difficult to accurately perceive a system of which one is a part. As Raphael Bob-Waksberg wrote, "When you look at the world through rose-colored glasses, all of the red flags just look like flags." If a Muslim nation such as Iran were to jail one out of every three Christians or if in China one in three Capitalists were incarcerated most Americans would say this constitutes evidence of systematic government persecution. Yet those who would make such claims in regards to the United States are political outliers.

In addition to incarceration disparities between races and genders, there is also a good deal of disparity in incarceration between different regions of the United States.

Southern States tend to incarcerate people at a much higher rate than any other region. The four states with the highest incarceration rates are Louisiana, Oklahoma, Alabama and Arkansas. The four States with the lowest incarceration rates are Maine, Rhode Island, Massachusetts and Minnesota. Louisiana incarcerates its citizens at a rate of 816 per 100,000 while Maine does so at a rate of 153 per 100,000 (Mauer, “Trends in U.S. Corrections” 4).

Another unique aspect of the U.S. justice system is how the overwhelming majority of criminal cases are tried. While the sixth amendment of the constitution guarantees every citizen the right to a speedy trial by an impartial jury of peers, of all cases that end in a felony conviction ninety-five percent are the result of a plea bargain (Durose). In order to plead guilty to a criminal charge or to accept a plea bargain offered by the prosecution, the plea of guilty must be: not the result of force, threats or promises, other than a plea bargain agreement, and is, on the whole, a knowing, voluntary and intelligent act of the defendant. If a plea of guilty is truly to be knowing, voluntary and intelligent this means that the only people who should be pleading guilty are those who actually committed the crime for which they are charged. This means when ninety-five percent of charges end in plea bargains America’s police departments and prosecutors’ offices are functioning with a minimum ninety-five percent accuracy rate—a degree of accuracy that it is hard to imagine any government body attaining.

Mass incarceration also has societal impacts outside of the justice department. Forty-eight states have laws which limit the voting rights of those individuals who are convicted of a felony. There are currently 5.85 million disenfranchised Americans as a result of such policies. Not only do such laws deprive citizens of their voice in the

democracy, but they disproportionately effect historically disenfranchised groups. Out of all eligible voters, 2.5 percent of white voters are disenfranchised due to a felony conviction compared to 7.66 percent of blacks (Mauer, “Trends in U.S. Corrections” 7). This means that for every one disenfranchised white there are three disenfranchised blacks.

In addition to losing the right to vote, people convicted of a felony drug crime are barred from receiving federally funded public assistance (Alexander, 157). This law prohibits the neediest members of society from receiving any assistance in the days and weeks after they are released from serving their prison term. The job market is hard enough on the uneducated poor, but coupled with a felony record, finding a job can be nearly impossible in some locations. Though discrimination against individuals with criminal records is not technically legal, a study conducted by the National Employment Law Project found that such discrimination happens on a regular basis (Alexander, 153). Employment discrimination and the lack of ability to receive government assistance create a situation in which former offenders are likely to break their parole conditions or to commit new crimes out of economic desperation. The system of mass incarceration that bars former offenders from reengaging in society perpetuates itself when these offenders are reincarcerated. This helps to explain a recidivism rate that is as high as 49.3 percent (Hunt, 5). The far reaching effects of the system of mass incarceration within the United States makes assimilation back into society extremely difficult for those who have been branded felons.

### *Mass Incarceration and Crime*

Now that some individual aspects of the American system of mass incarceration have been examined, the question needs to be asked: Does this system work? Has the United States' approach to incarceration produced reductions in crime? The answer to this question is multifaceted. Crime rates have undergone a steady decline since the early 90's and during this same time period incarceration numbers have gone up (Mauer, *Race to Incarcerate* 93). By just examining the system in this superficial way one could easily attribute the decline in crime to the system of mass incarceration. While this line of thought is enticing—if the U.S. is going to have the world's largest prison system it would at least be nice to say that this system is the most effective means of crime reduction available—there is little evidence that mass incarceration leads to proportionate reductions in crime.

The best place to begin examining the relationship between crime rates and incarceration is the statistics. From 1980 to 2000 the overall crime rate dropped from 5,950 crime reports per 100,000 to 4,124 reports. This 31 percent decrease in crime reports was mirrored by a 308 percent increase in the number of state prisoners. Over those same twenty years, violent crimes decreased by 15 percent, while the number of people incarcerated for violent crimes increased 240 percent. Property crimes decreased by 32 percent, while the number of people imprisoned for property crimes increased 167 percent (Mauer, *Race to Incarcerate* 101). The tradeoff between incarceration rates and crime rates is not a proportionate one. A thirty-one percent decrease in crime that requires a tripling of prisoners does not seem to be a very enticing proposition. Even if the drop in crime rates could be entirely attributed to the prison system, it seems strange

that so many people would need to be incarcerated to produce such modest drops in crime rates.

Another troubling facet of the relationship between crime rates and incarceration is while incarceration numbers have been steadily increasing since the 1970's, crime rates have gone through periods of increased and decrease during this timeframe: "Overall crime rates generally rose in the 1970's, then declined from 1980 to 1984, increased again from 1984 to 1991, and then declined through 2003....Thus a steadily increasing prison population has twice coincided with periods of increase in crime and twice with declines in crime" (Mauer, *Race to Incarcerate* 94). The rise and fall of crime rates cast against the backdrop of perpetually rising prison populations does not lend much weight to the belief that an increase in incarceration will always produce a decrease in crime.

The relationship between crime rates and incarceration is a complex one, and the inconsistencies in the data that has been looked at do not allow for many hardline conclusions to be drawn. Incarceration clearly has some impact on crime, but it is also not the only factor that influences crime rates. Economic opportunity, education, and community programs also play a large role in reducing crime. Increase in incarceration has some effect on crime rates but it is unclear how much of an effect it has: "standard estimates of the amount of crime reduction that can be attributable to mass incarceration range from 3 to 25 percent" (Alexander, 236). These decreases in crime are not marginal, but they come at a huge cost. This issue will be reexamined in chapter 4, but for now it will suffice to conclude that while mass incarceration does result in at least some reduction in crime, it is very dubious whether these reductions justify maintaining the system.



### *Smith's Story*

Mr. Smith—whose real name has been withheld in order to respect his wish to remain anonymous—woke up this morning on a twin sized bed for which he is too tall. He woke up in a cramped room with three bare cement walls and a fourth wall made of metal bars. Smith lives in a cage that many would consider inhumane were he an animal confined to it in a zoo, yet there are no protesters picketing to free Mr. Smith. Mr. Smith is serving out a life sentence in a small for profit prison located in Waco, Texas. In many ways Smith's story is emblematic of a generation of people who find themselves caught up in the modern U.S. justice system.

Growing up as a young black male in East Waco, Smith spent his childhood in neighborhoods where poverty was prevalent. Where Smith grew up more black men end up in prison than end up in college. Like many prisoners, Smith never knew his father. Raised by his grandmother and his aunts, he found male role models on the streets rather than in his home. By the time he reached his late teens Smith was already pressured into the drug game. Having poor job prospects and no real hope for social or economic advancement, Smith was lured into becoming a small time drug dealer. Smith was promised more money than he could dream of making at a minimum wage job, and so he became part of a trade that he had witnessed in action all his life. Smith was never any sort of drug kingpin; he was just a low level street pusher with no better options. Smith's first arrest came at age twenty. He was charged for delivery of cocaine.

Smith was sentenced to eight years for this charge, and he did his time. When he finally got out of prison, Smith once again faced a life as a young black man living in an

impoverished area, but now Smith was a convicted felon. As a felon with no education beyond high school Smith's job prospects were far worse than they were before his time in prison. For a convicted felon even minimum wage jobs are hard to find. Remarkably, Smith did briefly get a job working at a car wash, but his schedule was inconsistent and the pay was low. Smith soon left the job. With no job and no money to live on, Smith returned to the one trade that is always hiring. Soon Smith was back out on the street selling small amounts of drugs in his neighborhood.

Not long after he started selling again, Smith received a call from one of his regular customers asking to buy a couple grams. Smith went and met his client, but unbeknownst to him he was secretly being recorded by a team of police officers. Smith made his sale, and soon after found himself handcuffed in a police cruiser. Smith was taken to the local jail and presented for arraignment. The judge set his bond, and somehow one of Smith's friends—most likely his supplier—managed to pay it. Now Smith faced another pending charge and a debt that needed to be paid. Smith immediately went back on the street in order to pay for his newly purchased freedom. Smith became known to local cops as an easy arrest. Soon he got picked up again for delivery of cocaine. For a brief while this became the pattern of Smith's existence: get arrested; go to jail; pick up another pending charge; get bonded out, and then go back out on the street. But Smith soon had so many pending charges that no judge would set him a bond and he was forced to await his trial from jail.

Smith's trial eventually arrived and even though he was lucky enough to be appointed an excellent attorney as his public defender—something few people in his position are likely to receive—he had little chance of a short sentence with so many

pending charges stacked against him. During his trial Smith took responsibility for his actions, and decided to waive his right to a jury during the punishment phase. In his testimony Smith had compared himself to the biblical figure Job, a man who had everything taken away from him. The Judge whom Smith sat before addressed this comparison during his sentencing. The Judge told Smith that Job did nothing to deserve the fate he was handed, whereas Smith's circumstances were a result of his own poor choices. Smith was sentenced to a life sentence stacked in addition to the sentence he was already serving.

While Smith was awaiting his court date from the inside of a jail cell he was visited by his girlfriend. She told him that she was pregnant. She would later give birth to a son. Smith's son will grow up much like he did: fatherless, living in the poorest neighborhoods of Waco, and being pressured to start making money selling drugs.

## CHAPTER TWO

### How We Got Here

The United States currently incarcerates more of its own citizens than any other country in the world—by a large margin. The United States currently holds five percent of the world’s population and twenty-five percent of the world’s prisoners (Ye He Lee). There are currently more prisoners in the United States than in Russia and China combined. At this point any conscientious U.S. citizen has to ask: Why? In order to understand how the United States came to have this massive system of incarceration, one must first understand the history of the prison—a history which happens to coincide with the birth of the nation.

#### *Evolution of Prison as Punishment*

Punishment for crime has changed throughout human history and is much different today than it was even a few centuries ago. In the 18<sup>th</sup> century and earlier, prison was not the principal form of punishment for those who transgressed against the law: “Under English common law, a conviction for sodomy led to the punishment of being buried alive, and convicted heretics also were burned alive. The crime of treason by a female was punished initially under the common law by burning alive the defendant. However, in the year 1790 this method was halted and the punishment became strangulation and burning of the corpse” (Davis, 41). While these punishments initially sound appalling, compared to other methods of execution exercised in that time period, strangulation and burning alive begin to sound rather clinical.

Michel Foucault, the modern French sociologist, begins his *Discipline and Punish* with a grisly description of the execution of Robert-François Damiens:

On 2 March 1757 Damiens the regicide was condemned to make the *amende honorable* before the main door of the Church of Paris, where he was to be ‘taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds’; then, ‘in the said cart, to the *Place de Greve*, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and Sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the ‘winds’(Foucault, 11)

Punishment as described above was not undertaken with any effort to reform those who committed the offense, but in order to leave a permanent mark on those who came to witness the execution. As Angela Davis observed, “Punishment was in essence, public spectacle” (41). It is easy to imagine how such public spectacles would leave a lasting effect on those who witnessed them.

But, these brutal executions and barbaric punishments eventually fell out of vogue; displays of the dominance of the state over the individual became less and less frequent: “The *amende honorable* was first abolished in France in 1791, then again in 1830 after a brief revival; the pillory was abolished in France in 1789 and in England in 1837. The use of prisoners in public works, cleaning city streets or repairing the highways...was abolished practically everywhere at the end of the eighteenth or beginning of the nineteenth century” (Foucault, 8). As public sentiment regarding individual liberties began to shift, so did perception of proper punishment for crime.

Angela Davis claims that it was the new notion of individual inalienable rights that led to the birth of incarceration as punishment: “Before the acceptance of the sanctity

of individual rights, imprisonment could not have been understood as punishment. If the individual was not perceived as possessing inalienable rights and liberties, then the alienation of those rights and liberties by removal from society to a space tyrannically governed by the state would not have made sense” (44). Therefore, in some sense, it was precisely—and ironically—the ideals that led to the founding of the United States that would eventually give rise to the prison crisis the country knows today.

The popularized notion of human rights played a large role in the growth of the prison system, but it was not the only factor involved. Increased economic opportunities also played a role in the growth of the prison: “With the rise of the bourgeoisie, the individual came to be regarded as a bearer of formal rights and liberties” (Davis, 43).

Michel Foucault links different systems of punishment with certain economic systems:

In a slave economy, punitive mechanisms serve to provide an additional labour force—and to constitute a body of ‘civil’ slaves in addition to those provided by war or trading; with feudalism, at a time when money and production were still at an early stage of development, we find a sudden increase in corporal punishments—the body being in most cases the only property accessible; the penitentiary, forced labour and the prison factory appear with the development of the mercantile economy. (Foucault, 25)

The newly formed British colonies in America provided the perfect economic and ideological grounds for the use of prison as punishment to flourish. The use of the prison in the colonies began with a small and experimental reform movement that brought an end to the dominance of capital punishment as the primary mode of criminal justice: “Quakers and other reformers in Pennsylvania had developed the institution of the penitentiary...derived from the concept of ‘penitence,’ the new institution emphasized having sinners engage in hard labor and reflect upon the errors of their ways”. Before this time “the jails that existed in Europe and the U.S. served primarily to detain

defendants who were awaiting trial and debtors who had not fulfilled their obligations, and they were not places of punishment for felons” (Mauer, *Race to Incarcerate* 2). This new method of punishment introduced not only a new means but a new end to punishment. Instead of spectacle punishment that was meant to terrify the citizenry into avoiding crime, incarceration in a penitentiary was meant to reform the convicted individual. As punishments such as executions, public whippings and brandings faded away prison as a new form of punishment and deterrence for both capital and noncapital offenders became the norm.

Prisons did not, however, spring into existence after the American Revolution and immediately begin to overflow with inmates. In fact, prison populations remained relatively steady even through the mid-twentieth century. From 1925 until 1970 state and federal prison populations combined tended to remain just under 200,000 total individuals (Mauer, *Race to Incarcerate* 18). Even as late as the 1970s “the most well-respected criminologists were predicting that the prison system would soon fade away. Prison did not deter crime significantly [and]... Those who had meaningful economic and social opportunities were unlikely to commit crimes...while those who went to prison were far more likely to commit crimes again in the future” (Alexander, 8).

The “prison experiment” had succeeded in putting an end to rampant capital punishment, but the goal of reforming the offender was not fulfilled. While the detriment to the individual thrown into jail initially seemed to be of a lesser variety compared to the individual put into the stocks, this assessment may have been premature. It is clear there is no benefit for humans to be drawn and quartered—there are no recorded incidents of this practice improving someone’s life—but neither is it beneficial for human beings to

be confined to a cage for long periods of time. In fact, when Charles Dickens toured the Pennsylvania prisons in the 1840s he proclaimed “this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body” (Mauer, *Race to Incarcerate* 9).

Prisons came into existence as part of a movement directed at ending harsh capital punishment. As incarceration gradually replaced other forms of “spectacle punishment”, prison rates remained fairly low and fairly stable, and as early as the mid-nineteenth century and as late as the 1970s serious propositions to once again reform and shrink the societal role of prisons were being considered. In fact, during the early 1970s, the National Advisory Commission on Criminal Justice Standards and Goals recommended that “no new institutions for adults should be built and existing institutions for juveniles should be closed” (Alexander, 8). In light of this information it seems entirely unbelievable that from 1972 to 2003 the inmate population rose more than 500 percent while the total population rose only 37 (Mauer, *Race to Incarcerate* 1). How is it possible that in 1972, the total number of people incarcerated in state and federal prisons and local jails combined was only 326,000 people—an incarceration rate of 160 per 100,000—and by 2014 that number rose to 2,224,400—an incarceration rate of 693 per 100,000 (Mauer, *Race to Incarcerate* 17)!?

### *Pre-1980*

As leading intellectuals and prison abolitionists of the early 1970’s wrote in favor of downsizing the U.S. prison system, the public at large began to develop a very different ideology. A great public shift in perception of what constitutes just punishment grew out of the one of the United States’ most socially turbulent decades—the sixties.



During the sixties, the United States saw a noticeable rise in crime rates due in part to an increase in the general population and in part to an increase in drug use. It was during the sixties that “the coming of age of the ‘baby boom’ generation brought with it an unprecedented number of young males in the high crime years of 15-24. While most of them never committed any serious offense, their sheer numbers alone were likely to contribute to at least a partial surge in crime”. It was also during this time period that the United States witnessed the first of “three drug epidemics...as heroin swept through many urban areas in the 1960’s, so would cocaine in the late 1970’s, and then crack cocaine in the 1980’s”. These drug epidemics did not just change the communities of drug users; they affected the entire criminal justice system: “Each episode would lead to a series of legislative and policy changes focused on punitive responses to the prevailing drug problem—changes that would significantly contribute to a harshening of criminal justice policy during these decades” (Mauer, *Race to Incarcerate* 50).

The sixties was also a decade marked by public protests on a scale which the United States had never before witnessed. Hippies gathered to protest the Vietnam War. Men burned draft cards; women burned bras. The civil rights marches also took place during this decade. Malcom X led thousands of followers through the streets of Harlem; Dr. King led his march on Washington. With these marches came arrests. Police turned batons, dogs and firehoses on the protestors. Activists were rounded up and incarcerated by the truckload. Amongst this unrest political ties also began to shift. Southern Democrats, whose ancestors had made up the pre-Civil War South, began to be recruited into the Republican Party, and minority groups once oppressed by these individuals became democrats.

This political reversal did not happen by accident. The recruitment of Southern whites into the Republican Party eventually became known as the “Southern Strategy”.

Nixon’s advisor on domestic affairs, John Echlichman, described the southern strategy as follows:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people, you understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities, we could arrest their leaders. Raid their homes; break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did. (13<sup>th</sup>, 00:18:20-00:18:40)

By formulating a rhetorical war on drugs the administration was able form an opposition to their political rivals and attack them indirectly. It was a genius political move that allowed the administration to avoid confronting the uncomfortable issues and, at the same, time draw a large voting chunk of former Southern Democrats. Nixon himself helped further this rhetorical strategy by committing the nation to a war against drug abuse. Nixon began referring to drug abuse as the greatest danger that faced America and was able to gain support because of it: “We must wage total war on what I have called public enemy number 1 in the United States and that is dangerous drugs” (13<sup>th</sup>, 00:16:40).

Nixon’s rhetorical strategies helped him to gain the White House, but his words were never implemented strongly or effectively into policy. The Watergate scandal cut his administration short and eliminated any chance for him to fully carry out any of his agenda. However, he did lay the groundwork for others to pick up where he left off.

Following the unrest of the 1960’s, both liberals and conservatives were growing increasingly uneasy with the notion of prisons as rehabilitative facilities. Liberals were

concerned that coercive institutions such as prisons might not represent the best pathway to meaningful change. Conservatives were growing worried about the droves of criminals who were serving only part of their sentences. In 1974, Robert Martinson published an article regarding research on juvenile and adult corrections programs. Martinson stated, “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation” (qtd. in Mauer, *Race to Incarcerate* 46). Studies such as Martinson’s were “hailed by the left as confirming that rehabilitation indeed was impossible in a coercive setting and by the right as proof that rehabilitation was not even worth trying” (Mauer, *Race to Incarcerate* 47). The perception of prison as a means to rehabilitation was quickly dying out.

With almost total consensus that the current rehabilitative prison system had failed, a new effort to refine the system began. Before the rise in crime of the sixties, “it was believed that if an inmate was to be encouraged to take advantage of programming in prison, a reward system should be in place. There could be no better reward than release from prison” (Mauer, *Race to Incarcerate* 44). Under this system prisoners who had records of good behavior and who took advantage of educational programs could expect substantial reductions in their sentences. In some cases, release dates were dependent on such apparent signs of rehabilitation. Indeterminate sentences that allowed for early release once an offender was rehabilitated were now rejected by the left and the right. As public support for prisons to remain places of rehabilitation faded away, there emerged “a growing belief from both directions that a more fixed and determinate sentencing structure, one that decreased emphasis on rehabilitation, would be an improvement over the prevailing system” (Mauer, *Race to Incarcerate* 47).

With bilateral approval for fixed sentences to replace indeterminate rehab based sentences, progress to enact change moved quickly. Liberals called for “short fixed prison sentences...to reduce the harm that might be caused by imprisonment and to reduce or eliminate the abuse inherent in the indeterminate sentencing system”. Conservatives favored a ‘tough on crime’ approach that sought to punish rather than to mitigate harm to the offender: “Since rehabilitation had now been discredited, the prison system could get on with its objective of incapacitating criminals. After all, an offender who was locked up was not able to commit crimes on the streets” (Mauer, *Race to Incarcerate* 47-8). With the rhetorical agreement that sentences should be fixed, the first piece of the puzzle that would eventually become America’s astronomical incarceration rate was laid in place. By 1970 the number of U.S. prisoners had risen to 357, 292 (13<sup>th</sup>, 00:18:55).

The first of many concrete legislative steps to crack down on crime came in 1973 when the New York legislature passed the Rockefeller drug laws. These laws required that offenders convicted of selling more than two ounces of controlled substances would be sentenced to a minimum of fifteen years in prison. New York’s laws were followed by similar legislative initiatives in Michigan and Massachusetts meant to curtail firearms violations. Michigan’s laws mandated a two year prison sentence for the use of a firearm in committing a felony even going so far as to erect billboards reading “One with gun gets you two” (Mauer, *Race to Incarcerate* 56). Such initiatives mandated jail time for offenses and turned a blind eye to any mitigating circumstances. The power to try individual cases and render unique verdicts for unique circumstances that once belonged

to the judicial branch of government was now beginning to be regulated by legislative mandates.

### *The Reagan Years*

Public sentiment regarding the purpose of the prison and how an offender ought to be treated was already shifting rapidly by the end of the 1970's, and in 1980 a presidential candidate was elected who promised to get tough on crime: Ronald Reagan. Most of Reagan's economic policy focused on limiting the influence of the federal government, but the administration's criminal justice policy expanded federal influence over the states. Reagan's war on drugs was popularized by Nancy Reagan's "Just Say No" message and was first institutionalized in 1982 when "the administration and Congress authorized \$125 million to establish twelve new regional drug task forces staffed by more than a thousand new FBI and DEA agents and federal prosecutors". With the influx of resources, arrests and convictions for drug related crimes skyrocketed: "While federal prosecutions for all nondrug offenses increased by less than 4 percent from 1982 to 1988, drug prosecutions rose by 99 percent during this period" (Mauer, *Race to Incarcerate* 61). By the end of his first year in office in 1980, the Reagan administration oversaw 513, 900 prisoners (13<sup>th</sup>, 00:27:05).

In addition to increases in federal funding for law enforcement the Reagan administration also enacted legislation that would guarantee mandatory sentences for drug offenders. By the end of his eight year tenure as President, Reagan was able to pass "'The Anti-drug Abuse Act of 1988,' which contained yet more mandatory sentencing laws among its hundreds of provisions...[and] also declared that it would be national

policy to ‘create a Drug Free America by 1995’” (Mauer, *Race to Incarcerate* 62). This legislation did not rid America of drugs, but it did put thousands of people in jail. By 1985, the number of incarcerated Americans had grown to 759,100 (13<sup>th</sup>, 00:27:10).

The rhetoric and legislation of the Reagan White House was very effective in enacting harsher penalties for criminals, but the research done by the Reagan department of Justice did not always support the policy of the administration. Mandatory sentencing laws meant sentencing all offenders convicted of the same crime to the same amount of jail time. This policy became known as collective incapacitation, and in 1983 a Department of Justice research paper “concluded that ‘the most striking finding is that incapacitation does not appear to achieve large reductions in crime,’ but that these policies ‘can cause enormous increases in prison populations’” (Mauer, *Race to Incarcerate* 64). Findings such as this did not deter the administration from pushing tough on crime legislation. Instead, such findings prompted members of the Justice Department to manufacture reports that seemed to favor the rhetoric and legislation issuing from the White House.

To justify the ever increasing number of people being jailed for drug crimes Reagan appealed to the economic impact of the increase in incarceration. In 1987, Edwin Zedlewski, a statistician working for the DoJ, produced a report which claimed that “incarcerating a single offender saved the taxpayer a staggering \$405,000” (Mauer, *Race to Incarcerate* 64). Zedlewski’s report was phenomenal news for fans of Reagan’s domestic policy, but bad news for fans of accurate research. Zedlewski based his findings “upon a survey of prison inmates in three states...for incarcerated felony offenders...[which] calculated that the *average* offender had committed between 187 and

287 crimes in the year prior to his incarceration”. Not surprisingly, the survey in question “reflected crimes committed by a small number of very high-rate offenders. The median offending rate was a much more modest total of fifteen crimes per year”. Zedlewski’s errors did not go unnoticed; a “leading journal...demonstrated how, using Zedlewski’s assumptions, the 237,000 increase in number of prison inmates from 1977 to 1986 should have completely eliminated crime in the United States”. But, even with his research refuted, “‘saving \$405,000 for every offender who is incarcerated’ became a staple opening line for many members of Congress and state legislators...Frustrated academics and criminal justice professionals bemoaned the deception and dishonesty of the campaign, but...were little match for the federal government and its conservative allies” (Mauer, *Race to Incarcerate* 65-6).

In the final year of his Presidency, Reagan made major strides in mobilizing his drug war. A rhetorical war on drugs is not effective unless the small police departments across the nation actively commit to rounding up and incarcerating drug users. Unfortunately for the Reagan administration, there is not much incentive for police to devote time to drug crimes. Police departments have a limited number of staff, and most of their work is directed towards investigation of more serious offenses. Therefore, in order to motivate the police to carry out the war on drugs, “In 1988, at the behest of the Reagan administration, Congress revised the program that provides federal aid to law enforcement, renaming it the Edward Byrne Memorial State and Local Law Enforcement Assistance program...The Byrne program was designed to encourage every federal grand recipient to help fight the War on Drugs” (Alexander, 73). With federal money pouring

into local police departments, there was now a clear motive for police to arrest any and all drug users.

Ronald Reagan's efforts to reshape the U.S. criminal justice system were effective due to the White House's ability develop rhetoric that controlled discussion of crime and craft policy to capitalize on the frenzy stirred up by such rhetoric:

In the final year of the Reagan presidency, Assistant Attorney General William Bradford Reynolds sent a memorandum to key leaders within the Justice department...the memorandum proposed that the administration attempt to 'polarize the debate' on a variety of public health and safety issues—drugs, AIDS, obscenity, prisons, and other issues. Reynolds suggested that “we must not seek consensus, we must confront...in ways designed to win the debate and further our agenda”. (Mauer, *Race to Incarcerate* 63)

Reynolds's strategy was successful. In 1988 vice President, George Herbert Walker Bush, was elected to succeed Reagan.

### *The Bush Senior Years*

During his Presidential campaign, George H. W. Bush relied on the same rhetorical tactics that he Reagan had used during his time in office. Bush made “tough on crime” a key platform of his campaign and ran the Willie Horton ad in an attempt to undo his opponent's chances of victory:

The Willie Horton ad featured a dark-skinned black man, a convicted murderer who escaped while on a work furlough and then raped and murdered a white woman in her home. The ad blamed Bush's opponent, Massachusetts governor Michael Dukakis, for the death of the white woman, because he approved the furlough program. For months, the ad played repeatedly on network news stations and was the subject of incessant political commentary. Though controversial, the ad was stunningly effective; it destroyed Dukakis's chances of ever becoming president. (Alexander, 54)



This ad was doubly effective for Bush's campaign. On one level the ad proclaimed Bush's support for the death penalty and his disavowal of Dukakis's weekend pass program, but on a second level this ad—which, complete with pictures, told the story of a black man's brutal rape and murder of a white woman—was an effective use of the "Southern Strategy".

With respect to criminal policy, Bush's term in office was similar to that of his predecessor. One of the more significant moments in the Bush administration's criminal policy initiatives came when, in 1991, Attorney General Richard Thornburgh retired. Bush appointed William Barr to replace him. Barr continued Reagan's strategy of attempting to galvanize public support for criminal policy by taking policy goals straight to the people: "Barr quickly coined a sound bite to describe his approach to the crime problem—'more prisons or more crime'". In 1992, Barr published a work entitled "Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice" which included such suggestions as "enhanced mandatory minimum penalties, building more prisons (the 'morally right thing to do,' as well as being cost effective), tough juvenile sanctions and other measures" (Mauer, *Race to Incarcerate* 67). Under Barr's leadership average prison sentences continued to increase in length across the nation.

As Bush's chief architect of criminal policy, Barr helped the new administration continue on the same course that the Reagan administration had charted: tougher penalties for offenders, mandatory minimum sentencing guidelines and the building of more prisons. By the end of Bush's time in office, William Barr had helped insure that "drug arrests nationally exceeded one million a year". During this same period "federal spending on employment and training programs had been cut nearly in half, while

corrections spending had increased by 521 percent” (Mauer, *Race to Incarcerate* 68). By 1990 the U.S. prison population total reached 1,179,200 people (13<sup>th</sup>, 00:34:40)

### *The Clinton Years*

In 1993 Bush’s time in office came to an end and for the first time in twelve years a Democrat was elected to the white house. Bill Clinton became president in January, 1993. Clinton represented a new breed of Democrat and did not want to be perceived as soft on crime. In order to combat this perception, Clinton “chose to fly home to Arkansas to oversee the execution of Ricky Ray Rector, a mentally impaired black man who had so little conception of what was about to happen to him that he asked that the dessert from his last meal be saved for him until the morning” (Mauer, *Race to Incarcerate* 69). Actions such as these sent a strong message that Clinton’s White House would not go easy on violent criminals.

Even while Clinton attended executions, he gave campaign speeches in which he supported alternatives to mandatory prison terms for some crimes and often spoke of the need for drug treatment. Clinton’s pick for Attorney General was in sharp contrast to his predecessor’s. Janet Reno was named Clinton’s AG after his first two choices fell through. But regardless of how she came to hold the position, “she quickly began delivering high-profile speeches around the country that consistently preached the message that ‘prenatal care is more important than prisons’ in controlling crime” (Mauer, *Race to Incarcerate* 69-71). Clinton’s political strategy of walking the line between prison reform and tough on crime helped him to get elected, but it did not result in justice system reform.

The first years of the Clinton presidency, which initially provided hope for prison reformers, quickly experienced major road blocks. In 1993, three random acts of violence each gained national news attention and helped to once again fuel a populist demand for tough on crime policy. First, in July of 1993, Michael Jordan's father was murdered in his sleep. Later in October, twelve year old Polly Klaas was kidnaped from her mother's home and later strangled. Finally in December '93 a gunman aboard the Long Island Railway system killed six passengers and injured 19 more. This wave of violent crime helped start a media frenzy that captivated the nation: "television coverage of crime more than doubled from 1992 to 1993, while murder coverage tripled during the period, despite the fact that crime rates were essentially unchanged" (Mauer, *Race to Incarcerate* 73).

Propelled by the media frenzy, the Democrat controlled White House began work on a crime bill that would stray from the goals that Janet Reno had initially espoused. Efforts to create a crime bill that would pass in congress soon escalated when, "early in 1994...the White House recommended the appointment of Ron Klain as counselor to Reno, with an initial responsibility of coordinating the effort to pass the bill". With a new team in place, the crime bill—which may once have focused on reform—now took a punitive, if not unpopular, stance on criminal justice. The final product that came out of congress was a "six-year \$30 billion legislative package heavily weighted toward law enforcement and incarceration. Almost \$8 billion of the total funding was directed toward prison construction, accompanied by incentives for states to toughen penalty structures in order to qualify for funding" (Mauer, *Race to Incarcerate* 77-8). This bill provided a federal mandate to the states to sentence criminals to longer prison stays.

Clinton's presidential tenure which began with mixed signals regarding his stance on criminal justice ended in similar fashion. During his last weeks in office, "Clinton published a remarkable op-ed article in the *New York Times*...Among key provisions of [his] agenda were calls to reexamine mandatory minimum sentences for non-violent offenders and 'immediately reduce the disparity between crack and powder-cocaine sentences.' Nowhere...was there any mention that over a period of eight years the administration had actively supported the expansion [of these measures]" (Mauer, *Race to Incarcerate* 81). While Clinton may have personally been reform minded in his approach to criminal justice, his administration did nothing to decrease the number of people behind bars or lighten the severity of mandatory minimum sentences. In 2000 when his time in office came to an end, Bill Clinton oversaw 2,015,300 inmates.

### *The Bush Junior Years*

George W. Bush took the oath of office in January 2001. Before he became the President of the United States, Bush was the Governor of Texas: "In his six-year tenure as governor, Bush presided over the execution of 152 people, far more than any governor in the past half-century". In addition to the executions that he oversaw, "Bush also presided over one of the nation's largest prison systems and signed into law policies that called for increased imprisonment for low-level cocaine offenders" (Mauer, *Race to Incarcerate* 82-3). The outlook towards the criminal policies he would endorse as President favored a tough on crime approach.

Bush appointed the former attorney general and governor of Missouri, John Ashcroft as U.S. attorney general. Ashcroft was well known for his punitive approach to

criminal justice: “As state Attorney General, Ashcroft fought hard to reinstate the death penalty, and as governor he more than doubled the prison budget in just eight years”. Additionally, Ashcroft supported policies that called for “classification of second-time marijuana possession as a felony and sponsored legislation designed to try more juveniles as adults” (Mauer, *Race to Incarcerate* 83). Following eight years of a tough on crime Democrat in the White House, Bush’s appointment to Attorney General seemed to signal that he would be taking Clinton’s efforts one step further.

It came as somewhat of a national surprise, therefore, when in his 2004 state of the union address Bush called for \$300 million dollars to fund prisoner reentry programs focused on job training, job placement and mentor services. Bush began to make a rhetorical connection between the family life and the health of the community. In his 2003 state of the union he denounced the situation in which “children have to go through a prison gate to be hugged by mom or dad” (Mauer, *Race to Incarcerate* 85). It began to seem that even in spite of his punitive pick for attorney general Bush might be reform minded when it came to criminal policy.

Unfortunately, despite Bush’s rhetoric the program to fund better prisoner reentry did not function as intended. In fact, “of the \$300 million proposed for the four-year reentry program, Congress appropriated only \$30 million”. This reduction in funds greatly curtailed any positive effects that such a program could have had, but even if the full funding had been approved Mauer is skeptical that such a program would have gone far enough to promote meaningful reform: “Even had the proposed annual budget of \$75 million for reentry been allocated, it would have translated into only about \$125 in programing for each of the 600,000 offenders released from prison each year” (*Race to*

*Incarcerate*, 86-7). It is hard to imagine that the struggles facing someone reentering society after years in a jail cell could be remedied by \$125 in program assistance.

The Bush White House was unsuccessful in securing funding to assist formerly incarcerated individuals in their reentry to free society, but it was able to pass the Freeney amendment. This amendment which was part of an anti-child-kidnapping bill was designed to rein in judges from downward departures from the sentencing guidelines. Freeney was yet another brick in an ever growing wall of mandatory sentencing guidelines that sapped the power of the judge to try cases with an eye towards individual circumstances. Supreme Court Justice Rehnquist remarked that policies such as Freeney, “could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties” (Mauer, *Race to Incarcerate* 89).

The Freeney amendment and Clinton’s crime bill, in addition to the adoption of the “three strikes you’re out” policy by many states, caused prison numbers to soar. These policies effected the growth of the prison population in more ways than one. By mandating jail time for many offenses these law ensured that alternatives to prison sentences would not be employed as punishment. Additionally, by mandating such long prison stays even for non-violent drug crimes the laws insured that once an individual was jailed he or she would not be leaving for a long time. The change in rhetoric regarding criminal policy that Bush introduced may have helped to soften the public perception of criminal policy, but it did very little to help offenders: “In contrast with state prison systems, which were generally experiencing lower rates of growth in the early years of the twenty-first century, the federal prison population rose at three times the rate of the state systems. The rhetoric on crime had changed somewhat, but this was

of little consolation to the more than two million Americans behind bars” (Mauer, *Race to Incarcerate* 91).

### *The Obama Years*

Barak Obama became the forty-fourth President of the United States in 2009. As the first ever black President, his ascension to the White House was hailed as a huge victory for the black community which had been most affected by the war on drugs. Many hoped that the era of mass incarceration would be brought to a close under Obama. After all, “Obama’s stated positions on criminal justice reform suggest that he is opposed to the War on Drugs and the systematic targeting of African Americans for mass incarceration” (Alexander, 251). Unfortunately, at the end of Obama’s Presidency mass incarceration was still alive and well.

In contrast to the Presidents that preceded him, Obama had a very different perception of crime. Growing up as a young black man in a poor family Obama had experimented frequently with drugs: “As he wrote in his memoir about his wayward youth, ‘Pot had helped, and booze; maybe a little blow when you could afford it’” (Alexander 251). Though he was never arrested for his drug offenses Obama was aware that his life could have turned out very differently had he been incarcerated and labeled a felon. Obama sympathized with the plight of those incarcerated for drug crimes, and he became the first President to ever visit a prison and speak with prisoners while in office (13<sup>th</sup>, 01:19:00).

In spite his personal sympathies and tendency towards reform, Obama’s cabinet picks did not share his same goals regarding criminal justice policy:

Obama chose Joe Biden, one of the Senate's most strident drug warriors, as his vice president. The man he picked to serve as his chief of staff in the White House, Rahm Emanuel, was a major proponent of the expansion of the drug war and the slashing of welfare rolls during President Clinton's administration. And the man he tapped to lead the U.S. Department of Justice—the agency that launched and continues to oversee the federal war on drugs—is an African American former U.S. attorney for the District of Columbia who sought to ratchet up the drug war in Washington, D.C., and fought the majority black D.C. City Council in an effort to impose harsh mandatory minimums for marijuana possession. (Alexander, 252)

The decision to staff his administration with individuals whose political agenda was so different than his own seems to be an ineffective way to bring an end to the drug war.

With his staff in place, Obama began to enact policies that continued to escalate the drug war rather than bring about its resolution. Obama “revived President Clinton’s Community Oriented Policing Services (COPS) program and increased funding for the Byrne grant program—two of the worst federal drug programs of the Clinton era...responsible for the militarization of policing, SWAT teams, Pipeline drug task forces, and [a] laundry list of drug-war horrors” (Alexander, 253). Unlike Clinton, Obama’s motive for funding these programs was economic growth, not crime reduction: “The Obama administration chose to increase funding for Byrne programs twelvefold not in response to any sudden spike in crime rates...but instead because handing law enforcement billions of dollars in cash is an easy, efficient jobs program in the midst of an economic crisis” (Alexander, 253). Regardless of political motive, the choice to fund such programs led to an increase in incarceration. In 2014, the U.S. prison population reached 2,306,200 inmates (13<sup>th</sup>, 00:50:40)



### *Impact of Legislation*

The mandatory sentencing laws, enacted through Clinton's crime bill and through many state legislations, had an unparalleled effect on the judicial system. The power of judges to try their cases with an eye to individual aspects of each case and to render sentences on an individual basis was slowly usurped over a forty-year period. Initially, during the 1970's, there was some judicial resistance to these policies. When the mandatory sentencing laws were first being implemented, some jurisdictions actually experienced a drop in convictions. Mauer explains that while those who were convicted during these years were more likely to go to prison and stay there for a longer time "judges and prosecutors who felt that the mandatory terms were too harsh in some cases either declined to prosecute or found a means of convicting offenders with lesser statutes" (*Race to Incarcerate*, 57). But, such conscientious acts by prosecution would not counterbalance the power of legislative mandates for long.

The criminologist Donald Cressey explained this phenomenon and the effect it has had on the American democracy:

In democracies, nondiscretionary sentencing systems always give power to the legislative branch of government, as compared to the judicial and executive branches. The power is the same as that seized by dictators who tolerate no breaches of their orders...Currently, legislators are using the justice model of sentencing to restrict the freedom of courthouse personnel to be wise, compassionate, innovative, judicious, and fair. Judges are being directed to impose fixed amounts of pain on criminals in a machine-like manner. (qtd. in Mauer, *Race to Incarcerate* 48)

Once these policies were firmly in place there was no way to avoid adhering to them, and as a result America soon developed the largest network of prisons that the world has ever seen. Figure 3 represents the growth of the American prison system from 1970 to 2014.



Figure 3: Growth of the U.S. prison population from 1970 to 2014

## CHAPTER 3

### Financial Incentives and the Prison Industrial Complex

The political policies described in the previous chapter, enacted over four decades by five presidents, tell half the story of America's system of mass incarceration.

American society is not dominated entirely by government action; the United States is as much controlled by the free market as it is controlled by the government, and corporate interests have also played a large role in crafting the system of mass incarceration. This chapter will examine the way in which money and politics have interacted to reshape the nation's police forces, finance a massive prison building campaign and allow private corporations to turn a system of mass incarceration into a system of mass profit.

#### *War Is Expensive: Federal Money for Local Cops*

When Ronald Reagan declared a war on drugs, the police did not immediately rush into the streets and start arresting anyone who looked like he might use drugs. Law enforcement is generally a reactive force. Police do not usually go around making arrests until a crime is reported to them. When a crime such as a robbery or an assault is committed the victim or a witness dials 911; once alerted, the police respond to the scene, interview witnesses and make arrests. Drug crimes are difficult for law enforcement to deal with due to the fact that they are victimless crimes; that is, no party involved is motivated to alert law enforcement that a crime has been committed. With no report being filed, it is rare for police to be aware of a crime let alone to intervene.

While the 1970's are often associated with rampant drug use, few people were actually prosecuted for drug crimes during that decade. Comparatively, far more people are arrested for drug crimes today: "Approximately half a million people are in prison or jail for a drug offense today, compared to an estimated 41,100 in 1980—an increase of 1,100 percent...To put the matter in perspective, consider this: there are more people in prisons or jails today just for drug offenses than were incarcerated for *all* offenses in 1980" (Alexander, 60). For his war on drugs to be effective, Reagan would have to change the methods in which the police responded to crime.

In order to make the drug war viable, the Reagan administration needed to find a way to incentivize—or coerce—police across the country to devote a much larger share of their staff and resources to drug crimes. The method the administration employed was to offer financial incentives for police to be proactive in their enforcement of drug laws. As noted in the previous chapter, the Reagan administration created the Edward Byrne Memorial State and Local Law Enforcement Assistance Program in order to funnel federal money directly to the state and local police agencies. Through the Byrne program "huge cash grants were made to those law enforcement agencies that were willing to make drug-law enforcement a top priority". The money from the Byrne program was effectively directed towards the specific prosecution of drug users and sellers: "Nationally, narcotics task forces make up about 40 percent of all Byrne grant funding, but in some states as much as 90 percent of all Byrne grant funds go toward specialized narcotics task forces. In fact, it is questionable whether any specialized drug enforcement activity would exist in some states without the Byrne program" (Alexander, 73). This

federal money allowed for the hiring of more officers who could be devoted specifically to drug crimes.

The War on Drugs, an issue which draws most of its support from the political right, was not initially embraced by conservatives with much fervor. Advocates of states' rights did not look kindly upon a federal mandate telling them how to direct their police forces. Moreover, many local police departments did not have the resources to devote any extra attention to crimes beyond the scope of their normal duties especially victimless crimes: "Participation in the drug war required a diversion of resources away from more serious crimes, such as murder, rape, grand theft, and violent assault—all of which were of far greater concern to most communities than illegal drug use" (Alexander, 73). However, once the federal money started pouring into local departments, police were happy to hire more officers and expand their operational capacity to prosecute more criminals.

Ten years after the Byrne program's inception, the use of federal funds by local law enforcement had drastically changed the relationship between the average police force and the federal government: "By the late 1990s, the overwhelming majority of state and local police forces in the country had availed themselves of the newly available resources and added a significant military component to buttress their drug-war operations" (Alexander, 74). In addition to the cash grants made available to police departments willing to carry out the drug war, the Byrne program also made military grade equipment—previously only implemented in times of war against enemy combatants—available to local law enforcement:

According to the Cato Institute, in 1997 alone, the Pentagon handed over more than 1.2 million pieces of military equipment to local police

departments. Similarly, the *National Journal* reported that between January 1997 and October 1999, the agency handled 3.4 million orders of Pentagon equipment from over eleven thousand domestic police agencies in all fifty states. Included in the bounty were “253 aircraft including six- and seven-passenger airplanes, UH-60 Blackhawk and UH-1 Huey helicopters, 7, 856 M-16 rifles, 181 grenade launchers, 8,131 bulletproof helmets, and 1,161 pairs of night-vision goggles.” A retired police chief in New Haven, Connecticut, told the *New York Times*, “I was offered tanks, bazookas, anything I wanted.” (Alexander, 74)

Police departments which once barely had enough staff to investigate local crime now had the money, the manpower and the equipment to wage the drug war as a literal war.

Along with the new equipment given to law enforcement followed a strong desire to put it to use. After all, what is the point in having body armor, assault rifles and night vision goggles if you never get to use them? The federal money and gear being given to local jurisdictions led to a major increase in the proliferation of Special Weapons and Tactics (SWAT) teams: “SWAT teams originated in the 1960s and gradually became more common in the 1970s, but until the drug war, they were used rarely, primarily for extraordinary emergency situations...That changed in the 1980s, when local law enforcement agencies suddenly had access to cash and military equipment specifically for the purpose of conducting drug raids”. The mere existence of SWAT teams amongst law enforcement is not novel, but the increasingly common use of SWAT to respond to minor crimes represents a shift in police operations. While certain situations may require special weapons and tactics, these extraordinary crimes are rare. In most jurisdictions the threat of a hostage situation does not warrant the police to maintain a dedicated SWAT team. Due to a lack of serious crimes that allow for the regular mobilization of SWAT, “today, the most common use of SWAT teams is to serve narcotics warrants, usually with forced, unannounced entry into the home. In fact, in some jurisdictions drug warrants are

served *only* by SWAT teams—regardless of the nature of the alleged drug crime” (Alexander, 74-5). As policing tactics shifted towards military style raids, the perception of the police’s role in society also began to shift.

The increasingly common use of SWAT teams to execute no-knock warrants against U.S. citizens who are not under arrest and have not been found guilty nor accused of any crime represents a major shift in policing methods. This use of military force against U.S. citizens was ethically dubious and required an act of congress to give the practice legal protection:

The transformation from ‘community policing’ to ‘military policing,’ began in 1981, when President Reagan persuaded Congress to pass the Military Cooperation with Law Enforcement Act, which encouraged the military to give local, state, and federal police access to military bases, intelligence, research, weaponry, and other equipment for drug interdiction. That legislation carved a huge exception to the Posse Comitatus Act, the Civil War-era law prohibiting the use of the military for civilian policing. (Alexander, 76-7)

The militarization of the police force fostered distrust between the community and the police and led to an increased number of fatal shootings by police. Criminologist Peter Kraska reported that, “between 1989 and 2001 at least 780 cases of flawed paramilitary raids reached the appellate level, a dramatic increase over the 1980s, when such cases were rare, or earlier when they were nonexistent. Many of these cases involve people killed in botched raids” (qtd. in Alexander, 75).

SWAT teams were a preferred method of drug enforcement, but the motive for making arrests continued to be money. Cash grants and gear given to police by the federal government allowed departments to expand their staff and increase their operations budgets, but there were strings attached to the money. A 2001 article, written

for the *Capital Times* in Madison, Wisconsin explained the direct link between federal dollars and drug arrests:

In the 1990s, Wisconsin's police departments were given nearly a hundred thousand pieces of military equipment. And although the paramilitary units were often justified to city councils and skeptical citizens as essential to fight terrorism or deal with hostage situations, they were rarely deployed for those reasons but instead were sent to serve routine search warrants for drugs and make drug arrests. In fact, the *Times* reported that police departments had an extraordinary incentive to use their new equipment for drug enforcement: the extra federal funding the local police departments received was tied to antidrug policing. The size of the disbursements was linked to the number of city or county drug arrests. Each arrest, in theory, would net a given city or county about \$153 in state and federal funding. Non-drug-related policing brought no federal dollars, even for violent crime. As a result, when Jackson County, Wisconsin, quadrupled its drug arrests between 1999 and 2000, the county's federal subsidy quadrupled too. (Alexander, 77-8)

The federal government gave local law enforcement the tools and the training to make drug arrests in a manner that had never before been available outside military operations, but in order to maintain this level of funding, officers had to make arrests—lots of them.

Whereas the tightening of sentencing guidelines and the provisions of the Freeney amendment described in the previous chapter represent a legislative hijack of the judicial system, the federal funding and directives given to local law enforcement represent, in essence, a federal takeover of local police. Local police, who once had the autonomy to direct their staff and enforce law in the manner they saw fit, were now beholden to the federal government for much of their budget. And once the money was put to use and more officers were hired there was no way to avoid fulfilling the mandate to crack down on drug crimes outside of drastically downsizing operations and refusing federal money—something no chief of police would be keen to do.



### *If You Want It, Take It: Civil Forfeiture*

Another financial incentive for law enforcement to carry out the war on drugs was their ability to keep property seized in relation to drug crimes. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act. The act included a “civil forfeiture provision authorizing the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs”. This act was intended to curtail the drug trade by robbing high profile dealers of the ability to manufacture and supply drugs to an open market. The law initially only provided for the forfeiture of the instruments involved in the drug trade and did not provide much of a benefit the agencies who confiscated and destroyed the drug paraphernalia, but in 1984, “Congress amended the federal law to allow federal law enforcement agencies to retain and use any and all proceeds from asset forfeitures, and to allow state and local police agencies to retain up to 80 percent of the assets’ value” (Alexander, 78-9). This new amendment provided clear financial incentive for agencies to go after anybody who might be involved in the drug trade.

Under the new amendment, property or cash could be seized without anyone being charged with a crime, hence the name *civil* forfeiture:

Property or cash could be seized based on mere suspicion of illegal drug activity, and the seizure could occur without notice or hearing, upon an ex parte showing of mere probable cause to believe that the property had somehow been “involved” in a crime...Neither the owner of the property nor anyone else need be charged with a crime, much less found guilty of one. Indeed, a person could be found innocent of any criminal conduct and the property could still be subject to forfeiture. Once the property was seized, the owner had no right of counsel, and the burden was placed on him to prove the property’s “innocence.” (Alexander, 79)

If the police suspected somebody of being a drug dealer and could show probable cause, they had the legal right to confiscate any money the suspect carried because there was reason to think the money was involved in a drug crime. If a person was pulled over with drugs in their car, then the car could be forfeited due to the fact that it might have been involved in drug trade. Likewise, a home found to contain drugs is liable to seizure under civil forfeiture.

The ability to simply take cash away from citizens without having to file criminal charges quickly led to a huge accumulation of funds for law enforcement as well as a surplus of corrupt operations. Within the span of just a few years, drug task forces were able to seize hundreds of millions of dollars: “According to a report commissioned by the Department of Justice, between 1988 and 1992 alone, Byrne-funded drug task forces seized over \$1 billion in assets. Remarkably, this figure does not include drug task forces funded by the DEA or other federal agencies” (Alexander, 79). With so much money free for the taking, corruption spread quickly. Eric Blumenson and Eva Nilsen document a litany of corrupt operations in their report, *Policing for Profit: The Drug War’s Hidden Economic Agenda*:

In Florida, reporters reviewed nearly one thousand videotapes of highway traffic stops and found that police had used traffic violations as an excuse—or pretext—to confiscate “tens of thousands of dollars from motorists against whom there [was] no evidence of wrongdoing,” frequently taking the money without filing any criminal charges. Similarly, in Louisiana, journalists reported that Louisiana police engaged in massive pretextual stops in an effort to seized cash, with the money diverted to police department ski trips and other unauthorized uses. And in Southern California, a Los Angeles Sheriff’s Department employee reported that deputies routinely planted drugs and falsified police reports to establish probable cause for cash seizures. (qtd in Alexander, 80-81)

The wrongdoing by the police documented in Florida, Louisiana and California is only a fraction of the corrupt practices that occurred across the nation during the 1990's. Such actions fostered distrust of not only police but the entire criminal justice system.

Such rampant corruption could not proceed indefinitely, and in 2000, Congress passed the Civil Asset Forfeiture Reform Act. The passage of this act was meant to prohibit police abuse of civil forfeiture and return some protections to the citizen: "The Reform Act resulted in a number of significant due-process changes, such as shifting the burden of proof onto the government, eliminating the requirement that an owner post a cost bond, and providing some minimal hardship protections for innocent parties who stand to lose their homes" (Alexander, 81-2). These changes made it the government's duty to prove that an asset was involved in a drug crime rather than the owner's responsibility to prove that it was not. But the standard of proof which the government must attain in order to confiscate property is only "a preponderance of the evidence." This could be as little as a fifty-one percent chance that the asset was used in a drug crime, and the government still has the right to confiscate. Contrast with the actual drug crime itself which requires proof beyond a reasonable doubt to merit a conviction.

The Civil Forfeiture Reform Act fixed some problems that became apparent through the police corruption of the 1990s, but it did not take away the profit incentive for making drug arrests. Money confiscated during drug arrests is no longer kept by the local arresting office, but "law enforcement agencies are still allowed, through revenue-sharing agreements with the federal government, to keep seized assets for their own use". In fact, civil forfeiture remains an incredibly profitable policy for law enforcement. Those who have their property confiscated are not always charged with a crime, and

without being charged there is no constitutional right to an attorney. Therefore someone who loses their car to civil forfeiture would have to choose whether they want to spend ten thousand dollars hiring an attorney in order to attempt to reclaim a seven thousand dollar car. It is due to this dynamic that in some jurisdictions ninety percent of civil forfeiture cases go unchallenged (Alexander, 83).

With policies such as civil forfeiture in place—which incentivize police to seek out and arrest large numbers of people for the sake of their department budget—it is impossible to curtail the number of people being rounded up and arrested. These policies, which were originally intended eliminate the use of drugs and benefit society are now sapping entire communities of their resources. Federal grants that make drug arrests a criteria for funding and forfeiture laws that make confiscation of property a vital part of police budgets create an ongoing cycle where the police must constantly be seeking out new groups to arrest in order to maintain job security. Michelle Alexander summarizes, “This dramatic change in policy (civil forfeiture) gave state and local police an enormous stake in the War on Drugs—not in its success, but in its perpetual existence. Law enforcement gained a pecuniary interest not only in the forfeited property, but in the profitability of the drug market itself” (78).

The traditional reactionary role of police—responding to crime complaints and patrolling the community—has been transformed by economic programs that have normalized aggressive proactive policing strategies. Over the past forty years, federal programs and laws have provided money for police to expand their staff and weaponry. They have created a system in which the budget of the police force is dependent not upon the community need, but upon the amount of drug busts that can be made. These

circumstances have created a situation in which distrust between the community and the police runs high and the oath of the officer to “serve and protect” has been severely—perhaps irreparably—corrupted.

### *Building Prisons*

The creation of financial incentives to arrest and prosecute drug crimes coupled with strict sentencing guidelines has led to an unparalleled increase in incarceration numbers. This increase in the number of people being jailed necessitated a rapid expansion of the prison system. The financial costs of storage, control, food, and healthcare for over two million inmates amounts to billions and billions of tax dollars on a yearly basis.

The prison system which existed in the early 1970’s and before was much too small to house the ever increasing number of citizens being sentenced to serve time. As has already been noted, during the 1970’s, criminologists and sociologists were recommending the downsizing of the prison system—a system which incarcerated only around 200,000 offenders. Instead of being downsized, the next four decades saw an expansion of the prison system unlike any the world had ever witnessed during a time of peace. Angela Davis uses the state of California as a case study to depict the rapid growth of the U.S. prison system from the Reagan era onward:

The first state prison in California was San Quentin, which opened in 1852. Folsom, another well-known institution, opened in 1880. Between 1880 and 1933, when a facility for women was opened in Tehachapi, there was not a single new prison constructed...In all, between 1852 and 1955, nine prisons were constructed in California. Between 1962 and 1965, two camps were established, along with the California Rehabilitation Center. Not a single prison opened during the second half of the sixties, nor during the entire decade of the 1970s. However, a massive project of prison construction was initiated during the 1980s—that is, during the years of the

Reagan presidency. Nine prisons, including the Northern California Facility for Women, were opened between 1984 and 1989. Recall that it had taken more than a hundred years to build the first nine California prisons. In less than a single decade, the number of California prisons doubled. And during the 1990s, twelve new prisons were opened... There are now thirty-three prisons, thirty-eight camps, sixteen community correctional facilities, and five tiny prisoner mother facilities in California. (Davis, 12-13)

The cost of building just one prison is substantial. The cost of building twenty-one prisons in a twenty year timespan, as California did, is an extraordinary allocation of funds to corrections. Patterns of prison growth similar to what occurred in California took place across the entire country during the '80s and '90s.

In 1985 total state spending on corrections totaled \$6.7 billion; by 2015 this number rose to \$56.9 billion (Mauer, "Trends in U.S. Corrections"). That is an increase of 849.25 percent over the course of 30 years. Compare this growth percentage to that of state spending on education over the same period. In 1985 the total state funding for higher education totaled \$33.282 billion; by 2015 higher education funding totaled \$188.037 billion. Over that same 30 period that corrections spending increased 849.25 percent, higher education spending increased only 564.98 percent. State spending in total for 1985 was \$300.109 billion; by 2015 state expenditures totaled \$1.854 trillion. Overall state expenditures increased by 617.78 percent over these 30 years. Corrections spending went from accounting for 2.3 percent of the overall state expenditures in 1985 to 3.1 percent in 2015; meanwhile higher education went from making up 11.1 percent of the expenditure budget to 10.1 percent (Benker and Howard; Kelley). These small shifts in the budget may seem minuscule, they are indicative of a legislature that values prison building over funding colleges. Marc Mauer describes the hidden costs of such financial decisions:

These tradeoffs are rarely discussed in the world of public policy. Legislators do not pass an appropriations bill that states that funding for new prisons will be taken from state colleges, nor are parents of state college students informed that tuition increases are due to budget cutbacks caused by increased prison spending. But these are often exactly the repercussions of many public policy decisions. (Mauer, *Race to Incarcerate* 198)

As corrections spending grows at a pace that outstrips other state programs, money must be diverted away from other programs into corrections spending to sustain this growth. Michelle Alexander puts this phenomenon in perspective by comparing Clinton's corrections spending to his public housing spending: "During Clinton's tenure, Washington slashed funding for public housing by \$17 billion (a reduction of 61 percent) and boosted corrections by \$19 billion (an increase of 171 percent), effectively making the construction of prisons the nation's main housing program for the urban poor." (57). Public housing was not the only program that experienced budget cuts in order to allocate more money for a prison building campaign: "between 1980 and 1993, federal spending on employment and training programs were cut nearly in half while corrections spending had increased 512 percent" (Mauer, *Race to Incarcerate* 68). Additionally, from 1985 to 2015 state expenditure for public assistance went from making up 6.1 percent of the budget to only 1.4 percent; while the overall state expenditure grew by 617 percent, public assistance grew only 41 percent (Benker and Howard; Kelley).

This allocation of funds acted as a double edged sword for boosting incarceration numbers. Funding for punishment has increased more than funding for education, and at the same time funding for social welfare programs has either barely increased or been cut back. This has created an environment in which more and more of America's poor are

likely to become incarcerated. These budget allocations also show that America's largest government system for caring for its poor is now the prison.

### *Prison Profiteering*

The expansion of the U.S. prison system has created a large web of subsidiary industries that find ways to profit off large number of captive customers. The federal and state money allocated for corrections does not go directly to the care of prisoners. This money is first filtered through a layer of subsidiary industries, many of which are private corporations. The web of corporations looking to profit off prisons is vast. For example, once a state decides to construct a new prison it must acquire plans for the design. That means that an architect must be hired and paid for his service. Then the prison must be built, and many times this will be done by the construction contractor with the lowest bid. Once the prison is designed, built and operational there are a litany of other expenses. Inmates must be provided with food, toiletries, medical care and means of communication with family and attorneys. Federal and state tax dollars are what pay for all of these expenses, but it is private companies who provide the services. This joint venture between corporate America and the U.S. prison system has led to large corporate profits at the expense of the inmate and the taxpayer.

The relationship between the criminal justice system and economic opportunists is nothing new. In fact, profiteers have been taking advantage of the criminal justice system for financial gain for well over a century. The thirteenth amendment to the U.S. Constitution states that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within



the United States, or any place subject to their jurisdiction.” This amendment, which made slavery illegal, decimated the Southern economy which was dependent on free slave labor. After the Civil War, many Southern states found a clever method of avoiding the legal and economic implications of this amendment. In the antebellum South, the newly freed slaves were arrested in droves for crimes such as loitering or vagrancy and were then made to serve on chain gangs or given back to their former masters as part of a convict lease program (13<sup>th</sup>, 00:3:20-00:4:20). The convict lease program allowed private individuals to regain the cheap labor that was temporarily lost with the abolition of slavery. The justice system of many Southern states during this time period was primarily concerned with maintaining the economic advantages that slavery had once provided: “The expansion of the convict lease system and the county chain gang meant that the antebellum criminal justice system, which focused far more intensely on black people than on whites, defined southern criminal justice largely as a means of controlling black labor” (Davis, 31). By arresting the newly freed slaves for minor crimes and returning them to forced labor, Southern states were able to turn the justice system into a system of industrial profit.

The convict-lease program was eventually outlawed, but the general system which allows private individuals and corporations to profit off of the prison system is still very much intact. According to the American Institute of Architecture there exist more than one-hundred architecture firms devoted entirely to prison architecture (Rosenblatt, 29). Additionally, government run prisons contract out the food service, health care and telecommunications to private corporations which can become quite wealthy off of the deals:

In the 1990s, the variety of corporations making money from prisons is truly dizzying, ranging from Dial Soap to Famous Amos cookies, from AT&T to health-care providers . . . In 1995 Dial Soap sold \$ 100,000 worth of its product to the New York City jail system alone . . . When VitaPro Foods of Montreal, Canada, contracted to supply inmates in the state of Texas with its soy-based meat substitute, the contract was worth \$34 million a year. (Davis, 99)

Prison contracts are extremely lucrative for corporations. Aramark, a corporation which provides “well over 1,000,000 meals a day for state and municipal facilities”, signed food service contracts with Michigan and Ohio worth \$145 and \$110 million dollars each (Loukis). Initially, the fact that the government relies upon private companies to provide services to inmates seems to be a necessary evil. While the concept of someone profiting off of the punishment of a fellow human being is, at best, ethically dubious, the government can hardly be expected to own the industries necessary to provide food, healthcare, sanitary products and communications equipment to over two-million inmates.

The problem of having private companies profit off providing services to inmates is twofold. The first problem with a system of corporate profits based on providing goods and services to inmates is that corporations increase their net worth as the number of inmates increases. Once corporations realized that their profits could increase along with the growing system of mass incarceration they began to take political action to insure that the system continue to grow (this phenomenon will be addressed in detail later in the chapter).

The second problem which prison contracts create is that they incentivize corporations to provide the minimum quality service necessary to fulfill their contract. Outside the competition of the free market the companies that win prison contracts need

not worry about providing a high quality of service; their customers have no alternative. Food service contracts and inmate health care are particularly susceptible to this flaw. When food providers sign a government contract to service a prison they get paid a set amount regardless of how much they actually spend on the food they provide or the care they take in providing it. Therefore it is in a company's best financial interests to provide the service as cheaply as possible.

The incentive for food providers to cut corners to heighten profits has led to many unethical practices. The nation's largest provider of food service to prisons, Aramark, has committed a laundry list of offenses:

An Aramark employee in Michigan served prisoners food that was thrown in the trash, while another was fired after serving cake that had been nibbled on by rats; Aramark was held partly responsible for infestations of maggots found in three areas of an Ohio prison kitchen and dining hall, and maggots were also found in Michigan prison kitchens serviced by the company; Aramark food is blamed for sickening prisoners in a number of states and is the focus of several lawsuits; Aramark has been fined hundreds of thousands of dollars, and had its contract terminated in one state for violations that included unsanitary conditions, spoiled food, unauthorized menu changes and inadequate meal portions, and hundreds of Aramark employees have been disciplined, fired or prosecuted for smuggling contraband and engaging in sexual misconduct with prisoners. (Loukis)

Despite these offenses, Aramark still holds contracts to with prisons worth hundreds of millions of dollars. Some of Aramark's practices may be unethical, but few other companies have the ability to provide food service to so many people at such a low cost; until this dynamic changes Aramark will continue to win prison contracts and their ethical violations will be mostly ignored.

### *For-Profit Prisons*

Even more profitable than contracts to provide prison construction or food service are for-profit prisons. The private prison industry allows for publicly traded corporations to build, maintain and run entire prisons for the profit of their shareholders. Instead of the government acting as the controlling agency which contracts out certain aspects of running the prison to private corporations, for-profit prisons have the autonomy to control every aspect of the prison. The government simply supplies the inmates. Opting to privatize the prison industry can seem like a good move for the government. Instead of having to negotiate contracts for food and medical care, hire architects and construction crew and train guards, all of these tedious issues can be resolved with one payment to a private prison corporation. However, private prisons often stray into the same ethical gray areas as prison contractors. There are direct financial benefits for these companies to provide service as cheaply as possible and to take political action to insure that there will be a steady stream of inmates to keep profits high.

The largest private prison corporation, Corrections Corporation of America, has made millions upon millions of dollars by running prisons and detention centers across the nation. CCA has a direct monetary interest in keeping prisons as full as possible. CCA also has a clear understanding of the political policies that will either help or hinder their bottom line. In a statement to the Securities and Exchange Commission, CCA explained changes in policy that might negatively affect their growth:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts,

leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our 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. (Alexander, 231)

CCA's knowledge of the policy changes that might curtail their expansion is not bad in and of itself, but the fact that CCA has taken steps to influence political policy for its own financial gain is very troubling.

The opportunity to profit off of America's prison system has attracted "rich and powerful people, including former vice president Dick Cheney, [who] have invested millions in private prisons" (Alexander, 230). Dick Cheney, who had an eighty-five million dollar investment in the private prison company, Vanguard Group, was indicted for contributing to prisoner abuse: "On November 17, 2008, a Texas grand jury returned an indictment against then-Vice President Richard B. Cheney and former U.S. Attorney General Alberto Gonzales, charging Cheney with contributing to prisoner abuse in privately-run prisons and Gonzales with covering up the abuse by interfering with investigations" (Clarke). While the charges were eventually dismissed, the court proceedings caused many shadowy ties to the private prison industry to come to light. Setting aside the obvious conflict of interest resulting from the vice President of the United States holding an eighty-five million dollar investment in a private prison and the Texas state senator who was indicted for accepting bribes from private prison companies, the trial proceedings uncovered even more political ties to private prisons in the Texas state legislation:

Carlos Zaffirini, an attorney who represents GEO, is the husband of State Senator Judith Zaffirini. State Rep. Rene Oliveira and his cousin David Oliveira are partners in another law firm that represents GEO. The

company's lobbyists have included former State Rep. Ray Allen; Scott Gilmore, Allen's former legislative chief of staff; Bill Miller, who is a personal friend of former House Speaker Tom Craddick; and Michelle Wittenburg, Craddick's former general counsel. (Clarke)

This tangled web of political connections to the private prison industry in Texas is only a few examples of questionable political ties from one particular state. The private prison industry stretches across the nation and is profitable enough to wield a considerable amount of influence on the nation's political leaders.

In the early 2000s there was some fear amongst the private prison industry that the prison boom of the 1990s might level off, leading to a decrease in the profitability of the industry. These fears, as it turns out, were wildly unfounded. The private prison industry had a record breaking year in 2008 when CCA increased its net income by 14 percent (Alexander, 231). In 2014, CCA along with its largest private prison competitor, GEO Group, boasted profits of 3.3 billion dollars (The Editorial Board, "Private Prisons' Powerful Friend"). To put this number in perspective, the nation with the highest rate of incarceration which was discussed in chapter 1, the Seychelles, has a GDP of \$1.443 billion. The nation with the world's highest incarceration rate in makes less than half the amount of money that the private prison industry makes in the United States.

Today, the private prison industry is as profitable as it has ever been. Immediately following the election of Donald Trump to the presidency private prison stock prices rose drastically: "On Nov. 9, the day after Mr. Trump won, the Corrections Corporation of America (now CoreCivic), the nation's largest operator of private prisons, saw its stock price jump 43 percent; its leading competitor, the GEO group, rose 21 percent. Stocks in those companies are up more than 100 percent since Election Day" (The Editorial Board, "Private Prisons' Powerful Friend"). These companies have many

reasons to be hopeful for increased profits during President Trump's time in office. Trump's Attorney General Jeff Sessions has already reversed President Obama's executive order which mandated a phasing out of federal private prisons over a five year period (The Editorial Board, "Private Prisons' Powerful Friend"). Now, once again, both federal and state prisons will be up available markets for CCA and GEO Group.

Not only have the markets been re-opened to privatization, but the new administration seems to favor prison privatization over other options. Trump has been quoted as saying, "I do think we can do a lot of privatizations and private prisons. It seems to work a lot better" (The Editorial Board, "Private Prisons' Powerful Friend"). Trump's platform, which has followed the traditional Republican "tough on crime" approach, curried favor with GEO Group. The corporation donated over half of a million dollars in support of Trump's and other Republican's campaigns: "Through contributions from its corporate entities and its political action committee, the Florida-based company contributed \$673,200 through the end of September, putting its weight behind Republican presidential nominee Donald Trump, Sen. Marco Rubio (R-Fla.) and Republican control of the Senate" (Blumenthal). Massive financial contributions given to politicians by corporations put pressure on elected officials to further their donors' interests, especially if they hope to secure more funding in the future, but campaign contributions are just one of several ways that corporations have been able to impact legislation for their own ends.

#### *ALEC*

The corporate desire to influence legislation has led to the hiring of thousands of lobbyists whose job is to represent corporate interests to policy makers at the federal level. These lobbyists facilitate campaign donations in hopes of political favors from

members of congress. Contrast to the federal government in D.C., state legislatures do not often attract lobbyists, but they often experience even more corporate influence. Corporations which were not satisfied with gaining political influence through writing checks, eventually found a way to actually write new laws. Corporations do this through the American Legislative Exchange Council or ALEC for short.

ALEC is a political action group that writes model policy to be introduced to state legislatures; ALEC's members include individual legislators as well as corporations. Within ALEC, corporate representatives work alongside legislators to craft model legislation—meant to advance corporate interest—that representatives then introduce into the state assembly. According to the ALEC website, nearly one quarter of all state legislators are members of ALEC. The depth of ALEC's reach into state legislators allows its corporate members to have huge amounts of bargaining power when it comes to representing their interests at the state level. ALEC is responsible for hundreds of bills concerning a wide variety of issues, and its former members include corporations ranging from McDonald's and Walmart to Google and Ford (13<sup>th</sup>, 00:54:15-01:07:00). Though many of these former members are no longer associated with ALEC they were all involved at one point in drafting model legislation, some of which is now law.

One long standing member of ALEC is CCA. The CCA was a member of ALEC during the late 1990's when ALEC crafted “three strikes you're out” laws as well as “truth in sentencing” laws to be introduced to state legislators. By helping craft these laws CCA was able to tamper with the criminal justice system to guarantee a steady flow of inmates which for them meant a steady flow of profits. ALEC has also been tied to Arizona's controversial SB1070 law which allowed police to stop any person who



appears to be an immigrant. This law which led to a rapid increase in arrests of illegal immigrants also greatly enriched the CCA which holds the contract to run immigrant detention facilities in Arizona—a contract worth 11 million dollars per month (13<sup>th</sup>, 00:54:15-01:07:00). Through its involvement in ALEC, CCA was able to move beyond standard lobbying efforts and become part of a body that actually drafts and introduces bills to state legislatures. By taking such action CCA could effectively prevent legislative acts that it listed in the SEC report as having the ability to impair its growth.

CCA left ALEC in 2010 after a news story accused them of directly profiting off SB1070. In the wake of the news expose and then following the murder of Trevon Martin in 2012 a large amount of corporate members made the choice to leave ALEC. Since that point ALEC maintains that it is promoting judicial reform rather than furthering a system of mass incarceration. However, much like with civil forfeiture laws, though ALEC has put forth a rhetoric of change, the systems which it created are still in place and its former members are still profiting. CCA may no longer be a member of ALEC but they are as profitable as ever, and American Bail Coalition, a for-profit company that provides bail services to alleged offenders, is still a member of ALEC (13<sup>th</sup>, 00:54:15-01:07:00).

## CHAPTER FOUR

### The Future of Mass Incarceration

The previous three chapters have given a statistical, a historical, a political and an economic account of mass incarceration within the United States. The findings have been shocking: We are a nation which accounts for 5 percent of the world population and yet we hold 25 percent of the world's prisoners. We incarcerate more of our own people—and at a greater rate—than any other nation. One out of every three black men living in America today will be arrested, convicted and confined to a prison cell for at least part of his life. Our police employ military equipment and tactics against our own citizens. We allow corporations to wrest billions in profit out of our nation's prisons while at the same time they lobby to tighten sentencing regulations, and we spend twice as much money on corrections as we do public assistance. What's more, this prison system and the complex web of policies that are meant to reduce crime have produced—at best—only modest reductions in crime rates at a huge cost in terms of tax dollars and human dignity.

When viewed in this light, it seems clear that efforts to dismantle the U.S. system of mass incarceration are merited. Due to the fact that the second and third chapter of this paper were dedicated to describing how the current system of mass incarceration developed, there is a temptation to believe that the system could easily be dismantled by simply repealing the laws that made its existence possible. But, to think that the current ills perpetuated by the system of mass incarceration could be undone by a repeal of the policies that created the system is to misunderstand the nature of the problem. U.S. politicians did not fall asleep at the wheel in 1980 after enacting a couple questionable

programs and then wake up forty years later to find the world's largest prison network mysteriously nestled in their backyard. It took strong public support accompanied by clever political action to build America's prison system, and it will take an even stronger movement to begin to dismantle it.

### *The Benefit(er)s of Mass Incarceration*

In order to fully appreciate how engrained the prison system is into American society, it is useful to reexamine the U.S. system of mass incarceration from a devil's advocate perspective. When the system is only viewed in terms of the harm that it does to individuals and society, there is little reason to acknowledge that there may be strong resistance to its dismantling. In the following paragraphs mass incarceration will be reexamined as a highly successful means of social control that provides political as well as economic goods to a small percentage of society. By looking at the benefits mass incarceration infers upon small segments of society this exercise will help illuminate the resistance which any attempts to dismantle the system may face.

The first and most basic way in which mass incarceration has benefited certain members of society is by acting as a financial stimulus package. The 849.25 percent increase in corrections funding since 1980 has allowed for the building of prisons in many poor areas. These prisons have become a major source of jobs for rural communities. Government spending on corrections currently provides jobs for "more than 700,000 prison and jail guards, administrators, service workers, and other personnel". The ability of prisons to introduce jobs into areas with stagnant economies has caused "communities that once organized against the siting of new prisons [to] now beg state officials to construct new institutions in their backyard" (Mauer, *Race to*

*Incarcerate* 10-1). Increases in corrections spending have provided thousands of jobs to communities where prisons are built, but increases in justice department spending has provided jobs numbering in the millions:

According to a report released by the U.S. Department of Justice's Bureau of Statistics in 2006, the U.S. spent a record \$185 billion for police protection, detention, judicial, and legal activities in 2003. Adjusting for inflation, these figures reflect a tripling of justice expenditures since 1982. The justice system employed almost 2.4 million people in 2003—58 percent of them at the local level and 31 percent at the state level. If four out of five people were released from prisons, far more than a million people could lose their jobs. (Alexander, 230)

The growth of the system of mass incarceration has led to the creation of millions of new government jobs. Those individuals who hold these jobs depend on the system for their livelihood and would not be likely to support policy changes which could cost them their source of income.

Mass incarceration also provides a benefit to the shareholders of private prison corporations and to those who own stock in companies that win prison contracts. These shareholders—some of whom are also influential political figures—have staked a claim to one of the most reliable and profitable investments on the market. The private prison system and corporations who win prison contracts represent a powerful economic force that does not hesitate to make political donations in order to further their economic interests. The privatization of the U.S. mass incarceration machine creates a unique system in which profit margins are guaranteed. Those profiting off this system are very reluctant to see it diminished.

Mass incarceration also performs a public service of sorts to the entirety of American society by falsely lowering national poverty and unemployment rates. Because prison inmates are not taken into account when these statistics are calculated, more than

two million jobless inmate are not factored into the unemployment rate (Alexander, 229). This public good made possible through mass incarceration allows for a sort of double reduction of the unemployment rate. Two million inmates go uncounted, but the millions of people charged with caring for the prisoners add to those numbered in the American work force.

Lastly, mass incarceration benefits political demagogues who can apply Nixon's "Southern Strategy" in order to gain a political advantage. "Tough on Crime" rhetoric has resurfaced in the campaign speeches of President Trump, and this rhetoric has won him a good deal of support, especially from the private prison industry. In addition to mere rhetoric, real political gains have been made through disenfranchisement laws which have caused over 5 million people to be forfeit their right to vote. Today one out of every twelve African Americans is ineligible to cast a ballot. This can create a major political advantage in states like Florida where one out of every four black men has lost the right to vote. The Bush/Gore election of 2000 was decided by less than six-hundred votes in Florida. Because of Florida's disenfranchisement laws six hundred thousand former felons who were barred from voting in that election. (Mauer, *Race to Incarcerate* 206). Far from becoming a political taboo, clever implementation of the "Southern Strategy" has played at least a minor role in electing two of the last four presidents. Here mass incarceration serves as an effective means of social control. The disenfranchisement of up to a quarter of a hostile political group is a major advantage to those whom that population would be likely to vote against.

This exercise in examining the ways in which mass incarceration benefits certain groups helps convey the size, diversity and power of those who would likely opposed a

downsizing of the U.S. prison system. Millions of middle class Americans employed by the justice system as well as lower-middle class corrections workers stand to lose their jobs if the current system of mass incarceration were drastically downsized. CEO's and shareholders of corporations who currently profit off fulfilling a government corrections contracts stand to lose billions in revenue if the prison system were suddenly reduced to the same scale it occupied forty years ago. This is not to mention the politicians who gain funding from private prison corporations, or leaders who are more electable if certain groups are disenfranchised. The opposition to meaningful justice reform encompasses individuals from all walks of life. From the most elite CEO to the average prison guard, there are millions of people who stand to lose their job if U.S. mass incarceration disappeared.

### *Baby Steps*

The fact that a movement to downsize the U.S. system of mass incarceration will face opposition is not to say that change is impossible. There will surely be opposition to any policy changes which lead to a major decrease in incarceration numbers, but as the federal government sinks further into debt and states grow tired of diverting funds away from education into corrections, there is growing support for policies which save money by reducing corrections spending. Some small steps are already being taken to counteract the effects of mass incarceration.

Public sentiment regarding the drug war has shifted in recent years. Federally funded anti-drug campaigns no longer fill the airwaves, and drug war rhetoric has subsided to a low roar. Currently, eight states have opted to legalize recreational marijuana, and many local jurisdictions—including Washington D.C. and Houston,

Texas— have decriminalized possession of small amounts of the drug. Though the drug is still illegal under federal law, without local police officers targeting marijuana users in these states, drug arrests for pot should begin to decline over the next few years. Even states that have not legalized the drug have scaled back their drug laws. New York’s Rockefeller drug laws have been modified, and Michigan’s mandatory sentence of life without parole for a major drug sale has also been reworked (Mauer, *Race to Incarcerate* 212). These changes in policy will help to reduce the number of people arrested for drug crimes on a yearly basis, but they will not end the drug war.

Along with shifts in perception of Draconian drug laws, mandatory sentencing guidelines also fell out of public favor. In 2005, the Supreme Court struck down the law that required judicial adherence to the federal sentencing guidelines. In this ruling, the Court changed the sentencing guidelines to an advisory system rather than a mandatory one (Mauer, *Race to Incarcerate* 212). With this Supreme Court ruling, the power of judges to depart from the federal sentencing guidelines and try cases with an eye to individual circumstances was, to a degree, restored.

Legalization of benign drugs and relaxation of harsh sentencing laws is a step in the right direction. These changes will slow the swell of prison numbers, but it will take more than minor legal shifts to bring the era of mass incarceration to an end. For there to be a significant reduction in the prison population sweeping legislative action will no doubt be required.

### *The Brennan Center Report*

The sort of large scale policy changes needed to drastically reduce prison populations are being speculated upon by various groups. Just this year, the Brennan

Center for Justice published a thoroughly researched and peer reviewed report which claims to have found a means to greatly reduce America's prison numbers while having little to no negative impact in terms of public safety. Chief researchers at the Brennan Center spent three years studying 1.46 million inmates to determine why these inmates were incarcerated and the amount of time they would spend behind bars. Based on this research the Brennan Center was able to conclude that thirty-nine percent of the inmates surveyed are incarcerated with little public safety rationale. These 576,000 inmates could either be released from prison or serve alternative sentences to incarcerations (Austin et al., 7). The following paragraphs detail these findings and recommendations for policy changes.

The rationale behind the Brennan Center's research focuses on finding a cost effective and sensible method to reduce the number of incarcerated Americans. The researchers who produced this report believe that the purpose of the prison is to rehabilitate offenders and to keep communities safe. Based on that underlying principle, the report aims at finding a pragmatic balance between protecting community safety and finding ways liberate those who are deemed to be unnecessarily incarcerated. Research has shown that as a system of incarceration increases in size it reaches a point where further increases no longer have a positive effect in controlling crime. Not only does this law of diminishing returns make the American system of mass incarceration ineffective it can also lead to counterproductive as gratuitous prison stays can actually make offenders more likely to commit crimes upon release (Austin et al., 5). The Brennan Center report examines methods to eliminate this problem by downsizing the expanse of the U.S. prison system.



In order to arrive at their policy recommendations, researchers at the Brennan Center examined the nature of the offenses committed by 1.46 million inmates surveyed and evaluated these offenses in terms of their seriousness, their impact on a victim, the intent of the offender and likelihood of recidivism. By using these factors to evaluate offenses committed, researchers were able to differentiate between inmates who pose a threat to public safety and those who could be released with limited consequences in terms of public safety.

The findings show that for twenty-five percent of inmates surveyed alternatives to prison could be a more effective means of treatment. This group of offenders constitutes 364,000 of the total 1,463,000 inmates surveyed (Austin et al, 8). Offenders who make up this group are currently in prison for crimes such as drug possession, minor larceny, minor fraud/forgery, unlawful entry and reentry to the country, lesser burglary, gambling and simple assault. Such crimes as these were evaluated by using the four pronged approach described above (seriousness, victim impact, intent, and recidivism), and researchers determined that alternatives to prison could be a more effective means of treatment.

Two good examples of how the Brennan Center evaluates these crimes and recommends an appropriate sentence can be found in their treatment of drug possession and lesser burglary. Charges for lesser burglaries account for fifteen thousand inmates or one percent of all prisoners. Due to the fact that three of the Brennan Centers four pronged evaluative approach indicate that this crime does not warrant a threat to public safety, alternatives to prison are recommended:

“Lesser burglaries” are burglaries of abandoned or unoccupied structures when occupants are not present.

- Seriousness: These burglaries occur on abandoned or unoccupied structures, but may result in property loss or damage. They do not involve homes, residential buildings, or office buildings.
- Victim Impact: These crimes do not involve contact with people directly, and therefore may cause less trauma.
- Intent: Intent to inflict property damage on others is required
- Recidivism: Recidivism data from BJS indicates that 31 percent of burglary offenders were reimprisoned for another crime within three years.

Three of the four factors indicate the public safety threat these prisoners present is low and that a default sanction other than incarceration may be appropriate. While the recidivism rate is relatively high, rehabilitation may be more likely achieved with an alternative sanction given the potential criminogenic effect of prison for these types of lower-level crimes. (Austin et al, 29)

Crimes of simple drug possession are very similar to crimes of lesser burglary. There are currently sixty-six thousand people behind bars whose only offense is possession of drugs, and these people pose little threat to public safety. Similar to the evaluation of lesser burglary, intent is the only prong of the Brennan Center test that does not indicate alternatives to prison as a more effective resolution of the crime (Austin et al., 10).

In addition to eliminating prison sentences for some lower level offenses, the Brennan Center also recommends reductions to the sentences imposed upon those offenders whose crimes warrant a jail time. Specifically, the Brennan Center recommends “a 25 percent cut as a starting point to determine how to reduce sentences for the six major crimes that make up the bulk of the current prison population: aggravated assault murder, nonviolent weapons offense, robbery, serious burglary, and serious drug trafficking” (Austin et al., 10). Because longer prison stays have not been found to reduce recidivism (Austin et al., 5), shortening sentences by twenty-five percent will reduce the prison population while still allowing substantial punishment for serious offenses. Punishment for an offense such as a robbery, which currently warrants a 4.2 year

sentence on average, will be replaced with a 3.2 year prison sentence. By reducing sentences for the six major crimes listed above by twenty-five percent the annual savings will amount to 6.6 billion in taxpayer dollars (Austin et al., 38-9).

The Brennan Center also recommends that these two reforms—prison alternatives for minor crimes and reduction in sentence length for six major crimes—should be applied retroactively. They recommend that prisoners who fall into either of these camps should be allowed to petition judges for early release, and judges would be able to evaluate these petitions on a case by case basis. If these reforms were applied retroactively, then 212,000 prisoners would be able to petition for early release based on the fact that they had already served an appropriate sentence for one of the six major crimes recommended for sentence reduction. Coupled with the 364,000 inmates for whom alternatives to prison is recommended the total number of prisoners who could be released with little impact on public safety is 576,000 (Austin et al., 7, 10).

If the recommendations made by the Brennan Center were followed and the current prison population were downsized by thirty-nine percent, substantial savings would be produced. Based on an average yearly cost of thirty-one thousand dollars per inmate, following the recommendations outline above would result in \$18.1 billion in annual savings. This amount of money is equivalent to the annual budget of the entire state of Connecticut. Saving this amount of money on corrections and justice department spending could allow for the hire of 360,000 probation officers or 327,000 new teachers; both of which could be instrumental in continuing a decrease in crime rates (Austin et al., 44).

### *Will the Era of Mass Incarceration End?*

The Brennan Center recommendations represent a bold new approach to dealing with crime and incarceration, but even if the recommendations were implemented it is unclear whether the U.S. would be rid of its system of mass incarceration. Even if the Brennan Center's recommendations were adopted wholesale the United States' incarceration rate would still be 572 inmates per 100,000 citizens. To refer back to the data examined in chapter one, this would still rank the U.S. within the top three nations with the highest rates of incarceration. With a rate of 572, the U.S. would drop from second to third and would trail only the Seychelles and Turkmenistan. Compared to other democracies the U.S. would still have a rate more than double its nearest competitor and more than triple that of the U.K. (Austin et al., 15) Figure 4 gives a graphic representation of this data.. Even if the U.S. did follow the Brennan Center's advice and release more than half a million prisoners, this nation would still be a world leader in terms of incarceration.

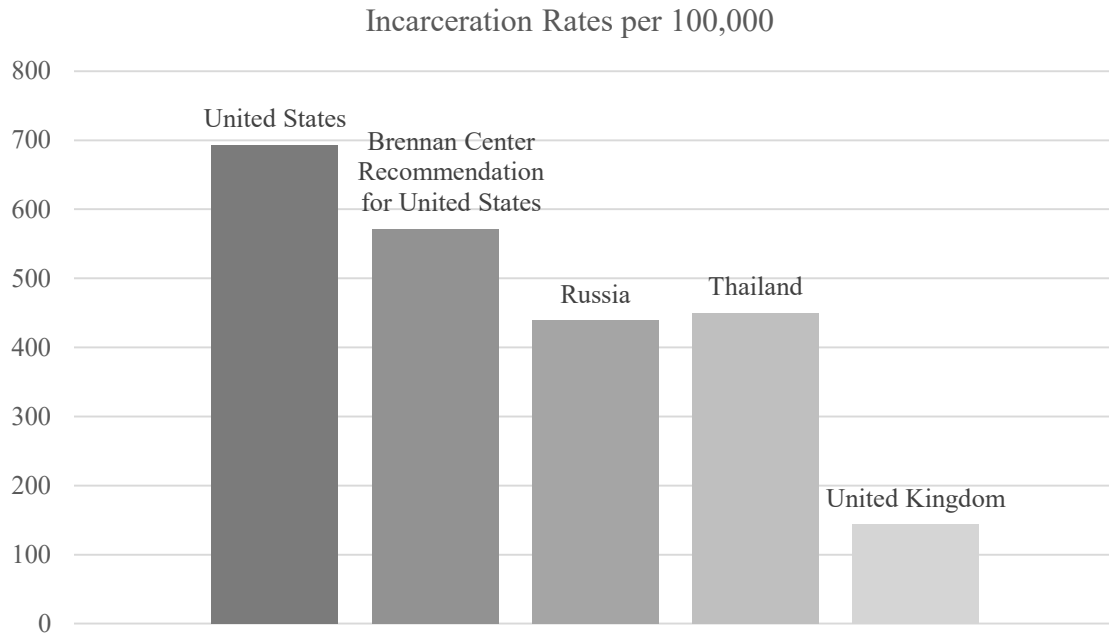


Figure 4: Brennan Center Incarceration Rate Comparison

Source: *World Prison Brief*; Institute for Criminal Policy Research, Oct. 2016. Web. 14 Nov. 2016; and Austin, James, Dr., Lauren-Brooke Eisen, James Cullen, and Johnathan Frank; *How Many Americans Are Unnecessarily Incarcerated?* Rep. Brennan Center for Justice, 9 Dec. 2016. Web. 7 Apr. 2017.

If the era of mass incarceration is ever to be brought to an end, it will require a populist movement even greater than the one which helped to create it. The news frenzies that stirred the people to call for “tough on crime” policies will need to be replaced with protests to end gratuitous prison sentences. The prison industrial complex where revenue streams are directly correlated with inmate populations will need to be eliminated. If the U.S. system of mass incarceration is to ever be dismantled the federal war on drugs will need to be ended; the Byrne program and civil forfeiture will need to be repealed. All financial incentives from the federal government to local police departments to increase arrests will need to go by the wayside.

More important than any of these specific policy changes is a growth of awareness amongst the American people. In order for a program as vast as mass incarceration to be dismantled the American people will have to realize that there is a problem with the justice system. Until the story of mass incarceration becomes part of the public conscience there is little hope that it will be dismantled. But as more and more Americans become aware of the unnecessary expanse of the U.S. prison system hopefully they will begin to ask themselves whether they prefer to live in a country that incarcerates two and a quarter million citizens or if they would rather live in a nation that exemplifies its ideology of securing liberty and justice for all.

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