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## Drug Law, Mass Incarceration, and Public Health

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## INTRODUCTION

Despite widespread recognition of its failure, the War on Drugs continues, leaving a legacy of punishment that worsens many public health and social problems once attributed to drugs themselves. Chief among these is our system of mass punishment itself.

We are only now beginning to appreciate the full consequences of putting over eight million Americans in prison over the last thirty-five years, for a total of over forty-five million person years of incarceration since 1975.<sup>1</sup> Examining the history and ongoing effects of these punitive policies on such a huge population through the lens of public health, using the standard metrics of epidemiology and life course studies, we can now identify the many risks imposed on the individuals, families, and communities most heavily affected. This history is important for the entire population, but especially for black men, whose rates of criminal prosecution and incarceration are at least an order of magnitude higher than those of whites.

As our system of mass imprisonment and its collateral damages have grown dramatically, they have taken on a life of their own, perpetuating themselves by destroying family and social capital in poor communities and damaging the pro-social family and community structures which are the natural basis of social order and crime prevention. Instead we have fostered the intergenerational transmission of risk for young black men, creating a “pipeline” from many black communities directly to jails and prisons.

The racially disparate application of punishment to African Americans can be traced back to roots in slavery and the structural injustices of Reconstruction. In the modern era, drug laws have become the instrument of racial subordination and the rationale for harsh punishment. Our drug policies must be held accountable for many of the public health and socially catastrophic outcomes they impose through mass incarceration—premature death, mental illness, family disintegration, and increased societal violence.

This is a critical moment for the world’s prohibitionist drug policies, most visible today in the surge of violence in neighboring Mexico, which has experienced over sixty thousand murders in the

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<sup>1</sup> See THE PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (rev. 2010), *available at* [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Pew\\_Prison\\_Count\\_2010.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Pew_Prison_Count_2010.pdf); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 8 app. tbl.1 (2012), *available at* <http://bjs.gov/content/pub/pdf/cpus11.pdf>.

last six years.<sup>2</sup> Many Latin American leaders now call on the United States to change our core assumptions about the role of drug policy—focusing on reducing violence and forgoing punishment in favor of prevention and treatment.

This Article proceeds in the following Parts. Part I discusses trends in incarceration policy and practice and explains the advent of mass incarceration, paying specific attention to the role of the War on Drugs. Part II further explains the growth of mass incarceration, addressing other new “crimes” that result in incarceration. Part III discusses the disparate impacts of mass incarceration on historically disadvantaged groups including African Americans, Latinos, and women. Part IV discusses the public health implications and effects of mass incarceration. Finally, the Article concludes that we must replace our system of drug punishment with a public health and therapeutic harm reduction model, responding to the all-too-real threats of potent new drugs—including many licit pharmaceutical and “legal” drugs, as well as those of alcohol and tobacco. We can begin by building and mobilizing public health and law enforcement coalitions against the War on Drugs and its deadly culture of mass punishment.

## I

### DRUG LAW AND THE GROWTH OF U.S. PRISONS

The U.S. incarceration rate climbed steadily throughout a thirty-year period beginning in the mid-1970s<sup>3</sup>—coinciding with the most aggressive era of the United States’ War on Drugs. Incarceration did not reach a peak until 2009, topping out with 2.3 million people behind bars, a rate of 720 prisoners per 100,000 members of the population—by then the highest rate and greatest number of prisoners of any nation in the world.<sup>4</sup> During this time a total of about eight million individual Americans went to prison.<sup>5</sup> In 2010, we saw the first decline in U.S. prison populations in thirty-eight years and it was

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<sup>2</sup> CORY MOLZAHN ET AL., DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2012, at 13–14 (2013), available at <http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf>.

<sup>3</sup> THE PEW CTR. ON THE STATES, *supra* note 1, at 1.

<sup>4</sup> ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (9th ed. 2011), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>.

<sup>5</sup> See THE PEW CTR. ON THE STATES, *supra* note 1, at 1; BUREAU OF JUSTICE STATISTICS, *supra* note 1, at 8 app. tbl.1.

a small one: as of January 1, 2010, there were 4,777 (0.3%) fewer prisoners (1,404,053 total) under the jurisdiction of fifty state prison authorities than a year earlier.<sup>6</sup> These decades of growth and eventual record levels became the cornerstones of the epidemiology of mass incarceration in America—and clearly resulted from our drug policies.<sup>7</sup>

State prisons (the largest prison population) are only part of the story; another 218,000<sup>8</sup> individuals are in the still-expanding federal prison system (up ten-fold since 1970<sup>9</sup>). And over 760,000 people sit in local jails each day, where over sixty percent are defendants who have been arrested and cannot make bail, but who have not yet been convicted of any crime.<sup>10</sup>

The vast scale of mass incarceration is the primary source of this epidemic's far-reaching consequences for so many families and communities. Despite the recent small drop, as of January 1, 2013, over 2.2 million individuals still remain behind bars in America<sup>11</sup> and another five million are under the control of the criminal justice system on parole or probation,<sup>12</sup> a clear indication that the national epidemic of mass incarceration remains an important reality. We can now see some changes in the patterns of incarceration in America,

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<sup>6</sup> THE PEW CTR. ON THE STATES, *supra* note 1, at 1.

<sup>7</sup> See ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 79–81 (2011).

<sup>8</sup> BOP: *Weekly Population Report*, FED. BUREAU OF PRISONS, [http://www.bop.gov/news/weekly\\_report.jsp](http://www.bop.gov/news/weekly_report.jsp) (last visited Mar. 28, 2013) (this number is current as of March 28, 2013; the site updates the total number of federal inmates every Thursday at 12:00 a.m., so the total number may change after this Article is published).

<sup>9</sup> See THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 1 (2011), available at [http://www.asca.net/system/assets/attachments/2811/inc\\_FederalPrisonFactsheet\\_March20112.pdf?1304452236](http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236).

<sup>10</sup> TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 10 tbl.7, 16 tbl.12 (2010), available at <http://bjs.gov/content/pub/pdf/jim09st.pdf>.

<sup>11</sup> E.g., Associated Press, *U.S. Report: 2.2 Million Now in Prisons, Jails*, NBC NEWS (May 21, 2006, 4:49 PM), <http://www.nbcnews.com/id/12901873/#.UUdQgRn1fu0;Incarceration>, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Mar. 29, 2013).

<sup>12</sup> E.g., David Crary, *Probation, Parole Numbers Surge Past 5 Million, Reports Finds*, BOSTON.COM (Mar. 3, 2009), [http://www.boston.com/news/nation/articles/2009/03/03/probation\\_parole\\_numbers\\_surge\\_past\\_5\\_million\\_reports\\_finds/](http://www.boston.com/news/nation/articles/2009/03/03/probation_parole_numbers_surge_past_5_million_reports_finds/); see also Laura M. Maruschak & Erika Parks, *Probation and Parole in the United States, 2011*, BUREAU OF JUST. STAT. (Nov. 29, 2012), <http://bjs.gov/index.cfm?ty=pbdetail&iid=4538>.

such as increasing numbers of women in prison,<sup>13</sup> a lower proportion of African Americans,<sup>14</sup> and some state trends that raise the hope of further declines in prison populations.<sup>15</sup> But several recent studies offer new evidence of worrying trends in criminal justice and raise new concerns about who gets incarcerated and why.<sup>16</sup>

At the same time, there are clear signs of growing interest and attention to the phenomenon of mass incarceration itself. A Google Scholar count of peer-reviewed articles on “mass incarceration,” performed in January 2013, found no articles at all published between 1950 and 1970<sup>17</sup> when the state and federal prison population already hovered around 200,000 inmates.<sup>18</sup> Only 155 articles were published in the entire decade of the 1990s, by which time the mass incarceration epidemic was well underway (with over a million people behind bars).<sup>19</sup> Indeed, the term “mass incarceration” does not appear to have been in common usage until 2001, when the first scholarly discussion in print on the topic, *Mass Imprisonment: Social Causes and Consequences*, was published.<sup>20</sup> But in 2010, when the nation’s prison population reached its peak, over 1,800 peer-reviewed articles on the topic were published, with many of the newer studies examining the public health and social consequences of our incarceration policies. This literature was increasingly focused on the

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<sup>13</sup> MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN’S INCARCERATION 6 (2013), available at [http://sentencingproject.org/doc/publications/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publications/rd_Changing%20Racial%20Dynamics%202013.pdf).

<sup>14</sup> *Shifting Prison Populations*, BALT. SUN (Mar. 4, 2013), [http://articles.baltimoresun.com/2013-03-04/news/bs-ed-prisons-blacks-20130304\\_1\\_prison-population-incarceration-rates-racial-makeup](http://articles.baltimoresun.com/2013-03-04/news/bs-ed-prisons-blacks-20130304_1_prison-population-incarceration-rates-racial-makeup) (“The survey, conducted by the Sentencing Project, a Washington-based prison research and advocacy group, found that between 2000 and 2009 incarceration rates nationally dropped 9.8 percent for black men and by an even larger 30.7 percent for black women. At the same time, the rate at which white men were imprisoned rose by 8.5 percent and incarceration rates for white women jumped a startling 47.1 percent.”).

<sup>15</sup> See JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 60 (2010), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf).

<sup>16</sup> See *infra* Parts II–IV.

<sup>17</sup> GOOGLE SCHOLAR, <http://scholar.google.com/schhp?hl=en> (last visited Mar. 29, 2013) (using the search term “mass incarceration” and initially performed in January 2013; when repeated in March 2013, the search returned seven results).

<sup>18</sup> ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 12 (1998).

<sup>19</sup> See JUSTICE POLICY INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1 graph 1 (2000), available at [http://www.justicepolicy.org/. . ./00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/. . ./00-05_rep_punishingdecade_ac.pdf).

<sup>20</sup> MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001).

adverse effects of incarceration itself. There are now dozens of books and thousands of articles about mass incarceration—another sea change is the contemporary view of mass incarceration as a problem, a very new perspective for the United States.

### A. Recent Trends in Incarceration

The curve of epidemic imprisonment in America has now begun to inflect and a growing number of states are now intentionally shrinking their prison populations in favor of alternatives to incarceration, especially for juveniles and drug offenders.<sup>21</sup>

New York, the first state to employ long mandatory sentencing for drug offenses with its “Rockefeller drug laws” of 1973,<sup>22</sup> is now leading the nation in reform. Indeed, New York State now has the nation’s largest percent drop in its prison population since the 1990s—from 73,000 inmates in 1994 to 58,000 in 2012—a decline of over twenty percent.<sup>23</sup> In New York, we can already see that this drop is due to changes in two important expressions of policy: the number of felony drug arrests and the patterns of mandated long sentences that have accompanied them, along with the repeat imprisonments that these policies made inevitable.<sup>24</sup> Felony drug arrests alone have dropped twenty percent in New York State since 2008, leading to declines in associated prosecutions, convictions, and imprisonments.<sup>25</sup>

Many states are now also engaged in drug law reform and the reduced use of long mandatory sentences for nonviolent drug felonies.<sup>26</sup> A National Institute of Justice research project (of which I am a principal investigator) is now examining these patterns and

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<sup>21</sup> See Office of Nat’l Drug Control Policy, *Alternatives to Incarceration*, WHITE HOUSE, <http://www.whitehouse.gov/ondcp/alternatives-to-incarceration> (last visited Mar. 29, 2013).

<sup>22</sup> See Brian Mann, *How the Rockefeller Drug Laws Changed America*, N. COUNTRY PUB. RADIO (Jan. 24, 2013), <http://www.northcountrypublicradio.org/news/story/21316/20130124/how-the-rockefeller-drug-laws-changed-america>.

<sup>23</sup> GREENE & MAUER, *supra* note 15, at 2.

<sup>24</sup> JAMES AUSTIN & MICHAEL JACOBSON, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 6 (2013), *available at* [http://www.brennancenter.org/sites/default/files/publications/How\\_NYC\\_Reduced\\_Mass\\_Incarceration.pdf](http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf).

<sup>25</sup> See OFFICE OF JUSTICE RESEARCH & PERFORMANCE, DIV. OF CRIMINAL JUSTICE SERVS., 2009 DRUG LAW REFORM UPDATE 5 (2012), *available at* <http://criminaljustice.state.ny.us/drug-law-reform/documents/drug-law-reform-june-2012.pdf>.

<sup>26</sup> *E.g.*, *New York State Permanent Commission on Sentencing: Mission and Goals*, N.Y. ST. UNIFIED CT. SYS., <http://www.nycourts.gov/ip/sentencing/mission.shtml> (last updated Sept. 23, 2011).

related sentencing changes in New York City.<sup>27</sup> In addition, New York State has a new Judicial Sentencing Commission whose assignment is to change sentencing rules and practices with an eye toward minimizing the size of the state's prison population in the future—while still seeking to assure public safety.<sup>28</sup>

Other states have also made substantial reductions in their prison populations, which dropped in twenty-six states between 2008 and 2010, with six states—including New Jersey, California, Michigan, and Maryland—posting reductions of three to nine percent (almost 30,000 beds) in those two years alone.<sup>29</sup> At the same time, however, the number of prisoners in the other twenty-four states has continued to grow, with several significant recent increases—Indiana leading with a 5.3% increase between 2008 and 2010.<sup>30</sup>

### B. Public Attitudes About Incarceration

Do these declines reflect any of the shifts in public attitudes about mass incarceration that are now evident in the press and in the professional literature? Are these attitudes shaping the decline of mass incarceration in America—or merely reflecting it? There is growing popular and judicial support for cutting back on the size of our prison population as well as for more sweeping kinds of prison reform. Our nation's massive use of harsh punishment has brought increased awareness that imprisonment at such extreme levels is a flawed policy, with its steep cost, collateral damages, and high rates of recidivism, all now seen as signs of this policy's shortcomings and unwanted consequences.

In California, after decades of abuse associated with prison overcrowding and many violations of court-mandated changes, the courts imposed close judicial oversight of the entire state system.<sup>31</sup>

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<sup>27</sup> *A Natural Experiment in Reform: Analyzing Drug Policy Change in New York*, VERA INST. JUST., <http://www.vera.org/project/analyzing-drug-policy-change-new-york> (last visited Mar. 29, 2013).

<sup>28</sup> See *New York State Permanent Comm'n on Sentencing*, N.Y. ST. UNIFIED CT. SYS., <http://www.nycourts.gov/ip/sentencing/> (last updated Sept. 23, 2011).

<sup>29</sup> THE PEW CTR. ON THE STATES, *supra* note 1, at 2.

<sup>30</sup> *Id.*; *Senate Democrats: Taylor Reappointed to Criminal Code Evaluation Commission*, IND. SENATE DEMOCRATIC CAUCUS (July 15, 2011), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=7/2/2011&todate=7/15/2011&display=&type=public&eventidn=63920&view=EventDetails&information\\_id=128922&print=print](http://www.in.gov/activecalendar/EventList.aspx?fromdate=7/2/2011&todate=7/15/2011&display=&type=public&eventidn=63920&view=EventDetails&information_id=128922&print=print).

<sup>31</sup> See MAGNUS LOFSTROM & KATHERINE KRAMER, PUB. POLICY INST. OF CAL., CAPACITY CHALLENGES IN CALIFORNIA'S JAILS 1, 5 (2012), available at [http://www.ppic.org/content/pubs/report/R\\_912MLR.pdf](http://www.ppic.org/content/pubs/report/R_912MLR.pdf).

This included placing the California prison system's two-billion-dollar medical care programs into "receivership" and imposing a 33,000-person reduction on the size of the state prison population (a cut of almost twenty percent of the 165,000 inmates then in the state's system) over a two-year period.<sup>32</sup> Additional orders called for "improve[ment in] the treatment of mentally and physically ill inmates, a decision that has been upheld by the U.S. Supreme Court."<sup>33</sup>

We can also see changes in public attitudes about some of our most punitive sentencing policies. In 2004, California voters rejected a proposition to change some aspects of the state's notorious "Three Strikes" law, which sentenced many people with two prior felony convictions (no matter how minor) to life in prison for even minor third felonies (for example, for stealing six video tapes).<sup>34</sup> In 2012, by contrast, Californians approved Proposition 36, which revised the "Three Strikes law to impose life sentences only when the new felony conviction is 'serious or violent.'"<sup>35</sup> Proposition 36 also "authorize[s] re-sentencing for offenders currently serving life sentences if their third strike conviction was not serious or violent and if the judge determines that the re-sentence does not pose [an] unreasonable risk to public safety."<sup>36</sup>

Voter approval of Proposition 36 had an immediate and very large effect in California: of the approximately 9,000 convicted felons who were serving life terms under the Three Strikes law as of November

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<sup>32</sup> Don Thompson, *California Prison System: End of Federal Oversight Not Certain, Interview Suggests*, HUFFINGTON POST (Jan. 27, 2012), [http://www.huffingtonpost.com/2012/01/27/california-prison-system-oversight\\_n\\_1238200.html](http://www.huffingtonpost.com/2012/01/27/california-prison-system-oversight_n_1238200.html); see also LOFSTROM & KRAMER, *supra* note 31, at 1.

<sup>33</sup> Thompson, *supra* note 32.

<sup>34</sup> Mark Martin, *Proposition 66: Efforts to Reform 'Three Strikes' Law Likely to be on Ballot Again*, SFGATE (Nov. 4, 2004), <http://www.sfgate.com/politics/article/PROPOSITION-66-Efforts-to-reform-three-2638541.php>.

<sup>35</sup> David Greenwald, *Study Finds Majority of Three-Strikes Inmates Non-Dangerous Addicts*, VANGUARD CT. WATCH (Oct. 1, 2012, 6:12 AM), [http://davisvanguard.org/index.php?option=com\\_content&view=article&id=5734:study-finds-majority-of-three-strikes-inmates-non-dangerous-addicts&Itemid=100](http://davisvanguard.org/index.php?option=com_content&view=article&id=5734:study-finds-majority-of-three-strikes-inmates-non-dangerous-addicts&Itemid=100); accord Marisa Lagos & Ellen Huet, *Proposition 36: 'Three Strikes' Changes Approved*, SFGATE (Nov. 7, 2012), <http://www.sfgate.com/politics/article/Prop-36-Three-strikes-changes-approved-4014677.php>.

<sup>36</sup> Greenwald, *supra* note 35. California law "continue[s] to impose a life sentence . . . if the third strike conviction was for 'certain non-serious, non-violent sex or drug offenses or involved firearm possession' and maintain[s] the life sentence penalty for felons with a 'non-serious, non-violent third strike if prior convictions were for rape, murder, or child molestation.'" *Id.*

2012,<sup>37</sup> 2,800 of those, whose third strike convictions were for nonviolent crimes, became eligible to petition the courts for new, reduced sentences.<sup>38</sup> “Some estimates were that reducing the sentences of these current prisoners could result in saving the state somewhere between \$150 to \$200 million a year.”<sup>39</sup>

Mass incarceration is increasingly seen by states and cities (who bear the costs amidst chronic budget crises) as a heavy financial burden. But there is also genuine substantive criticism of the old policies that gave us mass incarceration—with its stubborn persistence of obvious injustice on such a gargantuan scale. For example, the Innocence Project, which since its founding in 1992 has fought to employ sophisticated DNA testing of samples gleaned from old capital cases, has successfully exonerated over 300 individuals on death row.<sup>40</sup> DNA evidence continues to reveal ever more wrongful convictions and widespread police and prosecutorial misconduct that few have challenged before,<sup>41</sup> but are now the subject of best-selling books and popular TV shows—drawing many science students into forensic careers.<sup>42</sup> Together these developments both reflect and determine changing attitudes opposing mass incarceration.

But it is the great racial and class disparities in the application of our laws, especially for drug offenses, that have become most apparent as a driver of mass incarceration—along with a wider recognition of mass incarceration’s many harms to large populations of family members and communities that have committed no crime. A growing public is ready for alternatives. There is also now such wide

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<sup>37</sup> *Santa Barbara County’s ‘Three-Strikes’ Offenders Seek Resentencing Under Proposition 36*, SOUTHLAND L. (Dec. 31, 2012), <http://southland-law.com/santa-barbara-countys-three-strikes-offenders-seek-resentencing-under-prop-36/>.

<sup>38</sup> *Proposition 36 Gives Inmates Serving Life in Prison a Chance at Reducing Their Sentence*, SOUTHLAND L. (Dec. 21, 2012), <http://southland-law.com/proposition-36-gives-inmates-serving-life-in-prison-a-chance-at-reducing-their-sentence/>.

<sup>39</sup> *California Proposition 36, Changes in the “Three Strikes” Law (2012)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_36,\\_Changes\\_in\\_the\\_%22Three\\_Strikes%22\\_Law\\_\(2012\)](http://ballotpedia.org/wiki/index.php/California_Proposition_36,_Changes_in_the_%22Three_Strikes%22_Law_(2012)) (last updated Feb. 18, 2013).

<sup>40</sup> *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Mar. 29, 2013).

<sup>41</sup> See, e.g., Radley Balko, *Solving Kathy Mabry’s Murder: Brutal 15-Year-Old Crime Highlights Decades-Long Mississippi Scandal*, HUFFINGTON POST (Feb. 22, 2013, 7:31 PM), [http://www.huffingtonpost.com/2013/01/17/kathy-mabry-murder-steven-hayne-michael-west\\_n\\_2456970.html](http://www.huffingtonpost.com/2013/01/17/kathy-mabry-murder-steven-hayne-michael-west_n_2456970.html).

<sup>42</sup> Laura Clark, *The Degree Inspired by TV: How Forensic Science Has Become the ‘New Media Studies.’* MAIL ONLINE (Oct. 14, 2009, 2:11 AM), <http://www.dailymail.co.uk/news/article-1220252/The-degree-inspired-TV-How-forensic-science-new-media-studies.html>.

popular perception of the failure of the War on Drugs and more openness to a public health model to grapple with our nation's persistent drug problems—including growing receptiveness to drug legalization.

### *C. Drug Law and Policy Reform*

Our nation's punitive drug laws and the key role of drug sentencing policies in accounting for the rising epidemic of mass incarceration in America are now giving way to increased support for drug law reform and altered sentencing policies. These changes are beginning to help roll back the incarceration epidemic; the longer-term future of incarceration in America will be powerfully determined by the way our drug and sentencing policies evolve over the next five to ten years.

On a state-by-state basis reform is seen most dramatically in the laws affecting marijuana. This includes the passage of state laws legalizing medical marijuana in sixteen states.<sup>43</sup> Despite federal efforts to limit the economic viability of these businesses,<sup>44</sup> an estimated 400,000 individuals have medical letters supporting their access to marijuana from local dispensaries,<sup>45</sup> and in 2010, these states' marijuana dispensaries generated over \$100 million in state and local tax revenues.<sup>46</sup> And in two states—Colorado and Washington—the 2012 general elections resulted in full legalization of marijuana for “recreational” use amidst full legalization campaigns in half a dozen other states.<sup>47</sup>

New drug policies tantamount to decriminalization (especially for marijuana) are also having an effect on arrests and jail populations—again on a state-by-state and city-by-city basis. So while New York

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<sup>43</sup> *Medical Marijuana: 18 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Feb. 22, 2013).

<sup>44</sup> See Al Olson, *IRS Ruling Strikes Fear in Medical Marijuana Industry*, NBC NEWS, <http://www.nbcnews.com/business/irs-ruling-strikes-fear-medical-marijuana-industry-1C7101112> (last visited Mar. 29, 2013).

<sup>45</sup> Sunil K. Aggarwal et al., *Medicinal Use of Cannabis in the United States: Historical Perspectives, Current Trends, and Future Directions*, 5 J. OPIOID MGMT. 153, 158 (2009).

<sup>46</sup> See Jonah Loeb & Chris Graf, *Which States Budgets Are Benefitting from Medical Marijuana—And Who Is Missing Out?*, MINYANVILLE (Nov. 8, 2012), <http://www.minyanville.com/sectors/biotech-pharma/articles/legal-marijuana-legalized-medical-marijuana-legalized/11/8/2012/id/45677#ixzz2KFHmERvW>.

<sup>47</sup> Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), [http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0).

City had over 50,000 marijuana arrests in 2011,<sup>48</sup> California police no longer pay attention to even public use of the drug—a *de facto* form of decriminalization directly affecting arrest and imprisonment rates.<sup>49</sup>

The public context of these changes is reflected in the role of drugs in U.S. politics, which has also changed significantly in the last few years.<sup>50</sup> “In the 2012 US Presidential Election, [where] America’s healthcare policies remain[ed] hotly disputed[,] . . . the issue of drugs and addiction, formerly a prominent public and health concern, [was] . . . invisible in [the] national political debate[.]”<sup>51</sup> “[I]n practice[,] local candidates [still] fight over who can be [the] toughest on crime— . . . being soft on drugs leaves candidates open to attack [from the right].”<sup>52</sup> But increasingly the War on Drugs is perceived as a failed policy, and over fifty percent of Americans now believe that drugs should be handled as a health problem rather than as a criminal matter.<sup>53</sup>

In addition, there is now an initiative in New York State to change bail policies affecting nonviolent drug offenders and prevent the costly and damaging jail sentences associated with their inability to make bail—now set at about \$1,500 on average<sup>54</sup>—an amount few poor defendants can meet.<sup>55</sup> “[T]he bail process in New York [i]s unfair to the poor and susceptible to allowing dangerous suspects to be set free,” according to the state’s top judge, Jonathan Lippman.<sup>56</sup> He has called “for an overhaul of the bail system that would bring the state closer in line with the rest of the country. . . . New York [is] one

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<sup>48</sup> Hakeem Jeffries, *Marijuana Law Just Creates Criminals*, CNN (June 6, 2012), <http://www.cnn.com/2012/06/06/opinion/jeffries-marijuana-law>.

<sup>49</sup> Adam Nagourney, *Marijuana, Not Yet Legal for Californians, Might as Well Be*, N.Y. TIMES (Dec 20, 2012), [http://www.nytimes.com/2012/12/21/us/politics/stigma-fading-marijuana-common-in-california.html?\\_r=0](http://www.nytimes.com/2012/12/21/us/politics/stigma-fading-marijuana-common-in-california.html?_r=0).

<sup>50</sup> Ernest Drucker, *Drugs: The Third Rail of US Politics*, 380 LANCET 1626, 1626–27 (2012).

<sup>51</sup> *Id.* at 1627.

<sup>52</sup> *Id.*

<sup>53</sup> See John Whitesides, *Majority of Americans Support Legalizing Marijuana: Poll*, REUTERS (Dec 5, 2012, 6:06 AM), <http://www.reuters.com/article/2012/12/05/us-usa-marijuana-poll-idUSBRE8B40EG20121205> (stating that 51% of the public approves the legalization of marijuana for medical use).

<sup>54</sup> See *Bail in New York Criminal Court Arraignments*, N.Y. ARRAIGNMENTS, <http://www.new-york-arraignments.com/bail.htm> (last visited Apr. 9, 2013).

<sup>55</sup> See Russ Buettner, *Top Judge Says Bail in New York Isn’t Safe or Fair*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/nyregion/judge-jonathan-lippman-seeks-to-overhaul-bail-process.html>.

<sup>56</sup> *Id.*

of only four states that [does] not allow judges to consider public safety when making a bail determination.”<sup>57</sup> The main criteria used now is the defendant’s “flight risk”—i.e., “not returning to court for trial. ‘As a result, defendants may be put back on the street with insufficient regard to public safety, with possibly catastrophic consequences,’” the judge argued.<sup>58</sup> “Conversely, Judge Lippman said the bail system was stacked against those accused of minor crimes, keeping them in jail at great personal hardship and weakening their resolve in plea negotiations. The judge called that outcome ‘unfair’ and said it ‘strips our justice system of its credibility.’”<sup>59</sup>

#### *D. The Privatization of Correctional Services*

Half the states currently use privately owned and operated “correctional services” companies for both the construction and operation of entire prisons, and now rely on private companies for over twenty-five percent of the operations of their state prisons.<sup>60</sup> These large, privately owned correctional service companies are publicly traded and, in the last decade, their stocks have performed better than Dow Jones.<sup>61</sup> Only the federal government and three states are larger than the leading company, Corrections Corporation of America (CCA), the nation’s largest private-sector owner and operator of correctional facilities.<sup>62</sup> CCA operates sixty-seven correctional and detention facilities in twenty states and the District of Columbia, including forty-seven facilities that it owns, with a total capacity of approximately 92,500 beds,<sup>63</sup> and an additional 1,124-bed

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Mark Colvin, *Disturbing Snapshot of American Private Prisons*, PM WITH MARK COLVIN (Nov. 9, 2011, 6:34 PM), <http://www.abc.net.au/pm/content/2011/s3360515.htm>; see also AMY CHEUNG, *THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION* (2004), available at [http://www.sentencingproject.org/doc/publications/inc\\_prisonprivatization.pdf](http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf); JUDITH GREENE & ALEXIS MAZÓN, *PRIVATELY OPERATED FEDERAL PRISONS FOR IMMIGRANTS: EXPENSIVE. UNSAFE. UNNECESSARY* (2012), available at <http://www.justicestrategies.org/sites/default/files/publications/Private%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf>.

<sup>61</sup> Colvin, *supra* note 60.

<sup>62</sup> CORR. CORP. OF AM., *PARTNERSHIP IN ACTION: BUILDING VALUE FOR STOCKHOLDERS 2* (2011), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDYwNDkzfENoaWxkSUQ9NDg4NTU3fFR5cGU9MQ==&t=1> (CCA’s 2011 Annual Report on Form 10-K); CHEUNG, *supra* note 60, at 3.

<sup>63</sup> *Stock Report for Corrections Corporation of America*, EDGAR ONLINE (Mar. 25, 2013), <http://ndqstockreports.eolcorp.com/CXW.html>.

facility in Millen, Georgia, under contract to the Georgia Department of Corrections.<sup>64</sup>

Prison privatization is an aggressively entrepreneurial business—highly profitable and eager to increase its market. In 2012, CCA sent a letter to prison officials in forty-eight states, offering to buy prisons from these states in exchange for a twenty-year management contract and a guaranteed occupancy rate of ninety percent.<sup>65</sup> “Community organizations have criticized the proposals, arguing that the contractual obligations of states to fill the prisons to ninety percent occupancy are poor public policy that could force communities [ ]to creat[e] criminals[ ] and that these contractual clauses end up costing taxpayers more than state-run prisons would.”<sup>66</sup> The growth of these private facilities has been increasingly associated with the growth of the federal immigration detention and deportation system<sup>67</sup>—now with about 30,000 beds and a record 400,000 deportations in 2012<sup>68</sup>—has been a boon to this industry, which continues to lobby aggressively for market share.

### *E. The Prison Reentry Industry*

After decades of tough criminal justice policies, states with crowded prisons now straining their smaller budgets have tried to save money by diverting inmates to lower cost private facilities at every point in the system—from pretrial detention, to sentence facilities, to post-release reentry programs after release from prisons. As is the case with the privatization of state prisons and immigration detention, with about 700,000 leaving federal and state prisons in 2012,<sup>69</sup> reentry in particular has become a highly lucrative new industry. This frequently comes at the expense of quality services by

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<sup>64</sup> CORR. CORP. OF AM., *supra* note 62, at 2.

<sup>65</sup> Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFINGTON POST (Feb. 14, 2012, 5:27 PM), [http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons\\_n\\_1272143.html?view=screen](http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html?view=screen) (including a link to a CCA solicitation letter).

<sup>66</sup> Bill Hood, *Your Lost Tax Dollars*, THIS WEEK I LEARNED (June 10, 2012), <http://universaldomainexchange.com/thisweekilearned/your-lost-tax-dollars/>.

<sup>67</sup> AMNESTY INT’L, *JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 3* (2009), available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.

<sup>68</sup> David Grant, *Deportations of Illegal Immigrants in 2012 Reach New US Record*, CHRISTIAN SCI. MONITOR (Dec. 24, 2012), <http://www.csmonitor.com/USA/2012/1224/Deportations-of-illegal-immigrants-in-2012-reach-new-US-record>.

<sup>69</sup> *Nearly \$1 Million Now Available to Support Partnerships Offering Education and Workforce Training for Incarcerated Individuals Exiting Prisons*, U.S. DEP’T JUST., <http://www.justice.gov/opa/pr/2012/November/12-ag-1385.html> (Mar 18, 2013).

older, well-established service and advocacy programs such as The Fortune Society, The Osborne Association, and the Correctional Association of New York—all of which now must compete for government grants with private sector “nonprofit” organizations with no interest in any activities that do not pay well.<sup>70</sup>

A recent investigative series in the *New York Times* looked closely at New Jersey—where halfway houses serving over 10,000 people per year are run by private nonprofit companies with “deep connections” to politicians of both parties, as well as to the New Jersey Governor.<sup>71</sup> Local officials supporting this approach have called these large facilities an “innovative example of privatization” and widely promote the lower cost approach, which their experts praise “as a potentially important tool to help inmates make the return to society.”<sup>72</sup> The evidence discovered by the newspaper’s investigation, however, reveals poor supervision and poor outcomes.<sup>73</sup>

“Many of these [facilities] are as big as prisons, with several hundred beds, and bear little resemblance to the neighborhood halfway houses of the past,” which were meant for low-level offenders.<sup>74</sup> “[W]ith little oversight, the [New Jersey] halfway houses have mutated into a shadow corrections network, where drugs, gang activity and violence, including sexual assaults, often go unchecked, according to a 10-month investigation by [t]he *New York Times*.”<sup>75</sup> The *Times* found that “[a] company with deep ties to Gov[ernor] Chris Christie dominates New Jersey’s system of large halfway houses. . . . with little state oversight, despite widespread problems.”<sup>76</sup>

Two New Jersey organizations account for eighty-five percent of the state contracts and total thirty-nine million dollars per year—with

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<sup>70</sup> See Sam Dolnick, *Halfway Houses Prove Lucrative to Those at Top*, N.Y. TIMES (Dec. 29, 2012), [http://www.nytimes.com/2012/12/30/nyregion/operator-of-new-jersey-halfway-houses-paid-millions-to-founder.html?hpw&\\_r=0](http://www.nytimes.com/2012/12/30/nyregion/operator-of-new-jersey-halfway-houses-paid-millions-to-founder.html?hpw&_r=0).

<sup>71</sup> Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2012), <http://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html?pagewanted=all>; see also Paul Krugman, Op-Ed., *Prisons, Privatization, Patronage*, N.Y. TIMES (June 21, 2012), [http://www.nytimes.com/2012/06/22/opinion/krugman-prisons-privatization-patronage.html?pagewanted&\\_r=0](http://www.nytimes.com/2012/06/22/opinion/krugman-prisons-privatization-patronage.html?pagewanted&_r=0).

<sup>72</sup> Dolnick, *supra* note 70.

<sup>73</sup> Dolnick, *supra* note 71.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

over half a billion dollars earned in the last decade alone.<sup>77</sup> According to the *Times*, the New Jersey private reentry facilities are “run like a well-heeled family business”—with six-figure salaries for family members and little to show for their efforts in meaningful outcomes for the inmates,<sup>78</sup> many of whom will be rearrested and imprisoned within a few months of release.<sup>79</sup> The infamous revolving door of mass incarceration—with its recurrent cycles of rearrest and return to imprisonment, as those leaving prison find it increasingly difficult to establish viable economic lives in the community—has thus now become a very profitable business with little incentive to improve its outcomes.

## II

### NEW AND DEVELOPING REASONS FOR MASS INCARCERATION

#### *A. Expanding Criminalization and New Forms of Punishment*

During the decades of its growth, mass incarceration in America was built on the expression of our nation’s very longstanding forms of structural inequality and chronic patterns of injustice—especially regarding issues of race. But now we can also discern a recent shift in the uses of incarceration—indeed, of the entire criminal justice system—in support of a new set of right-wing political objectives that foster some of the deepest divisions in American political life. As was the case with the drug laws, which played a central role in launching mass incarceration in America, the recent employment of criminal justice policies and the expanded uses of imprisonment are emerging as powerful new tools for stoking the most retrograde discourse and most demagogic actors in our national debates about social justice, serving to sustain many portions of the bloated prison industrial complex, despite record lows in crime rates.

Like the War on Drugs, the use of expanded criminalization and vigorous law enforcement of many newly defined “crimes” often comes at the expense of enforcement of other laws crucial to public safety in poor communities (e.g., fewer than fifty percent of gun

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<sup>77</sup> Dolnick, *supra* note 70.

<sup>78</sup> *Id.*

<sup>79</sup> Peter B. Hoffman & James L. Beck, *Recidivism Among Released Federal Prisoners: Salient Factor Score and Five-Year Follow-Up*, 12 CRIM. JUST. & BEHAV. 501, 505–06 (1985).

possession offenses are prosecuted in New York City,<sup>80</sup> even as the NRA lobbies against gun control). Under the auspices of the new breed of extreme conservative “tea party” politicians, this politicized role for criminal justice is now being employed in new ways both to sustain the huge criminal industrial complex and in the service of advancing new and very conservative social and political agendas in some key areas—women’s status, reproductive and sexual rights, and immigration policies.<sup>81</sup>

### *B. Immigration Detention and Deportation*

For three years in a row, more people have been convicted of immigration offenses than of any other type of federal crime, according to the United States Sentencing Commission. Illegal re-entry into the United States was the most commonly filed federal charge last year, marking a dramatic shift in the makeup of the U.S. criminal justice system, which has been dominated by drug crimes in recent decades. [The] surge of new immigration offenders flow[ing] into the federal prison system [is] being held primarily in private prisons operated by multibillion-dollar corporations that contract with the government. Federal prison officials argue that privatization saves money and frees up space for more violent criminals in government-run prisons. . . . “These are basically second-class prisoners,” said Judith Greene, . . . who has researched the rise of private prisons over nearly three decades and recently wrote a report on federal prisons for undocumented immigrants.<sup>82</sup>

Greene explains that “[t]hey’re hiring cheap labor, and they’re not putting dollars into the things that keep prisoners relatively content: medical care and food,”—complaints and rebellions are now common due to poor conditions and inadequate medical care.<sup>83</sup> Yet Congress is “appropriating more than [twenty-five] million [dollars] for another 1,000 contracted private prison beds to hold more undocumented immigrant offenders, and the offer from the federal Bureau of Prisons contains a [ninety] percent occupancy guarantee”<sup>84</sup>—which CCA has

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<sup>80</sup> Sam Roberts, *Prison Isn’t as Mandatory as State’s Gun Laws Say*, N.Y. TIMES (Jan. 20, 2013), <http://www.nytimes.com/2013/01/21/nyregion/prison-not-as-mandatory-as-ny-state-gun-laws-say.html?pagewanted>.

<sup>81</sup> See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (discussing the politicization of crime and its effects).

<sup>82</sup> Chris Kirkham, *Private Prisons: Immigration Convictions in Record Numbers Fueling Corporate Profits*, HUFFINGTON POST (Sept. 27, 2012, 1:40 PM), [http://www.huffingtonpost.com/2012/09/27/private-prisons-immigration\\_n\\_1917636.html](http://www.huffingtonpost.com/2012/09/27/private-prisons-immigration_n_1917636.html).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

also been seeking from many states. Last year, the United States deported at least 400,000 illegal immigrants, a new record.<sup>85</sup> The White House “emphasizes deporting ‘criminal aliens’ to protect public safety, but the high figure serves to remind Latinos of the [P]resident’s unfulfilled pledge to reform immigration policy.”<sup>86</sup>

### C. Banishment and Imprisonment for Debt

In their book, *Banished, The New Social Control In Urban America*, sociologists Katherine Beckett and Steve Herbert have documented the increasing criminalization of poverty. They write that “the U.S. penal system contributes to socio-economic inequality”<sup>87</sup> in at least two ways that also reveal some new directions in criminalization and punishment: through the use of court orders to bar the poor and unruly from many public spaces—under the threat of arrest and incarceration<sup>88</sup>—and by the imposition of new criminal penalties to police the collection of many of the most common financial obligations of prisoners, including child support, civil penalties associated with arrest, trial, and the costs of imprisonment.

With urban poverty rising and affordable housing disappearing, the homeless and other “disorderly” people continue to occupy public space in many American cities. Concerned about the alleged ill effects their presence inflicts on property values and public safety, many cities have wholeheartedly embraced “zero-tolerance” or “broken window” policing efforts to clear the streets of unwanted people.<sup>89</sup>

Beckett explains that these steps take place “[t]hrough an almost completely unnoticed set of practices, [whereby the poor] are banned from occupying certain spaces.”<sup>90</sup> Beckett’s work details how “[o]nce zoned out, [the homeless] are subject to arrest if they return” to these locations<sup>91</sup>—effectively criminalizing their poverty—reminiscent of

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<sup>85</sup> Grant, *supra* note 68.

<sup>86</sup> *Id.*

<sup>87</sup> Dep’t of Sociology, *Katherine Beckett*, U. WASH. C. ARTS & SCI., [http://www.soc.washington.edu/people/faculty\\_detail.asp](http://www.soc.washington.edu/people/faculty_detail.asp) (referring to her recent work: KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (2009)).

<sup>88</sup> BECKETT & HERBERT, *supra* note 87, at 13–15, 105–06.

<sup>89</sup> *Id.* at 210 (back cover).

<sup>90</sup> *Id.*

<sup>91</sup> *Banished: Katherine Beckett*, OXFORD U. PRESS, <http://www.oup.com/us/catalog/general/subject/Sociology/CriminalJustice/Criminology/?ci=9780195395174> (last visited Apr. 8, 2013).

the vagrancy laws that first arose during Reconstruction and led to the chain gang.<sup>92</sup> “[T]hese new tactics . . . dramatically enhance the power of the police to monitor and arrest [many] thousands of city dwellers,”<sup>93</sup> while “appear[ing] responsive to concerns about urban disorder.”<sup>94</sup>

#### *D. Sex Offenses and Public Registries*

Another of the fastest growing set of “crimes” accounting for increased arrests and imprisonment is “sex offenses.” This realm has seen the rapid expansion of the number of common behaviors—ranging from underage consensual sexuality, to Internet access to child pornography,<sup>95</sup> to public urination—now being criminalized as sex offenses. These offenses are the basis of the growing use of offender “registries,” which establish public Internet access to registry information—including a former offender’s criminal history, current photograph, current address, and place of employment—making it almost impossible for anyone ever entered into such a registry to lead a normal life thereafter. The moving force behind this expansion of the definition of “sex offenses” and increasingly punitive responses to them are the so-called “Megan’s Laws”—typically named for the young victims of widely publicized kidnappings, rapes, and/or murders. Such laws are politically popular—often described as “catnip” for state legislators because of their irresistible political appeal<sup>96</sup>—which is reminiscent of the once equally popular laws mandating harsh sentences for even low-level drug offenders.

Of course we must recognize that child pornography is replete with sexual and nonsexual abuse and brutality of minors—its production and distribution is not a victimless crime. As these films and photos are widely distributed on the Internet, where they remain in permanent circulation, they come to constitute a long-term assault on these children’s lives as they grow into adults. By constantly re-

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<sup>92</sup> BECKETT & HERBERT, *supra* note 87, at 12–15.

<sup>93</sup> *Id.* at 210 (back cover).

<sup>94</sup> *Banished: Katherine Beckett*, *supra* note 91.

<sup>95</sup> See, e.g., Rachel Aviv, *The Science of Sex Abuse: Is it Right to Imprison People for Heinous Crimes They Have Not Yet Committed?*, NEW YORKER (Jan. 14, 2013), [http://www.newyorker.com/reporting/2013/01/14/130114fa\\_fact\\_aviv](http://www.newyorker.com/reporting/2013/01/14/130114fa_fact_aviv).

<sup>96</sup> See, e.g., Erica Goode, *States Seeking New Registries for Criminals*, ASS’N ST. CORRECTIONAL ADMIN., <http://www.asca.net/system/assets/attachments/2861/States%20Seeking%20New%20Registries%20for%20Criminals.pdf?1306171531> (last visited Mar. 27, 2013).

stimulating the victim's trauma into adulthood, this market continues a source of ongoing damages done by the initial production.

### III

#### SOCIAL INJUSTICE IN MASS INCARCERATION

##### *A. Continued Racial Disparities in Incarceration*

Despite these signs of substantial progress in acceptance of new drug policies that can further reduce the size of the U.S. prison population, many of the most important and unjust disparities of mass arrests and incarceration continue unabated—and some have worsened. The most significant of these continue to be related to our longstanding racial and ethnic disparities in imprisonment, which are still vast.<sup>97</sup>

“African Americans now constitute nearly 1 million of the total 2.3 million incarcerated population,” a rate of 2,200 per 100,000 members of the population—“nearly six times that of whites,” or 400 per 100,000.<sup>98</sup> “African Americans and [Latinos] comprised 58% of all prisoners in 2008, even though African Americans and Latinos make up” only 30% of the U.S. population.<sup>99</sup> “[I]f African American[s] and [Latinos] were incarcerated at the same rates [as] whites, today’s prison and jail populations would decline by approximately 50%.”<sup>100</sup> As of 2001, one of every six black men in America (a rate of 15%) had been incarcerated<sup>101</sup>—and that figure is now higher: the Bureau of Justice Statistics estimates that if current trends continue, one in every three black males born today can expect to spend time in prison during his lifetime.<sup>102</sup> In addition, African American women are imprisoned at a rate triple that of white

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<sup>97</sup> *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Mar. 27, 2013).

<sup>98</sup> *Id.*; accord MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

<sup>99</sup> *Criminal Justice Fact Sheet*, *supra* note 97; accord USA *QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Mar. 14, 2013).

<sup>100</sup> *Criminal Justice Fact Sheet*, *supra* note 97; accord JAMES AUSTEN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 7 tbl.3 (2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

<sup>101</sup> *Criminal Justice Fact Sheet*, *supra* note 97.

<sup>102</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON (1997), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/Llgsfp.pdf>.

women.<sup>103</sup> Nationwide, African Americans represent about 12% of the U.S. population yet account for “26% of juvenile arrests, 44% of youth who are detained, 46% of the youth who are [sent] to criminal court, and 58% of the youth admitted to state prisons.”<sup>104</sup>

Drug sentencing disparities continue to dominate these statistics and drive prison rates. “About [fourteen] million Whites and 2.6 million African Americans report using an illicit drug”—five times as many Whites as African Americans (and a higher rate in the white population as well).<sup>105</sup> “[Y]et African Americans are sent to prison for drug offenses at [ten] times the rate of Whites.”<sup>106</sup> “African Americans represent 12% of the total population of drug users, but 38% of those arrested for drug offenses, and 59% of those in state prisons” who are there for a nonviolent drug offense.<sup>107</sup> “African Americans serve virtually as much time in prison for a drug offense (58.7 months) as whites do for [all] violent offense[s] (61.7 months).”<sup>108</sup>

These disparate rates of punishment for blacks are not due to any greater use or sales of illicit drugs. Indeed, recently published research from Columbia’s New York State Psychiatric Institute employed large national datasets to convincingly demonstrate *lower* rates of both drug use and drug offenses for blacks versus whites in the United States.<sup>109</sup> While this representative sample of African American adolescents found that they were *less likely* than whites to have been engaged in either drug use or drug selling, nonetheless, blacks in this national survey were far more likely to have been arrested for drug offenses.<sup>110</sup>

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<sup>103</sup> Leonard A Sipes, Jr., *Statistics on Women Offenders*, CORRECTIONS.COM (Feb. 6, 2012), <http://www.corrections.com/news/article/30166>.

<sup>104</sup> *Criminal Justice Fact Sheet*, *supra* note 97.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; accord THE SENTENCING PROJECT, CRIMINAL JUSTICE PRIMER: POLICY PRIORITIES FOR THE 111TH CONGRESS 5, 9 (2009), available at <http://www.sentencingproject.org/doc/publications/cjprimer2009.pdf>.

<sup>109</sup> Meghana Kakade et al., *Adolescent Substance Use and Other Illegal Behaviors and Racial Disparities in Criminal Justice System Involvement: Findings from a US National Survey*, 102 AM. J. PUB. HEALTH 1307, 1307 (2012). The study used data from an eight-year national longitudinal survey of youth behavior and criminal justice experiences to examine arrest rate disparities between 6725 African American and white adolescents (aged twelve to seventeen) for drug-related offenses—which included both charges of possession and sale of drugs. *Id.*

<sup>110</sup> *Id.*

Policing and law enforcement practices also reflect the striking scope of racial disparities in our criminal justice system. Chief among these has been the “stop and frisk” policing policies in New York City—where over three million stops and body searches of young men were conducted between 2003 and 2012, almost exclusively in minority neighborhoods.<sup>111</sup> In a sign of new resistance to such policies, this highly publicized concentration of racially disparate policing has provoked new legal challenges and public calls for greater police accountability.<sup>112</sup> In January 2013, a Manhattan federal judge ruled that these stop and frisk policies were unconstitutional and also ordered police to stop making trespass stops outside private residential buildings immediately—the ruling is under appeal by the New York Police Department.<sup>113</sup>

The racial disparities of mass incarceration in America have also stimulated a rich body of historical scholarship and literature linking it to past patterns of racial injustice, prejudice, and violence.<sup>114</sup> *The New Jim Crow*, Michelle Alexander’s very influential work on the role of race in mass incarceration, has brought a new awareness of the deep roots and long history of large-scale racial disparities in U.S. law enforcement and imprisonment—among them, the startling recognition that our current rates of incarceration of blacks equal the scale reached at the peak of American slavery in 1864, with over four million blacks brutally subordinated in both systems.<sup>115</sup> Alexander’s book is in addition to the many specific studies of race and drug use that find no evidence to warrant the higher arrest and imprisonment rates of blacks for drug offenses—revealing the origins of higher

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<sup>111</sup> See N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING 3, 24–25 (2012), available at [http://www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf).

<sup>112</sup> See *Report: NYPD Stop-and-Frisk Activity in 2011 (2012)*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/publications/report-nypd-stop-and-frisk-activity-2011-2012> (last visited Mar. 27, 2012).

<sup>113</sup> Kerry Wills et al., *NYPD’s Controversial ‘Stop and Frisk’ Policy Ruled Unconstitutional*, DAILY NEWS AM. (Jan. 9, 2013), <http://www.nydailynews.com/new-york/nypd-controversial-stop-frisk-policy-ruled-unconstitutional-article-1.1235578#ixzz2iiFZ2YKu>; see also *Stop and Frisk Policy—New York City Police Department*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/s/stop\\_and\\_frisk/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/stop_and_frisk/index.html) (last visited Mar. 27, 2013).

<sup>114</sup> See, e.g., KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

<sup>115</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 27, 101–02 (rev. ed. 2012).

arrest and prosecution rates in the history of American racial prejudice.

In his award-winning 2010 book, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, historian Khalil G. Muhammad, Director of the New York Public Library's Schomburg Center for Research in Black Culture, identifies the "condemnation of blackness" as a deep-rooted American belief linking African Americans with crime, a perceived association that affects both police conduct and the use of imprisonment.<sup>116</sup> A foundation of this prejudice is the use of the racial disparities in imprisonment—rather than biased policing and prosecution practices—to support widespread popular belief in the higher criminality of blacks.<sup>117</sup>

This is in sharp contrast to the more progressive views taken of the roots of crime and effects of imprisonment among poor whites. Muhammad notes that "compassionate progressives and social scientists" of the early twentieth century "treated the white working-class and immigrant criminals sympathetically: they were victims of the dehumanizing effects of poverty and isolation, a 'great army of unfortunates.'"<sup>118</sup> At the same time, the architects of social policy in the Progressive era routinely labeled blacks as "self-destructive and pathological[,] their 'own worst enemies,'" and warned black college graduates that "criminality is in the ultimate analysis a greater danger to your race than any other thing can be."<sup>119</sup>

Muhammad and other scholars of our nation's racial history now identify "[l]iberal approaches to crime, gang, and violence prevention"—including "[a]nti-vice crusades, public recreation, community policing, and prison rehabilitation in the urban North"—as "for whites only," lasting well into the second half of the twentieth century.<sup>120</sup> *The Condemnation of Blackness* and many other works "reveal[] the untold history of how progressives deemed white criminality society's problem, but told blacks to work out their own salvation."<sup>121</sup> This view is even embedded (unwittingly?) in President

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<sup>116</sup> See MUHAMMAD, *supra* note 114, at 6–11.

<sup>117</sup> *Id.* at 8.

<sup>118</sup> Khalil Gibran Muhammad, *Buy My Book—The Condemnation of Blackness*, BRENNAN CENTER FOR JUST. (July 1, 2010), [http://betterballotactionproject.org/blog/archives/buy\\_my\\_book\\_-\\_the\\_condemnation\\_of\\_blackness](http://betterballotactionproject.org/blog/archives/buy_my_book_-_the_condemnation_of_blackness); see also MUHAMMAD, *supra* note 114, at 7–8, 47.

<sup>119</sup> Muhammad, *supra* note 118; see also MUHAMMAD, *supra* note 114, at 8, 170–71.

<sup>120</sup> *E.g.*, Muhammad, *supra* note 118; see also MUHAMMAD, *supra* note 114, at 8–9.

<sup>121</sup> *E.g.*, Muhammad, *supra* note 118; see also MUHAMMAD, *supra* note 114, at 10.

Obama's "no excuses" posture, in which striving blacks are expected to overlook this aspect of their own history.

This condemnatory history extends well into the present era, drawing energy from the War on Drugs, which continues to fuel condemnatory public perceptions of blacks and still drives racial disparities in incarceration. A *New York Times* editorial on January 4, 2013, marking the 150th anniversary of Lincoln's signing of the Emancipation Proclamation ending slavery in the Northern states, took the occasion to note the newest evidence of widespread (and increasing) anti-black sentiment in America.<sup>122</sup> Columnist Charles Blow reported that both a PEW poll released in April 2011 and a 2012 CNN poll found negative attitudes about blacks to be increasing.<sup>123</sup> This was confirmed in October 2012 in a survey by the Associated Press, which found that "51 percent of Americans now express explicit anti-black attitudes, compared with 48 percent in a similar 2008 survey."<sup>124</sup> "When measured by an implicit racial attitudes test, the number of Americans with anti-black sentiments jumped to 56 percent, up from 49 percent during the [2008] presidential election."<sup>125</sup> Further these racial disparities and prejudices are not simply a problem for America's blacks. Nobel Prize winner in economics Joseph Stiglitz explains that racial disparities and the wide extent of our social and economic inequality now threaten America's economic recovery and seriously diminish many of our nation's future social prospects.<sup>126</sup>

### B. Increased Incarceration of Women

In the last [twenty-five] years, the number of women and girls caught in the criminal justice system has skyrocketed; many [women] have been swept up in the "war on drugs" and subject[ed] to increasingly punitive sentencing policies for non-violent offenses.

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<sup>122</sup> Charles M. Blow, Op-Ed., *Escaping Slavery*, N.Y. TIMES (Jan. 4, 2013), <http://www.nytimes.com/2013/01/05/opinion/blow-escaping-slavery.html>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (internal quotation marks omitted) (quoting The Associated Press, *AP Poll: U.S. Majority Have Prejudice Against Blacks*, USA TODAY (Oct. 27, 2012, 8:37 AM), <http://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/>).

<sup>125</sup> *Id.*

<sup>126</sup> See Joseph E. Stiglitz, *Inequality Is Holding Back the Recovery*, N.Y. TIMES (Jan 19, 2013); see also Frontline, *The Financial Crisis: Interview with Joseph Stiglitz*, PBS, <http://www.pbs.org/wgbh/pages/frontline/oral-history/financial-crisis/joseph-stiglitz/> (last visited Mar. 28, 2013).

There are now more than 200,000 women behind bars and more than one million on probation and parole. Many of these women struggled with substance abuse, mental illness, and histories of physical and sexual abuse. Few get the services they need. The toll on women, girls, and their families is devastating.<sup>127</sup>

In addition to the racial disparities noted above, women are now among the groups with the fastest growth rate in all prison systems. “Although just 7.2% of the entire population is in prison or jail, the percentage of women behind bars exploded 757% between 1977 and 2004, a number nearly twice as great as the increase in the incarcerated male population during the same period.”<sup>128</sup> “The number of women in prison—along with the number of women giving birth in prison—continues to rise each year,”<sup>129</sup> where it is now part of a dramatic reversal in women’s health. A significant shift towards white women can be observed as well, as the black-white disparity between women in prison was cut in half from six-fold to three-fold.<sup>130</sup> Researchers recently reported a five-year drop in the life expectancy of poor white women over the last fifteen years.<sup>131</sup>

The increased incarceration of women for drug offenses has, in some states, now become a proxy for the nation’s resurgent abortion battles—especially to help some Southern states’ and their courts’ efforts to avoid *Roe v. Wade*. The linkage of women’s drug use and their increased risks for incarceration represents a cynical strategy to pervert child-protection statutes, using them as a lever to make gains in limiting women’s reproductive rights.

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<sup>127</sup> *Women in Prison*, AM. C.L. UNION, <http://www.aclu.org/prisoners-rights/women-prison> (last visited Mar. 28, 2013); accord MAUER, *supra* note 13, at 11 (2013).

<sup>128</sup> AM. CIVIL LIBERTIES UNION, ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS 1 n.1 (2012), available at [http://www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](http://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf).

<sup>129</sup> *Id.*; accord NATASHA A. FROST ET AL., INSTITUTE ON WOMEN & CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977–2004, at 25 (2006), available at <http://www.wpaonline.org/pdf/HARD%20HIT%20Full%20Report.pdf>.

<sup>130</sup> MAUER, *supra* note 13, at 2.

<sup>131</sup> Sabrina Tavernise, *Life Spans Shrink for Least-Educated Whites in the U.S.*, N.Y. TIMES (Sept. 20, 2012), <http://www.nytimes.com/2012/09/21/us/life-expectancy-for-less-educated-whites-in-us-is-shrinking.html>; see also ARIALDI M. MINIÑO & SHERRY L. MURPHY, U.S. DEP’T OF HEALTH AND HUMAN SERVS., DEATH IN THE UNITED STATES, 2010 (Nat’l Ctr. for Health Statistics, Data Brief No. 99, July 2012), available at <http://www.cdc.gov/nchs/data/databriefs/db99.pdf>.

In a 2012 article in the *American Journal of Public Health*, Roe v Wade and the New Jane Crow, legal scholar and leading reproductive rights advocate Lynn Paltrow shows that many of the state increases in female imprisonment are a result of “[e]fforts to establish separate legal ‘personhood’ for fertilized eggs, embryos, and fetuses” and are “being used as the basis for the arrests and detentions of and forced interventions on pregnant women, including those who seek to go to term”—i.e., a program of seizure of their newborns under child protection laws.<sup>132</sup>

Paltrow emphasizes that these cases reveal that both pregnant women who have abortions and those who do not are already being arrested and incarcerated at high rates—driven by the overall high rates of drug-related arrests and incarcerations of women of child-bearing age—“creating a Jane Crow system of laws that disproportionately punishes African American women.”<sup>133</sup> This situation underscores the “pressing need to dismantle the US system of mass incarceration [by also] oppos[ing] the recriminalization of abortion and passage of so-called personhood measures that would expand it.”<sup>134</sup> A paper by Paltrow and Flavin now identifies and details 413 cases of arrests and forced interventions on pregnant women in the United States between 1973 and 2005 where the pregnancy was the basis of arrest and prosecution because drugs were involved.<sup>135</sup>

The everyday cruelties of imprisonment also now bear down especially hard on pregnant women. Approximately 200,000 women are incarcerated in U.S. jails and prisons each year, and approximately 12,000 of those are pregnant while incarcerated.<sup>136</sup> Even while pregnant, incarcerated women are routinely subjected to harsh treatment, such as shackling.<sup>137</sup> Shackling pregnant women is degrading and unnecessary, and violates human rights, but only ten

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<sup>132</sup> Lynn M. Paltrow, *Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 17 (2012).

<sup>133</sup> *Id.* at 19.

<sup>134</sup> *Id.*

<sup>135</sup> Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 299 (2013).

<sup>136</sup> AM. CIVIL LIBERTIES UNION, *supra* note 110, at 2.

<sup>137</sup> *Id.* at 1.

states currently prohibit the practice.<sup>138</sup> None of these jurisdictions have reported escapes or security threats from pregnant prisoners since prohibiting shackling.<sup>139</sup>

#### IV

### MASS INCARCERATION AND ITS PUBLIC HEALTH IMPACTS

#### *A. Healthcare and Public Health*

Recent changes in healthcare law make it more likely that prisoners will receive continuity of health service upon release from prison.<sup>140</sup> Approximately ten million people spend time in correctional facilities at some point each year.<sup>141</sup> These individuals are more likely than people in the general population to have mental health problems and addictions, as well as communicable diseases such as Hepatitis C or HIV.<sup>142</sup> As part of the legacy of their history of poor healthcare, poor

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<sup>138</sup> *Id.* (citing the following state statutes as prohibiting or restricting shackling pregnant prisoners: ARIZ. REV. STAT. ANN. § 31-601 (Westlaw through 2013 First Reg. Sess.); CAL. PENAL CODE § 3423 (West, Westlaw through 2012 Reg. Sess.); COLO. REV. STAT. ANN. § 17-1-113.7 (West, Westlaw through Chapters 1-4 and 6 of the First Reg. Sess. of 2013); DEL. CODE ANN. tit. 11, § 6603 (West, Westlaw through 79 Laws 2013, chs. 1-4); FLA. STAT. ANN. § 944.241 (West, Westlaw through 2012 Reg. Sess.); HAW. REV. STAT. ANN. § 353-122 (West, Westlaw through 2012 Reg. and Spec. Sess.); IDAHO CODE ANN. § 20-902 (West, Westlaw through 2013); 55 ILL. COMP. STAT. ANN. 5/3-15003.6 (West, Westlaw through P.A. 98-4 of the 2013 Reg. Sess.); 730 ILL. COMP. STAT. ANN. 125/17.5 (West, Westlaw through P.A. 98-4 of the 2013 Reg. Sess.); LA. REV. STAT. ANN. § 15:744.2 (West, Westlaw through 2012 Reg. Sess.); NEV. REV. STAT. ANN. § 211.155 (West, Westlaw through 2011 Reg. Sess.); N.M. STAT. ANN. § 33-1-4.2 (West, Westlaw through Second Reg. Sess. of 2012); N.Y. CORRECT. LAW § 611 (McKinney, Westlaw through L.2013, chapter 6); 61 PA. CONS. STAT. ANN. § 1104 (West, Westlaw through 2012 Reg. Sess.); R.I. GEN. LAWS ANN. § 42-56.3-3 (West, Westlaw through chapter 491 of the January 2012 Sess.); TEX. GOV'T CODE ANN. § 501.066 (West, Westlaw through 2011 Reg. Sess.); TEX. HUM. RES. CODE ANN. § 61.07611 (West, Westlaw through 2011 Reg. Sess.); TEX. LOC. GOV'T CODE ANN. § 361.082 (West, Westlaw through 2011 Reg. Sess.); VT. STAT. ANN. tit. 28, § 801a (West, Westlaw through 2011-2012 legislation); WASH. REV. CODE ANN. § 72.09.651 (West, Westlaw through 2012 legislation); W. VA. CODE ANN. § 25-1-16 (West, Westlaw through 2012 First Extraordinary Sess.).

<sup>139</sup> AM. CIVIL LIBERTIES UNION, *supra* note 110, at 5.

<sup>140</sup> SUSAN D. PHILLIPS, THE SENTENCING PROJECT, THE *AFFORDABLE CARE ACT*: IMPLICATIONS FOR PUBLIC SAFETY AND CORRECTIONS POPULATIONS 2 (2012), available at [http://sentencingproject.org/doc/publications/inc\\_Affordable\\_Care\\_Act.pdf](http://sentencingproject.org/doc/publications/inc_Affordable_Care_Act.pdf).

<sup>141</sup> *Id.*; see also E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 (2012), available at <http://bjs.gov/content/pub/pdf/p11.pdf>.

<sup>142</sup> COMM. ON ETHICAL CONSIDERATIONS FOR REVISIONS TO DHHS REGULATIONS FOR PROT. OF PRISONERS INVOLVED IN RESEARCH, INST. OF MED. OF THE NAT'L ACADS., ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS 29 (Lawrence O. Gostin et al. eds., 2007), available at <http://www.ncbi.nlm.nih.gov/books/NBK19882/pdf/TOC.pdf>.

inmates also suffer from the most common chronic illnesses (diabetes, asthma, and hypertension) that have usually been inadequately treated in their home communities.<sup>143</sup> While their illnesses may be well-treated (often for the first time) under mandated healthcare services in prison, few states have successfully linked discharge from prison to continuity of care upon release.

The Affordable Care Act (ACA) signed into law by President Obama in 2011, however, will soon expand eligibility for Medicaid by extending it to former prisoners.<sup>144</sup> The ACA also creates new mechanisms for uninsured people to obtain coverage for physical and mental healthcare services<sup>145</sup>—which will apply to the annual 700,000 reentering prisoners. Additionally, prevention, early intervention, and treatment of mental health problems and substance use disorders will be considered “essential health benefits.”<sup>146</sup> Thus, the ACA could have important positive implications for controlling epidemics, including HIV and other infectious diseases affecting prisoners as well as mental health and addiction treatment—all conditions that require a public health approach based on long-term continuity of care.

#### *B. Impact of Mass Incarceration on U.S. Population Health Statistics*

Recent research by sociologist Becky Pettit, as described in her 2012 book *Invisible Men: Mass Incarceration and the Myth of Black Progress*, has now shown that, because we fail to consider the data from the inmate population in assessing the true status of our nation’s public health, mass incarceration masks important health disparities in our nation’s population health statistics.<sup>147</sup> Pettit’s work reveals the hidden ways in which incarceration impacts our perception of African American advancement in the mainstream measures of voter turnout, educational attainment, and employment, belying the common assumption that the status of the entire black population is steadily improving.<sup>148</sup>

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<sup>143</sup> PHILLIPS, *supra* note 140, at 2.

<sup>144</sup> Laura Tobler, *Medicaid for Inmates*, TRENDS & TRANSITIONS, May 2012, at 7, 7, available at <http://www.ncsl.org/LinkClick.aspx?fileticket=6HKwSINrkRs%3D&tabid=24670>.

<sup>145</sup> 42 U.S.C. §18022 (Supp. IV 2011 & Supp. V 2012).

<sup>146</sup> *Id.* § 18022(b)(1).

<sup>147</sup> BECKY PETTIT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* 94–98 (2012).

<sup>148</sup> *Id.* at 57–64, 79–81.

Most national population surveys—including the U.S. Census—fail to count prison inmates in calculating the health status of the U.S. black population. Pettit’s research shows that these defects in public health accounting methods have effectively rendered the inmate population “invisible.”<sup>149</sup> As a result, she concludes, mass incarceration—and our failure to acknowledge it in our national data sets—has effectively overstated black progress in the United States.<sup>150</sup>

By adding incarcerated Americans back into the existing data, Pettit finds that many of the key metrics used to assess social conditions of the African American males change significantly—exposing the ways in which mass incarceration in fact diminishes the status of the black population.<sup>151</sup> For example, the black high school dropout rate in America may be much higher than widely believed.<sup>152</sup> When inmates are included, the data show little “improvement in the black-white gap in high school graduation rates since the early 1990s.”<sup>153</sup> Likewise, disparities in employment rates are even worse than generally believed. Pettit shows that the employment rate for young, black male dropouts is twenty-six percent when inmates are included, compared to forty-two percent when they are excluded.<sup>154</sup> Likewise, Pettit argues, the 2008 election overestimated overall black voter turnout by thirteen percent and turnout among young, black male high school dropouts by over sixty-four percent.<sup>155</sup> By systematically excluding inmates and former inmates from key data, Pettit concludes, we have “cloud[ed] our understanding of the American economic, political, and social condition.”<sup>156</sup>

#### CONCLUSION

Our failed drug policies have for decades undermined our ability to deal effectively with both our drug problems and related public health problems—e.g., the AIDS epidemic, which continues to spread at a

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<sup>149</sup> See *id.* at 5–6, 8.

<sup>150</sup> *Id.* at 68.

<sup>151</sup> *Id.* at 7.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 63–64.

<sup>155</sup> *Id.* at 78 tbl.5.2.

<sup>156</sup> *Id.* at xi.

very high rate in the United States.<sup>157</sup> Today, even as we see some signs of decline in state prison populations, we continue to create new mechanisms to justify our massive system of punishment (e.g., immigration, expanded definitions of sex crimes, and poverty itself) and use these to sustain very high levels of imprisonment—as well as expansions of web-based criminal registries. At the same time, drug use persists as a powerful force sustaining the “prison industrial complex.”<sup>158</sup> Even New York State (with its big drop in prison populations) still arrested 50,000 people in 2011 for marijuana offenses (in New York City) and continues racial profiling for massive Stop and Frisk programs in minority communities.<sup>159</sup> And many other states’ criminal justice systems continue to ignore proven approaches to effective treatment for addiction to hard drugs. For example, a jail in New Mexico recently announced that it will stop offering medical treatment for the many heroin addicts locked inside it.<sup>160</sup> According to the warden, ““My concern is that the courts and other authorities think that jail has become a treatment program, that it has become the community provider,” he said. “But jail is not the answer.””<sup>161</sup>

As we recognize the epidemic qualities of mass incarceration, more scholars and public health officials are viewing our bloated system of punishment itself as the problem—shifting the paradigm and asking the right question: “How can we effectively rein in the wide misuse of imprisonment?” The public health model and its tools of epidemiological analysis (that have been used so successfully for the prevention of other public health threats) now has remarkable potential for helping to mitigate the damages and eventually to end the epidemic of mass incarceration in America.

We can reduce the scale of the epidemic of mass incarceration by addressing and eliminating some of its root causes, including the use of long mandatory prison sentences for nonviolent drug offenses, and by continuing to reform overly punitive drug laws—as New York and

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<sup>157</sup> Ernest Drucker, Commentary, *Failed Drug Policies in the United States and the Future of AIDS: A Perfect Storm*, 33 J. PUB. HEALTH POL’Y 309, 309 (2012), available at <http://www.palgrave-journals.com/jphp/journal/v33/n3/pdf/jphp201216a.pdf>.

<sup>158</sup> See NILS CHRISTIE, CRIME CONTROL AS INDUSTRY 73 diagram 5.3-2, tbl.5.3-2 (3d ed. 2000).

<sup>159</sup> Jeffries, *supra* note 49.

<sup>160</sup> Dan Frosch, *Plan to End Methadone Use at Albuquerque Jail Prompts Alarm*, N.Y. TIMES (Jan 6, 2013), [http://www.nytimes.com/2013/01/07/us/alarm-in-albuquerque-over-plan-to-end-methadone-for-inmates.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2013/01/07/us/alarm-in-albuquerque-over-plan-to-end-methadone-for-inmates.html?pagewanted=1&_r=0).

<sup>161</sup> *Id.*

some other states are now doing. In addition, we must begin to remove the long list of restrictive rules and disenfranchisements (from work, education, housing, and voting) that serve to socially and economically incapacitate convicted felons and undermine their chances for successful reentry to community life after prison. Next, we can reduce the harms and the collateral consequences of imprisonment itself on individuals and their families—by reinstituting rehabilitative models for prison programs providing adequate drug and mental health services and access to education. By intervening in these vectors of harm from incarceration for family and community ties—the basis of any social capital that prisoners may still have—we can begin to limit this epidemic’s spread across generations. Finally, as is already happening, we can begin to replace our crime and punishment model with one based on public health—using restorative justice and community reconciliation programs—which are especially effective for youthful offenders involved in drug use and drug sales in order to identify and reach out earlier to those at highest risk, immunizing them against future arrest and imprisonment. This means we must end the War on Drugs.

Despite widespread recognition of its failure, the War on Drugs continues as one of the main drivers of America’s epidemic of mass incarceration and the global patterns of corruption and violence associated with illicit drug markets that feed U.S. drug use. This legacy of violence and the decades of harsh punishment we have seen worsen many of the public health and social problems once attributed to drugs themselves. Further, this is a critical moment for global drug policies—with the early signs of drug law reform seen in medical marijuana’s growing support and moves toward full legalization of marijuana in some states. The United States federal government should stop opposing these reforms and join the growing international movement to alter global drug policies. We are now seeing serious proposals to replace the drug war with harm reduction methods aimed at stopping the spread of AIDS and other causes of preventable death and diseases associated with illicit drug use—with clean needles and effective treatment and with medications like methadone and overdose prevention now based on solid public health evidence.<sup>162</sup> Many world leaders and heads of state now support the harm reduction model and call on America to change our core assumptions

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<sup>162</sup> Ernest Drucker et al., *Harm Reduction: New Drug Policies and Practices*, in LOWINSON AND RUIZ’S SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 754 *passim* (Pedro Ruiz & Eric C. Strain eds., 5th ed. 2011).

about the role of drug policy.<sup>163</sup> The experience of Mexico is most telling: as a major supplier of the forty to sixty billion dollar U.S. drug market, Mexico saw over 60,000 murders in the last six years<sup>164</sup> and has captured world attention as stark evidence of the disastrous consequences of drug war policies. New global initiatives for better drug policies are now being developed and proposed by national leaders and international public health organizations—focusing on reducing violence and forgoing punishment for prevention and treatment.<sup>165</sup>

Ending the plague of prisons can be accomplished without compromising public safety. We can and must replace our system of punishment (first for the ninety percent of drug crimes that are nonviolent) with a public health and therapeutic model for individuals and a restorative justice program at the community level to heal rather than worsen the effects of social and personal conflicts that so often revolve around the illicit trade in drugs. In addition we must stop ignoring the real and potent health threats of the many legal drugs—including licit pharmaceuticals (prescription opioids and tranquilizers now cause more overdose deaths than heroin and cocaine<sup>166</sup>). Finally, the massive markets for “legal” drugs such as alcohol and tobacco must be better controlled, as they now account for even more deaths and greater disease than all other drugs combined.<sup>167</sup> It is time we had a uniform and effective system for regulating all types of drugs based

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<sup>163</sup> See Andrew Jones, *Speaker Promotes Drug Decriminalization*, BROWN DAILY HERALD (Feb. 27, 2013), <http://www.browndailyherald.com/2013/02/27/speaker-promotes-drug-decriminalization/>; see also INTER-AMERICAN DIALOGUE, REMAKING THE RELATIONSHIP: THE UNITED STATES AND LATIN AMERICA 9 (2012), <http://www.thedialogue.org/PublicationFiles/IAD2012PolicyReportFINAL.pdf> (discussing calls made by the Latin American Commission on Drugs and Democracy for serious review of U.S. drug policy).

<sup>164</sup> MOLZAHN ET AL., *supra* note 2, at 13–14.

<sup>165</sup> For examples, see *Drug Law Reform in Latin America*, TRANSNAT'L INST., <http://www.druglawreform.info/en/home> (last visited Mar. 28, 2013).

<sup>166</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, UNINTENTIONAL DRUG POISONING IN THE UNITED STATES 2 (2010), available at <http://www.cdc.gov/HomeandRecreationalSafety/pdf/poison-issue-brief.pdf>; see also Scott Glover & Lisa Girion, *Legal Drugs, Deadly Outcomes*, L.A. TIMES (Nov. 11, 2012), <http://www.latimes.com/news/science/prescription/la-me-prescription-deaths-20121111-html,0,2363903.htmlstory?main=true> <http://www.cdc.gov/homeandrecreationalsafety/pdf/poison-issue-brief.pdf>.

<sup>167</sup> See *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm> (last updated Nov. 13, 2008); *Alcohol and Public Health*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/alcohol/> (last visited Mar. 28, 2013).

on scientific evidence and held accountable for health outcomes. This requires giving up the moralistic and punitive drug war model that has been such a failure—replacing its quixotic notion of a drug-free world with pragmatic steps toward bringing our growing drug problems under better control and putting an end to the damaging response to drugs that their criminalization and mass incarceration has shown itself to be.