



National Lawyers Guild *Review*



NATIONAL LAWYERS GUILD REVIEW

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Editor's Preface

By Dalia Fuleihan

In the United States the specter of mass incarceration and police violence looms large over our daily lives. It seems that almost every week we are privy to news stories about the death of unarmed civilians at the hands of the police, and abuses within the prison system. As systematic abuses continue unabated, the problem of racial injustice and criminalization of Black, brown, and other marginalized bodies remains one of society's most urgent crises.

In this criminal justice themed issue of the National Lawyers Guild Review, we have gathered together a collection of written work that tackles the behemoth of the American criminal justice system from a multitude of perspectives. The topic of criminal justice covers a broad array of subjects included violent and discriminatory policing, mass incarceration, and the prison-industrial complex. Our contributors in this issue further expand upon these topics to demonstrate the complexities of how policing, mass incarceration, and the prison industrial complex are interwoven into all aspects of society including healthcare and education.

In this issue, I am pleased to present the work of four contributors who examine various aspects of the criminal justice system. Our first article, *Incentivizing Violence: How the Financial Incentives in Policing Maintain Racism, Classism, and Mass Incarceration*, Patrick Hogan conducts an overview of local government policies that contribute to the over-policing of marginalized communities and makes the case for changing incentives as a step towards changing racist and predatory police practices. Hogan explains how time and time again local police departments have been found to use policing to balance their budgets and financially supplement their programs. As Hogan describes policies that require a minimum number of arrests and create financial incentives to arrests and citations encourage police departments to target low-income communities, and communities and simultaneously contribute the maintaining the systemic oppression of these groups.

In *Involuntary Civil Commitment as Mass Incarceration*, Tristan Campbell advocates for abolition of involuntary civil commitment, which is used as a branch of the larger carceral state. Campbell's article highlights the intersection of the prison-industrial complex with the healthcare system in the United States. As he explains, involuntary civil commitment mirrors criminal incarceration in the way that it is disproportionately used against people of color and other marginalized folks. Campbell's article deftly describes the process of civil commitment including devastating due process

deprivations and highlights the similarities between civil commitment and criminal incarceration.

We are also thrilled to present our first poem in this issue. *We been knew the cops* by Sabine “Free” Pierre comments on the school to prison pipeline through their depiction of the emotional and psychological impact of policing in schools. *We been knew the cops* is a poignant snapshot of what it must be like for millions of children who face police every day in their schools.

We close this issue with an article written by Kinetic Justice, a jailhouse lawyer and organizer who has been serving a life sentence—about half of which has been spent in segregation—since he was about twenty years old. Kinetic Justice participated and organized numerous work stoppages over the years. In his article, *The Evolution of a Solution*, Kinetic Justice’s provides an often-overlooked view into the lives of those living within the prison-industrial complex. Kinetic Justice describes his experience organizing work including both accomplishments and the ever-increasing challenges that he faces.

The work of our four contributors examines the American criminal justice system from multiple perspectives. Together they highlight both the common themes of racism, white supremacy, and classism that form the basis of the American legal system, but also highlight the ways in which the criminal justice system and the prison industrial complex have become integrated into all aspects of our society. Taken together the works in this issue present a system of law enforcement and incarceration that resembles a hydra, and challenges us to see the whole creature rather than a single head in isolation.

Incentivizing Violence: How the Financial Incentives in Policing Maintain Racism, Classism, and Mass Incarceration

By Patrick Hogan

Patrick works for a legal aid organization with a focus in criminal records relief. He formerly worked in public safety roles and was a legal research volunteer for the NLG New York Chapter's Civil Litigation Task Force.

Introduction

In this paper, I will examine policies of local governments that provide financial and career incentives to police departments and officers to target low-income and people of color. A number of Department of Justice ("DOJ") Civil Rights Division ("CRT") patterns and practice investigations into many local police departments have found that policing is often used to off-set budget shortfalls, to financially supplement police and city operations, and to extract wealth from vulnerable people to boost statistics (i.e., arrest quotas used to apply for federal and state grants). By advancing "for-profit" and "numbers-based" policing, these governments and police departments systematically target low-income people, over-police communities of color, and sustain the carceral state. Even if every new police officer hired to a department was free of any racial bias, the systems established by local governments (in conjunction with *de jure* and *de facto* historic racial and classist policies) would still incentivize those new officers to target low-income people and communities of color. I will use the often-conflicting analytical lenses of "Critical Legal Studies¹" and "Law and Economics²" to examine how the economic incentives the law extends to the police maintain a racial and class hierarchy.

1 Critical Legal Studies, or "CLS," examines methods in which the "law supports the interests of those who create the law. *Critical Legal Theory*, www.law.cornell.edu/wex/critical_legal_theory (last visited Apr. 24, 2023). As such, CLS states that the law supports a power dynamic which favors the historically privileged and disadvantages the historically underprivileged. *Id.* CLS finds that the wealthy and the powerful use the law as an instrument for oppression in order to maintain their place in hierarchy." *Id.*

2 The Law and Economics perspective is a "school of thought advocating economic analysis of the law. *Law and economics*, www.law.cornell.edu/wex/law_and_economics (last visited Apr. 24, 2023). Examples include comparing the costs and benefits of alternative legal rules, searching for economic efficiency for individuals or society as a whole, and promoting new ideas such as efficient breach." *Id.*

Thesis:

Career and financial incentives for police departments established by local governments maintain and exacerbate violent and racist policing practices. Police are given financial and career incentives to create conflict, not to solve conflict: low-income people and People of Color face the effects of this incentive system most severely.

The City of Ferguson: A Case-Study:

The Department of Justice Civil Rights Division concluded that: “The City [of Ferguson, MO] budgets for sizable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved. City officials routinely urge Chief Jackson to generate more revenue through enforcement.”³ The City used its police force as a revenue generator, pressuring and incentivizing the police chief to make-good on his promises to raise revenue. The chief, in turn, incentivized his officers to prioritize revenue generation. The chief’s career and the promotion potential of individual rank-and-file officers were based on their successful completion of their quotas. “FPD supervisors are more concerned with the number of citations and arrests officers produce than whether those citations and arrests are lawful or promote public safety.”⁴ The Department incentivized revenue generation, but also disproportionately targeted communities of color, particularly Black people, and low-income people.

Thus, if we can imagine a world where every bigot was removed from the Ferguson Police Department and each remaining officer had their implicit biases under control, they would *still* disproportionately target communities of color, Black people in particular, and low-income people *because* of the revenue-based promotion incentives. Even with no racist left in the department, officers would seek out people from whom they are likely to be able to extract revenue. They are more likely to successfully generate revenue by patrolling a low-income area-- where a resident may not have had the funds to fix a recently broken taillight or pay for insurance, than they would ticketing a well-to-do white businessman who has his lawyer on speed-dial and would cost the city money by fighting a citation in court. As a result, police are incentivized to target low-income areas. Low-income areas in Missouri are intentionally segregated because decades of inten-

³ Department of Justice, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), available at www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁴ *Id.* at 17.

tional housing policy have forced Black and brown people into low-income neighborhoods and have made ascending the social hierarchy difficult. Decades of such discrimination have led to disproportionately segregated low-income areas.⁵ Because the officers are incentivized to target low-income neighborhoods, even a “racist-free” department will end up targeting Black and brown people.

This is not to say that current policing does not have built in or overt racism so that, if the discrimination of the past was undone or incentives changed, there would cease to be racism in law enforcement. To the contrary, the incentives provided additionally encourage racism to fester and racists to enter the profession. After all, the Federal Bureau of Investigation (“FBI”) has made clear that white supremacists have a history of employment in law enforcement agencies.⁶ Even when the same crime is occurring in the same municipality, police are more likely to arrest the suspect in the area with more Black or brown residents.⁷ These trends cannot be explained by simple cost-benefit financial analysis alone. While the career and financial incentives law enforcement have upheld violent racist and classist structures, changing the incentives alone are unlikely to be sufficient to address the problems prevalent in US law enforcement. However, addressing the career and financial incentives are necessary to understand those problems.

Historical Context: A Brief Discussion on the Origins of Racist and Classist Policing

To understand how current financial incentives maintain racist and classist policing, one must understand that *de jure* racist and intentionally classist policies have not been dismantled. So, even without racist or classist intent, a police department is incentivized to target the same people targeted by the intentional racism and classism of the past.

The modern idea of government-run full-time policing can draw its origins from two economic interests: the shipping industry in the North and the plantation in the South.

The Northern shipping industry contributed to the history of policing in the 1830s, when Bostonian shipping companies devised a plan to

5 Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, MO. L. REV., Forthcoming, University of Missouri School of Law Legal Studies Research Paper No. 2015-13, (July 20, 2015), available at <https://ssrn.com/abstract=2633675>.

6 FBI, *White Supremacist Infiltration of Law Enforcement*, (Oct. 17, 2006), <https://archive.org/details/FBI-Report-White-Supremacist-Infiltration-Police>.

7 Deray McKesson, *ON THE OTHER SIDE OF FREEDOM: THE CASE FOR HOPE* 59 (2018).

externalize the costs of security. The businesses had been paying for private security personnel to protect their property but managed to shift the burden to the taxpayers of Boston by arguing that the security service was a public good rather than a purely private good.⁸

The Southern contribution to the history of policing finds its origins in the Slave Patrol. Slave Patrols were organized groups of white men assigned authority by government bodies and tasked with “enforcing curfews, checking travelers for a permission pass, catching those assembling without permission, and preventing any form of organized resistance.”⁹ Essentially, the Slave Patrols were assigned with engaging in legalized terrorism against the enslaved Black people to ensure white supremacy was maintained and the political and economic interests of the plantation owner were upheld. Other forms of law enforcement existed, such as part-time nightwatchmen, local sheriffs assigned to enforce court orders and debts, and marshals assigned to patrol federal lands. Law enforcement today certainly draws from these historical examples, but the organized bureaucracy of full-time patrolers draws its most direct lineage from Northern shippers externalizing their security costs to the public and from Southern Slave Patrols.¹⁰

With the end of legalized chattel slavery did not come the end to legalized slavery or discrimination. Rather, the previously-accepted *de jure* discrimination was replaced with other legal regimes intended to maintain the racist order. Post-Reconstruction, laws were enacted criminalizing vagrancy, with these anti-vagrancy laws allowing the arrest of Black people for the crime of not being employed by a white person.¹¹ Then, following an inevitable conviction, the person convicted would be saddled with legal debts (which, as someone convicted for the crime of not having a job, they could not afford), and so would be pressed into the new legal slavery regime. In effect, simply by not hiring a Black person, wealthy white people would have Black people arrested, and so impressed into slavery for those white people.¹² White law enforcement in the South post-reconstruction

8 Olivia B Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), <https://www.time.com/4779112/police-history-origins/>.

9 *Slave Patrols: An Early Form of American Policing*, NATIONAL LAW ENFORCEMENT OFFICERS MEMORIAL FUND (July 10, 2019), <https://www.nleomf.org/slave-patrols-an-early-form-of-american-policing/>.

10 Gary Potter, *The History of Policing in the United States*, Part 1, ECU Online (June 25, 2013), <https://www.ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/>.

11 Brent Tarter, “Vagrancy Act of 1866”, ENCYCLOPEDIA VIRGINIA (Jan. 15, 1866), <https://www.encyclopediavirginia.org/entries/vagrancy-act-of-1866/>.

12 *Id.*

criminalized poverty (having created poverty among Black people) as an excuse to re-enslave Black people under a new legal mechanism.¹³ Policing targeted poverty—and certainly poor white people were and are affected by the criminalization of poverty—but the primary target of the criminalization of poverty in the South were Black people.¹⁴ This has affected a legacy of poverty, as wealth-generation and social mobility are often generational (i.e., if the parents are wealthy, the child will gain the benefits of their wealth) and significantly hampered if one has a criminal record (so that people convicted of a crime have difficulty becoming financially stable because employers are hesitant to hire a convicted felon).

The North's legacy of racial caste enforcement, too, primarily targeted Black and brown people with a clear goal of keeping Black people poor. The North's mechanism was less direct than the South's: while the South passed Jim Crow laws and criminalized not being employed, the North relied more heavily on housing discrimination.¹⁵ The legacy of housing discrimination cannot be understated, considering that, currently, the so-called liberal leadership in the Northern city of Chicago, IL, oversee the most segregated city in the United States.¹⁶ The federal government, in its attempts to fight communism after the Russian revolution, began impressing the importance of homeownership and suburbanization as a means to gain by-in in the capitalist system.¹⁷ With a renewed interest in housing, the federal government under president Franklin Roosevelt established the Home Owners' Loan Corporation ("HOLC") to assist people whose homes were at risk of foreclosure by buying their mortgages. HOLC did not just help anyone who was at risk of foreclosure—it helped people (and entire neighborhoods) it saw as least-risky to fail to repay their due to HOLC. One of the most significant factors in determining risk: race. White people and white

13 Ebony Slaughter-Johnson, *Homeless and harassed: Why police are encouraged to search the black community for fines and arrests*, SALON (Dec. 13, 2016), https://www.salon.com/2016/12/13/need-for-funding-in-criminal-justice-systems-leaves-black-people-disproportionately-exposed-to-encounters-with-police_partner/.

14 *Racialized Poverty, The Legacy of Slavery*, EQUAL JUSTICE INITIATIVE (Dec. 23, 2016), <https://www.eji.org/news/history-racial-injustice-racialized-poverty/>.

15 William H. Frey, *Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans*, BROOKINGS INST. (Apr. 6, 2021), <https://www.brookings.edu/research/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans/> (“[M]any northern areas with long-stagnating Black populations continue to show segregation levels into the 70s, reflecting the persistence of past patterns.”).

16 Tami Luhby, *Chicago: America's Most Segregated City*, CNN (Jan. 5, 2016), <https://www.money.cnn.com/2016/01/05/news/economy/chicago-segregated/index.html>.

17 Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 60-62 (Liveright Publishing 2017).

neighborhoods received assistance, while everyone else was “red lined.”¹⁸

After assisting white people and building up white neighborhoods by taking on many of the costs of mortgages and developing the suburbs, the federal government actively “discouraged banks from making any loans at all in urban neighborhoods rather than newly-built suburbs.”¹⁹ In 1934, Congress passed a bill, which Roosevelt signed into law, that established the Federal Housing Administration (“FHA”) to assist middle-class people who still could not afford to stop renting and move into the suburbs. The FHA insured mortgages for banks with the goal of incentivizing banks to make loans that otherwise would be too risky; the same banks the FHA insured were the ones it discouraged from making loans in urban areas.²⁰ In its *Underwriting Manual*, the FHA states explicitly establishing the desirability of “established barriers...[for] protecting neighborhoods...from adverse influences...includ[ing]the prevention of the infiltration of...lower class occupancy, and inharmonious racial groups.”²¹ It was the policy of the federal government to build wealth in white communities, establishing a suburban white middle-class while disregarding, if not actively degrading, the American city. By funding white movement to the suburbs while not giving the same benefits to the rest of the American public, the government created the segregation and poverty still at issue in urban areas throughout the country, but particularly in the North.²² Additionally, racially restrictive covenants that ran with the land served to keep Black people out of middle-class neighborhoods, as homeowners subject to the covenant were not permitted to sell their home to anyone who was not white—regardless of their economic standing.²³ These covenants were rendered impotent by the judicial system in 1948 with the decision in *Shelley v. Kraemer*,²⁴ but this change was ignored with some regularity by state courts and federal officials for years.²⁵ *De jure* segregation was quickly replaced with restrictive

18 *See id.* at “Chapter 4, Own Your Own Home.”

19 *Id.* at 65.

20 *See Id.* at “Chapter 4, Own Your Own Home.”

21 *Id.* at 65.

22 Tracy Hadden Loh, Christopher Coes, and Becca Buthe, *Separate and Unequal: Persistent Residential Segregation is Sustaining Racial and Economic Injustice in the U.S.*, BROOKINGS INST. (Dec. 16, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/>.

23 Catherine Silva, *Racial Restrictive Covenants: Enforcing Neighborhood Segregation in Seattle*, SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT, https://depts.washington.edu/civilr/covenants_report.htm (last visited Apr. 24, 2023).

24 *Shelley v. Kraemer*, 68 S. Ct. 836 (1948).

25 *See* Rothstein, *supra* note 17, at Chapter 5 “IRS Support and Compliance Regulators”.

zoning that established *de facto* discrimination and so were not prohibited under *Brown v. Board of Education*.²⁶ The result: government policy actively sought to keep Black and brown Americans poor and cramped into urban neighborhoods while advancing the economic interests of white Americans and established white suburbia.

This urban-suburban segregation in American cities lead to a number of phenomena. First, it perpetuated the presumptions behind racial stereotyping (if the suburbs were created for white people, then the sight of a Black person in the suburbs warrants a call to the police). Secondly, it created and enforced higher rates of poverty among Black and brown people by establishing wealth in a white middle class but ensuring Black and brown people were stuck without assistance in cramped urban centers. It is well-documented that poverty induces crime.²⁷ Thus, government policy that forces Black and brown people into conditions of poverty also forces them into a greater likelihood of being the victim of a violent crime, which not only leads to victimization, but also over-policing.²⁸

History has shown us that government policy, through legislative action, judicial inaction, housing incentives, and policing, has been intentionally directed at maintaining white supremacy and class-domination. With this context, even if a jurisdiction claims that its enforcement is “post racial” or “color blind,” the incentives given maintain racial and class discrimination. When laws are still enforced that criminalize poverty, and past government policies intentionally forced Black and brown people into

26 Erica Frankenberg and Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189 (2018), available at <https://heinonline-org.proxy.cc.uic.edu/HOL/Page?handle=hein.journals/jle47&id=195&collection=journals&index=>.

27 Halvor Mehlum, Karl Moene, and Ragnar Torvik, *Crime Induced Poverty Traps*, 77 J. OF DEV. ECON. 325 (August 2005), available at <https://doi.org/10.1016/j.jdeveco.2004.05.002>. (“Economic stagnation explains rising crime and rising crime, in turn, explains the economic stagnation. Some countries may therefore end up in an equilibrium state characterized by persistently low or negative growth rates and high or rising crime levels. Other countries, where crime is prevented and labor demand is not allowed to plummet, may take off on a sustainable path of social and economic development where high growth produces low crime rates, which leads to further economic growth and development.”).

28 Emily Widra, *Stark Racial Disparities in Murder Victimization Persist, Even as Overall Murder Rate Declines*, PRISON POL’Y INITIATIVE (May 3, 2018), www.prisonpolicy.org/blog/2018/05/03/homicide_overtime/ (“Homicide victimization rates for Black men, Black women and Indigenous women are consistently higher than for other racial and ethnic groups...economic disadvantage, not race, is the strongest predictor of violence in a particular neighborhood.”).

poverty, then the “color blind” enforcement of those laws will necessarily still target Black and brown people disproportionately. So long as police are incentivized to meet quotas and create conflict, rather than solve problems and advance public safety, then policing will continue to perpetuate racist and classist divides, whether purportedly “race neutral” or not.

This is not to say that changing the incentives alone will solve all the problems in the US criminal justice system; however, the importance of establishing incentives to behavior that achieve a desired result should not be understated. In the following sections, I examine the career and financial incentives provided to law enforcement and the behavioral results of these incentives.

Who is “Tough on Crime” Really Tough On?: Incentivized Arrests Rather than Crime-Fighting

Country-wide, police departments, and so the individual police officers employed by said departments, are incentivized to make arrests. The flawed idea that arrests equate to public safety arose out of the “1980s-era theory known as ‘Broken Windows,’ which argues that maintaining order by policing low-level offenses can prevent more serious crimes.”²⁹ This flawed concept—that heavily policing low-level offenses will prevent serious crime—has been shown generally problematic, yet has persisted.³⁰ The practice “can strain criminal justice systems, burden impoverished people with fines for minor offenses, and fracture the relationship between police and minorities. It can also lead to tragedy: in New York in 2014, Eric Garner died from a police chokehold after officers approached him for selling loose cigarettes on a street corner.”³¹ Despite evidence showing that targeting³² or prosecuting low-level offenses may actually increase crime or

29 Sarah Childress, *The Problem with “Broken Windows” Policing*, PBS (June 28, 2016), <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/>.

30 *What Works in Policing: Broken Windows Policing*, CENTER FOR EVIDENCE-BASED CRIME POL’Y GEORGE MASON UNIV. <https://cebcp.org/EVIDENCE-BASED-POLICING/WHAT-WORKS-IN-POLICING/RESEARCH-EVIDENCE-REVIEW/BROKEN-WINDOWS-POLICING/> (last visited Apr. 24, 2023) (“[T]here is concern that any effectiveness of broken windows policing in reducing crime (where the evidence...is mixed) may come at the expense of reduced citizen satisfaction and damage to citizen perceptions of the legitimacy of police.”).

31 Childress, *supra* note 29.

32 David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen, Shawn D. Bushway, *Short- and Long-Term Effects of Imprisonment on Future Felony Convictions and Prison Admissions*, PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES (Oct. 2017), available at <https://www.pnas.org/doi/full/10.1073/pnas> (“results demonstrate that the revolving door of prison is in part an effect of the nature of postprison supervision.”).

criminal behavior,³³ the incentives that the Broken Window approach (often referred to as the “Tough on Crime”) provided to police departments and police officers remain largely intact. Police are widely incentivized to find a reason to write citations and make arrests, not to deescalate conflict situations or positively engage with their communities.

I. Quotas and Statistics as Promotion Requirements:

Following the Broken Window or Tough on Crime approach, multiple police departments throughout the country require their officers to achieve a citation or arrest quota. In Tampa, FL, the police department (“Tampa PD”) incorporates the number of arrests made and citations issued by an officer into that officer’s promotion potential. “Each arrest, each ticket, feeds into a formula that calculates an officer’s ‘productivity ratio’ — number of hours worked divided by the number of tickets and arrests.”³⁴ A Tampa PD officer well-known for having a good reputation in the community and for successfully apprehending a number of suspects was disciplined for insubordination because he did not increase the number of traffic citations he issued.³⁵

A similar story is told throughout the country’s police departments. The DOJ wrote in its report following a Patterns and Practices Investigation into the Ferguson, MO, Police Department (“FPD”): “FPD supervisors are more concerned with the number of citations and arrests officers produce than whether those citations and arrests are lawful or promote public safety.”³⁶ In Rhode Island, an attorney who represents police unions expressed the opinion that “every department” in the state likely has internal emails where police supervisors direct their subordinates to increase or meet

33 Amanda Agan, Jennifer L. Doleac, and Anna Harvey, *Misdemeanor Prosecution*, NAT’L BUREAU OF ECON. RESEARCH WORKING PAPER SERIES (March 22, 2021) available at SSRN: <http://dx.doi.org/10.2139/ssrn.3814854> (“[in a number of jurisdictions] imposing a presumption of nonprosecution for a set of nonviolent misdemeanor offenses had similar beneficial effects: the likelihood of future criminal justice involvement fell, with no apparent increase in local crime rates.”).

34 *How Tampa Cops Are Incentivized to Arrest, Abuse and Ticket People*, TRUTH VOICE <https://www.truthvoice.com/2015/11/how-tampa-cops-are-incentivized-to-arrest-abuse-and-ticket-people/>.

35 *Id.*

36 *Investigation of the Ferguson Police Department*, DEP’T OF JUSTICE CIVIL RIGHTS DIV. (March 4, 2015), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

a citation and arrest quotas.³⁷

Who are the people that are targeted when arrests and quotas are the mark of a “successful” police officer? The people most likely, through the officer’s perspective, to enable them to write the citations and make the arrests. Police will target low-income neighborhoods and low-income people. A study has found that 30% of people experiencing homelessness have been arrested for sleeping in a public space and 25% of those surveyed have been arrested for sitting or lying down in a public space.³⁸ The number of unhoused people issued citations for sleeping or sitting in public is significantly higher.³⁹ Police are incentivized to target people without shelter, as it is easy to make a case against them: if it’s illegal to exist in public, then the mere fact that the “suspect” existed is cause for citation or arrest.⁴⁰ While public safety is not enhanced by targeting unhoused people, targeting them is an easy way to make an arrest or issue a citation, and so is an incentivized behavior.

Similarly, “civil asset forfeiture practices are riddled with racial profiling and disproportionately impact low-income black or Latino groups.”⁴¹ Civil asset forfeiture, whereby police seize a person’s property if they have reasonable suspicion that the property was used in the commission of a crime, offers the police an added incentive of gaining the value of that piece of property without expending the costs of going through the courts.⁴² Be-

37 Patricia Resende, *Attorneys tell NBC 10 I-Team: many departments have ticket quotas*, WJAR (Nov. 2, 2017), <https://www.turnto10.com/i-team/attorneys-tell-nbc-10-i-team-many-departments-have-ticket-quotas>.

38 *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, https://www.homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf.

39 *Id.*

40 *Court Orders LAPD to Stop Harassing Homeless*, ACLU OF SOUTHERN CALIFORNIA (Dec. 1, 2000), <https://www.aclusocal.org/en/news/court-orders-lapd-stop-harassing-homeless> (“The campaign of harassment and intimidation included: ‘stopping homeless people and demanding to see identification without a reasonable suspicion of a crime being committed;’ threatening to arrest homeless individuals who did not produce identification; ordering homeless individuals to move from public sidewalks and streets;’ arresting homeless individuals without probable cause;’ searching, seizing, and destroying the property of homeless individuals, and’ issuing citations for violations such as jaywalking or blocking a sidewalk when no such violation has occurred.”).

41 Karen Dolan and Jodi L. Carr, *The Poor Get Prison*, INSTITUTE FOR POL’Y STUDIES <https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf>.

42 Andrew Wimer, *New Proof That Police Use Civil Forfeiture to Take From Those Who Can’t Fight Back*, FORBES, (Oct. 25, 2021), <https://www.forbes.com/sites/instituteforjustice/2021/10/25/new-proof-that-police-use-civil-forfeiture-to-take-from-those-who-cant-fight-back/?sh=37d9fde034e8>.

cause the individual does not have significant due process rights under this situation, in many jurisdictions the individual whose property was seized bears the burden (and so the financial cost) to “prove that their property is unconnected to a crime.”⁴³ Even where the burden of proof to show the property was used in commission of a crime is borne by the government (which is the case in federal courts and most state courts), “the government is only required to show...[by] a ‘preponderance of evidence’ that the property abetted a criminal act.”⁴⁴ The government need not provide an attorney to assist the individual whose property was seized, so the heavy financial burden of defending against the state action to seize property still falls on the individual.⁴⁵ If the individual loses, they lose the value of the property plus the court costs, legal fees, and other related expenses. If they win, they may retrieve their property, but still lose the value of the court costs, legal fees, and other related expenses. So, the police are incentivized to target people to whom fighting the civil asset forfeiture would be cost prohibitive.⁴⁶ If the person whose property the police take does not have the assets to fight back in court, then the police can rest assured they will get to keep the property.⁴⁷ Departments understand this, and scholarship has observed that police officers “frequently made operational decisions to maximize perceived financial rewards [of civil asset forfeiture].”⁴⁸

Police officers are often incentivized to cite and arrest. In many departments, their careers depend on it: promotions are based on citations and arrests, their supervisors pressure them to cite and arrest, and failure

43 *Civil Asset Forfeiture: Unfair, Undemocratic, and Un-American*, SOUTHERN POVERTY L. CENTER (Oct. 30, 2017), <https://www.splcenter.org/20171030/civil-asset-forfeiture-unfair-undemocratic-and-un-american>.

44 *Id.*

45 *Id.*

46 *Id.* (“[T]he [Comprehensive Crime Control Act] earmarked all forfeiture profits for law enforcement purposes. State civil forfeiture bills creating similar funding mechanisms followed. In effect, lawmakers created a financial incentive for policing agencies to prioritize anti-drug law enforcement.”).

47 *Stop and Seize: Aggressive Police take Hundreds of Millions of Dollars from Motorists not Charged with Crimes*, WASH. POST, <https://www.washingtonpost.com/sf/investigation/2014/09/06/stop-and-seize/> (last visited Apr. 24, 2023).

48 *Policing for Profit*, INST. FOR JUSTICE, <https://ij.org/report/policing-for-profit-first-edition/part-i-policing-for-profit/> (last visited Apr. 24, 2023).

to increase citations and arrest are punished.⁴⁹ As such, police are given a reason to target low-income people and areas. Intentional enforcement and housing segregation forced many Black and brown people into financial disarray, and so created disproportionate financial instability among Black and brown people. While these intentional practices designed at benefiting white people and forcing poverty into Black and brown communities are no longer *de jure*, and while it is certainly true that many Black and brown people are financially successful, the effects of the *de jure* programs have not disappeared. To the contrary: according to a study released by the Federal Reserve Bank of Minneapolis, “historical data...reveal that no progress has been made in reducing income and wealth inequalities between black and white households over the past 70 years, and that close to half of all American households have less wealth today in real terms than the median household had in 1970.”⁵⁰ So, by forcing Black and brown people disproportionately into low-income areas, and then continuing to incentivize police to make arrests and citations (and so target low-income areas), police departments throughout the country are systematically incentivizing officers to target Black and brown people disproportionately.

II. Drug War Incentives:

Many incentives begin at the federal level. With the War on Drugs in full swing in the 1980s, the federal government made available huge swaths of funds to municipalities and police departments that took part.⁵¹ Police departments that wished to receive massive grants in federal funds had to comply with the federal requirements, and so police and municipal leaders were financially incentivized by the federal government to increase arrests.⁵²

49 Arjun Patel, *Police Quotas*, 96 N.Y. UNIV. L. REV. 529 (May 13, 2021), <https://www.nyulawreview.org/issues/volume-96-number-2/police-quotas/>. (“[Quotas] are sometimes formal and pre-specify a quantity. Other times, they are informal and premised on an implied understanding that employment actions—promotion, compensation, or discipline—will be predicated on an officer’s ability to engage in a ‘sufficient’ amount of enforcement activity.”)

50 Moritz Kuhn, Moritz Schularick, and Ulrike I. Steins, *Income and Wealth Inequality in America, 1949-2016*, OPPORTUNITY & INCLUSIVE GROWTH INSTIT. OF THE FED. RESERVE BANK OF MINNEAPOLIS (June 14, 2018), www.minneapolisfed.org/research/institute-working-papers/income-and-wealth-inequality-in-america-1949-2016.

51 *A History of Racial Injustice: Oct. 14, 1982*, | President Ronald Reagan Expands Drug War, EQUAL JUSTICE INITIATIVE, (Oct. 14, 1982), <https://calendar.eji.org/racial-injustice/oct/14>.

52 Brian Garbriel, *Are there Police Incentives for Drug Arrests?*, GABRIEL LAW TEAM, LAW OFFICE OF GABRIEL & GABRIEL, LLC (Oct. 30, 2017), <https://www.gabriellawteam.com/are-there-police-incentives-for-drug-arrests/>.

“In 1988, the [federal] government started the Edward Byrne Memorial Justice Assistance Grant Program to reward police departments throughout the country that actively participated in the War on Drugs...[whereby] local and state police departments receive federal funding based on how many people were arrested, rather than an overall reduction in crime.”⁵³ Federal funds earmarked for police departments continue to incentivize arrests by awarding funds based on arrests made or drugs seized, rather than on crime-reduction or violent crimes solved.⁵⁴ Police departments, then, have an incentive to increase arrests—and allocate resources towards effectuating arrests. These incentives are then passed to the individual officers.

Police leadership, desiring to boost their arrest and seizure numbers to be competitive for grants, encourage and reward officers for making arrests and seizures. “Several NYPD officers have alleged that in some precincts, police officers are asked to meet quotas for drug arrests. Former NYPD narcotics detective Stephen Anderson...testified in court that it’s common for cops in the department to plant drugs on innocent people to meet those quotas.”⁵⁵ A number of tapes of New York Police Department (“NYPD”) supervisors instructing their subordinates to avoid reporting some crimes (generally violent ones) while going out of their way to make quotas and inflate percent summonses issuances and arrest statistics suggest that the average NYPD patrol officer is incentivized—through punishment and rewards—to make quotas and affect the precinct crime statistics.⁵⁶

The NYPD is not alone. Federal money flows readily to local departments willing to make the War of Drugs a local priority.⁵⁷ These departments, seeking the benefits of federal assistance, provide promotion incentives to their officers to prioritize drug arrests and increase their arrest numbers.

States have taken up the charge in the War on Drugs, providing additional incentives to local departments to prioritize drug arrests (even at the

53 *Id.*

54 *Id.*

55 Radley Balko, *Driven by Drug War Incentives, Cops Target Pot Smokers, Brush Off Victims of Violent Crime*, HUFFPOST (Nov. 25, 2011), www.huffpost.com/entry/drug-war-incentives-police-violent-crime_n_1105701.

56 Matt Rogers, *The NYPD Tapes: Inside Bed-Stuy’s 81st Precinct*, VILLAGE VOICE (May 4, 2010), www.villagevoice.com/2010/05/04/the-nypd-tapes-inside-bed-stuys-81st-precinct/.

57 *Department of Justice Announces \$42 Million to Combat Illegal Manufacture and Distribution of Methamphetamine and Opioids*, U. S. DEP’T OF JUSTICE (June 23, 2020), <https://www.justice.gov/usao-ednc/pr/department-justice-announces-42-million-combat-illegal-manufacture-and-distribution>.

expense of other criminal investigations).⁵⁸

III. Prison-Industrial Complex: Political Control and Money-Making

The expansion of the carceral system in the United States has served (and continues to serve) a variety of problematic functions for the powerful and privileged castes.

The prison-industrial complex as we know has its origins in the “law and order” rhetoric of Richard Nixon.⁵⁹ In 1969, roughly six months after the Reverend Doctor Martin Luther King was murdered, Richard Nixon was elected President of the United States. Nixon rose in prominence in part because of his promise of “order” in response to the disturbance of the social order caused by the Civil Rights Movement.⁶⁰ Nixon revamped a previous federal program, the Federal Law Enforcement Assistance Administration (“FLEAA”) which earmarked billions in federal funds for local and state police department use.⁶¹ These funds were said to be directed at aiding local law enforcement in increasing personnel and obtaining necessarily technology to stem rising crime rates,⁶² but statistical modeling suggests “where blacks mobilized for political activity...per capita policing expenditures were larger in 1971,” suggesting racial and political motivations directed the use of funds on policing.⁶³

With the expansion in funding for policing came an expansion of arrests, and so followed an expansion in jails and prisons.⁶⁴ It did not take

58 David A. Makin, Dale W. Willits, and Nicholas P. Lovrich, *Marijuana Legalization and Crime Clearance Rates: Testing Proponent Assertions in Colorado and Washington State*, 22 POLICE QUARTERLY 3, 31–55. <https://doi.org/10.1177/1098611118786255> (“[F]indings suggest [cannabis] legalization has resulted in improvements in some clearance rates [of other crimes].”).

59 MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (rev. ed. 2012).

60 *See Id.* at 40-46.

61 *Nixon Signs Bill Extending Crime Agency 3 Years*, N.Y. TIMES (Aug. 7, 1973), www.nytimes.com/1973/08/07/archives/nixon-signs-bill-extending-crime-agency-3-years-32billion-is.html.

62 John N. Mitchell, *The War on Crime: The End of the Beginning*, DEP’T OF JUSTICE. (September 9, 1971), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-09-1971.pdf>

63 Jackson, Pamela Irving, and Leo Carroll. *Race and the War on Crime: The Sociopolitical Determinants of Municipal Police Expenditures in 90 Non-Southern U.S. Cities* 49 AMERICAN SOC. REV. 290 (1981), available at <https://www.jstor.org/stable/2095061>.

64 John Stern, *The War on Drugs and Jim Crow’s the Most Wanted: A Social and Historical Look at Mass Incarceration*, RAMAPO J. OF L. & SOC., available at <https://www.ramapo.edu/law-journal/thesis/war-drugs-jim-crows-wanted-social-historical-look-mass-incarceration/>.

long for the expansion of incarceration to become big business. Private prisons are run for profit, contractors are paid to provide services to the imprisoned⁶⁵, governments and private parties use prisoners for their labor, for example, firefighting in the American West.⁶⁶ A variety of financial stakeholders⁶⁷ with hefty pocketbooks and significant political leverage are party to a system which gains “vast profits from free or cheap prison labor and from lucrative private and public prison contracts. Prisons play a direct role in capital accumulation since their operation generates profit for corporations engaged in building, equipping and operating them as well as those employing prisoners as cheap labor (internal citations omitted).”⁶⁸

Political leaders have significant motivation to keep jails and prisons full. The two largest for-profit prison companies in the country have a “combined \$3.3 billion in annual revenue.”⁶⁹ This revenue is spilled into lobbying local, state, and federal officials and have supported officials who enact laws to “put more Americans and immigrants behind bars – such as California’s three-strikes rule and Arizona’s highly controversial anti-illegal immigration law.”⁷⁰ Even with President Joe Biden’s executive order phase out DOJ contracts with private prisons,⁷¹ the federal government will still conduct business with private prisons for immigration holding, which is run by the Department of Homeland Security (“DHS”) rather than DOJ. President Biden’s DHS “has moved to negotiate at least 15 new or expanded

65 *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU (Oct. 24, 2016), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration>.

66 Isabelle Chapman, *Prison Inmates are Fighting California’s Fires, but are Often Denied Firefighting Jobs After their Release*, CNN (Oct. 31, 2019), <https://www.cnn.com/2019/10/31/us/prison-inmates-fight-california-fires-trnd/index.html>.

67 James Brewer, *Are You Unknowingly Investing in Private Prisons?*, FORBES (Feb. 25, 2021), <https://www.forbes.com/sites/jbrewer/2021/02/25/are-you-unknowingly-investing-in-private-prisons/?sh=4b624cf7226b>.

68 André Douglas Pond Cummings, *All Eyez on Me: America’s War on Drugs and the Prison-Industrial Complex*, J. OF GENDER, RACE AND JUSTICE, *Forthcoming*, (April 5, 2012) (Available at SSRN), <https://ssrn.com/abstract=2035133>.

69 Michael Cohen, *How For-Profit Prisons have Become the Biggest Lobby no one is Talking About*, WASH. POST (Apr. 28, 2015) www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/.

70 *Id.*

71 *Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, WHITE HOUSE (Jan. 26, 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/.

contracts, with both private prisons and local jails.”⁷² Private prisons are continuing to make massive amounts of money—for the people who run the companies, for those who own their stock, for their dedicated lobbyists, and for the elected officials receiving campaign contributions. Many in political leadership are not keen on using their positions to end the mass incarceration system because that system brings them financial benefit.

Given the amount of money to be made in the prison-industrial complex, state and municipal leadership are incentivized to make arrests. After all, without prisoners there can be no prison-industrial complex from which to extract wealth. The wealth-extraction does not end with private prison contracts: prisoners are used for cheap labor; they are sold back their basic human needs⁷³; and their families are targets of fines and fees.⁷⁴

The State of Arizona was sued by a private prison company because a private prison was not filled to the contractually required levels.⁷⁵ Arizona settled for \$3 million, meaning that the state paid for failing to incarcerate enough people.⁷⁶ So, states which hold similar contracts have an incentive to meet their contractual obligations. These states have a contractual obligation to police, arrest, convict, and incarcerate the people they are supposed to serve.

With so many financial benefits accruing to so many powerful groups, and with contractual incentives for states to incarcerate people, the financial incentives to continue the system of mass incarceration, so far, have defeated any meaningful movement to adhere to an ideal of justice. Despite the huge costs of maintaining the carceral state, the costs are applied to the general public, while money is being made by powerful stakeholders.⁷⁷ Major prison companies make money from contracts with gov-

72 Alice Sperti, *Private Prisons Are Really Bad, but Good Enough for Immigrants, Concludes Homeland Security Report*, INTERCEPT (Dec. 5, 2016), theintercept.com/2016/12/05/private-prisons-are-really-bad-but-good-enough-for-immigrants-concludes-homeland-security-report/.

73 Christopher Reinhart, *Inmates Paying for Costs of Their Incarceration*, CONN. DEP’T OF CORRECTIONS, www.cga.ct.gov/2006/rpt/2006-R-0231.htm (last visited Apr. 24, 2023).

74 Daniel Wagner and Eleanor Bell Fox, *Time is Money: Who’s Making a Buck off Prisoners’ Families?*, CENTER FOR PUBLIC INTEGRITY (Sept. 30, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/time-is-money-whos-making-a-buck-off-prisoners-families/>.

75 *Private Prison Sues State for Not Having Enough Prisoners*, WONDERGRESSIVE (Dec. 12, 2013), <https://wondergressive.com/private-prison-sues-state-wins-more-prisoners/>.

76 *Id.*

77 *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/money.html>.

ernments, and so they lobby and donate to political leaders.⁷⁸ Thus, these leaders have political and financial incentives to instruct their police departments to continue to make arrests to fill the prisons. These political leaders then provide career incentives to police officers to increase arrests. The very people with the power to end the carceral state are the very people in positions of public trust, but because many of them benefit financially from the prison-industrial complex the incentives to over-police, arrest, and incarcerate persist.

It should be noted that a similar issue arises as incarceration overlaps with other industries. After protests over an oil pipeline in Minnesota a Canadian energy company, Enbridge, wishing to remove protestors from the area paid millions to—and met regally with the leadership of—local law enforcement.⁷⁹ According to a statement made to the publication *Deadline Detroit*: “in Minnesota, a financial agreement with a foreign company has given public police forces an incentive to arrest demonstrators.”⁸⁰ Police were paid by a foreign company to use heavy-handed tactics and to make hundreds of arrests.⁸¹ This privately funded police assault served to repress Native American activist groups whose land is most directly (and often irreparably) harmed by the frequent oil spills.⁸² Here, too, the financial interests of ultra-wealthy corporations lead to Enbridge paying out millions to incentivize local officials to assault and incarcerate Native Americans and allied protestors at the expense of the environment and public safety.⁸³ Enbridge’s financial interests were served at the expense of climate activist and Native American lives, in part because the prison-industrial complex

78 Steve Horn, *Private Prison Firms Use Revolving Door Lobbying, Generous Campaign Donations, Prison Legal News*, PRISON LEGAL NEWS (Aug. 6, 2018), <https://www.prisonlegalnews.org/news/2018/aug/6/private-prison-firms-use-revolving-door-lobbying-generous-campaign-donations/>.

79 Hilary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protesters*, GUARDIAN (Oct. 5, 2021), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

80 *Company Behind Michigan’s Line 5 Paid Police to Crack Down on Minnesota Demonstrators*, DEADLINE DET. (Oct. 10, 2021), <https://www.deadlinedetroit.com/articles/28993/enbridge-paid-michigan-police-department-to-follow-pipeline-protesters>.

81 *Id.*

82 Sheila Regan, *‘It’s Cultural Genocide’: Inside the Fight to Stop a Pipeline on Tribal Lands*, GUARDIAN (Feb. 19, 2021), <https://www.theguardian.com/us-news/2021/feb/19/line-3-pipeline-ojibwe-tribal-lands>.

83 *Company Behind Michigan’s Line 5 Paid Police to Crack Down on Minnesota Demonstrators*, DEADLINE DET. (Oct. 10, 2021), <https://www.deadlinedetroit.com/articles/28993/enbridge-paid-michigan-police-department-to-follow-pipeline-protesters>.

provided Enbridge with a militarily armed police force and massive jails and prisons capable of repressing and engaging a large-scale people's movement.

Negative Incentives (Disincentives)

As we have seen, numerous incentives drive policing strategies. But what of the negative incentives, also known as disincentives? Are there considerations which would dissuade the problematic strategies previously discussed, and so act as a counterweight to financial incentives? (i.e., while an officer may be incentivized to meet a citation quota, will that officer face consequences for racial profiling while meeting that quota?) As legal schemes stand, none of the established disincentives provide adequate balance so as to off-set the incentives.

I. Federal Investigation and Consent Decrees are Often Insufficient:

Cities which incentivize their police departments to act as revenue generators may run afoul of a federal law, triggering a Department of Justice investigation. These investigations generally fall into the category of "Patterns and Practices," rather than criminal, and may result in a consent decree,⁸⁴ whereby the municipality and police department agree to initiate DOJ-approved reforms⁸⁵ under the supervision of a monitor.⁸⁶

While a city may be required to pay the sizable fees of the monitors and face unflattering press, and considerable reforms have been implemented in some municipalities, the threat of a Patterns and Practices investigation often does little to affect behavior. DOJ investigations routinely find police departments being used to bolster budget and disproportionality targeting Black and brown communities. A consent decree does not impose any punishment for doing so—if a city is found to routinely violate Constitutional rights and other applicable federal law, it is ordered to impose reforms over a predetermined period of time and pay the fees of monitors,

84 *The Facts on Pattern-or-Practice Investigations*, CENTER FOR AMERICAN PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/article/facts-pattern-practice-investigations/>.

85 James Walsh, *The Most Powerful Weapon for Police Reform Is Back*, N.Y. MAG. (Apr. 21, 2021), <https://nymag.com/intelligencer/2021/04/what-do-justice-department-consent-decrees-do.html>.

86 Julia Ainsley, *Justice Department to Set New Rules for Court-Appointed Monitors of Police Departments*, NBC (Sept. 13, 2021), <https://www.nbcnews.com/politics/justice-department/justice-department-set-new-rules-court-appointed-monitors-police-departments-n1279051>.

but generally face no other repercussions.⁸⁷ So, a city need not be overly concerned that the DOJ will investigate; the DOJ investigation may come, but neither the city nor its agents will have to pay any meaningful reparations or face any consequence to speak of, and so still keep the benefits of their malfeasance.

Even when a consent decree is imposed, ordering a police department to implement reforms, the decrees are often rendered toothless. The Chicago Police Department (“CPD”) is subject to a consent decree resulting from a lawsuit brought in federal court by the Illinois Attorney General in 2018.⁸⁸ In 2021, the civilian commanding officer of the CPD Audit Division, Chad Williams, who was charged with the implementation and oversight of the consent decree, resigned.⁸⁹ In his resignation letter to Chicago Mayor Lory Lightfoot he stated, “[u]nfortunately, my disappointment with the inability of this department’s top leadership to even feign interest in pursuing reform in a meaningful manner has made it impossible for me to remain involved.”⁹⁰ Chad Williams resigned because, despite his high-ranking status in the CPD, he believed implementing reforms legally mandated in the consent decree was a fool’s errand. His conclusion is not without merit, as the CPD continuously missed deadlines for implementing reforms, missing 70% of its deadline in 2020 according to the Chicago Inspector General.⁹¹ The Chicago Office of the Inspector General (“OIG”) reports that the CPD routinely fails to implement its suggestions on policies which could bring the city into compliance with the consent decree.⁹²

The CPD has failed to meet its legal mandates, yet high-ranking police officials appear to be undisturbed.⁹³ After all, they have not faced any

87 N’dea Yancey-Bragg, *DOJ Looking for Discrimination, Excessive Force in Massachusetts Police Department. What’s Next?*, USA TODAY (Nov. 18, 2022), <https://www.usatoday.com/story/news/nation/2022/11/18/how-justice-department-pattern-practice-investigations-consent-decrees-work/10719876002/>.

88 Consent Decree, *State of Ill. v. City of Chi.*, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019).

89 Gregory Pratt, *Chicago Police Leader Resigned over Inability of Department Brass to even Feign Interest in Reform, then Accused Officials of Retaliation*, CHI. TRIB. (Nov. 11, 2021), www.chicagotribune.com/news/breaking/ct-chicago-police-consent-decree-reforms-resign-lightfoot-20211111-pdnyih24rgobpw6bmjogwgf4a-story.html.

90 *Id.*

91 Fran Spielman, *Inspector general turns up the heat on Chicago Police Department*, CHI. SUN-TIMES (Nov. 2, 2020), <https://chicago.suntimes.com/city-hall/2020/11/2/21546446/inspector-general-joe-ferguson-chicago-police-reform-consent-decree>.

92 *Follow-up: Review of the Chicago Police Department’s Management and Production of Records*, OIG FILE #21-0579 (Sept. 16, 2021), <https://igchicago.org/wp-content/uploads/2021/09/CPD-Records-Management-Follow-Up.pdf>.

93 Pratt, *supra* note 89.

significant legal ramifications for failing to implement reforms as required by law. With no action taken against the city or its officials, the consent decree fails to disincentivize the department from continuing in its racially disparate and unlawful policing strategies. Supporting the claim that the city and CPD are not disincentivized from following its previous racist and unconstitutional policing strategies is a 2021 lawsuit filed by a CPD Lieutenant Franklin Paz. Paz alleges that he was removed from his supervisor position on a city-wide unit ironically known as the Community Safety Team because he refused to order his subordinates to conduct unlawful stops, searches, and seizures.⁹⁴ Paz's attorney comments that the Community Safety Team was expected to engage in "[n]umbers-driven policing [which] leads to illegal policing in the neighborhoods of people of color."⁹⁵

Despite the consent decree, the CPD is facing allegations by its own ranking officials that the CPD is requiring numbers-based, illegal, and racially disparate behavior.⁹⁶ The CPD is undeterred by the consent decree, as it has not been meaningfully enforced against the city or any city officials. No consequences of significance have been levied for failure to follow the consent decree, and so the CPD continues to incentivize numbers-based, illegal, and racially disparate policing without being encumbered by adequate disincentives.

That is not to say that legal action to enforce the consent decree could not be imposed. However, "[o]nce the decree is fulfilled...and DOJ and the monitors leave, there is no requirement to maintain the standard that earned the resolution of the decree. In fact, there is no established mechanism or requirement to maintain any of the accountability features that were established under the [consent decree]."⁹⁷ So, even if a consent decree was enforced once its terms have been met the department need not continue to adhere to the reforms in the consent decree. The consent decree, even if initially followed, provides no permanent reform so that the old incentives which supported the very practices which led to federal investigation can be reinvigorated as soon as the initial terms of the agreement are met.

Nor do consent decrees necessarily cut off federal funding to the de-

94 Jeremy Gerner and Annie Sweeney, *Chicago Police Supervisor Sues City, Alleging Special Citywide Unit Improperly Driven by Traffic Stops and Arrests*, CHI. TRIB. (Jan. 19, 2021), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-lieutenant-whistleblower-suit-20210119-nsgj7i7chne75lap37zonyxyzy-story.html>.

95 *Id.*

96 *Id.*

97 Geoffrey Alpert, Kyle Mclean, and Scott Wolfe, CONSENT DECREES: AN APPROACH TO POLICE ACCOUNTABILITY AND REFORM, 20 POLICE QUARTERLY (Sept. 2017).

partment in question. “For instance, in September 2013, six months after the Justice Department began a new investigation into discriminatory policing in Cleveland, the city received a grant of \$1.25 million to hire 10 new police officers and another \$1 million for crime-prevention efforts. The next year, just before Attorney General Holder accused the force of ‘systemic deficiencies,’ it was awarded \$1.9 million more to hire 15 new officers.”⁹⁸

The threat of a federal investigation and consent decree offer no significant disincentive to a department or to any individual police officer, as they can easily be ignored, have no mechanism to ensure continuous compliance, and do not even halt the flow of federal funding.

II. 1983 Lawsuits are Insufficient:

The Civil Rights Act of 1871 grants individuals a cause of action if the rights granted to them by the Constitution or other federal law is violated by a government official acting under the color of law.⁹⁹ This law allows individuals to sue government employees, law enforcement employees included, for violations of the individual’s rights. The threat of a lawsuit could certainly act as a powerful disincentive—for instance, if a police officer’s supervisor orders an illegal search (and so incentivizes the officer to conduct the search), that officer might refuse the instruction of the supervisor if that officer will be held personally liable in a lawsuit for their tortious conduct. The career and financial benefit of unlawful policing could be outweighed by the cost associated with financial liability for unlawful policing. However, the law provides immense protections so that police officers generally need not fear a lawsuit (and so are only nominally subject to the disincentivizing influence they present).

The Supreme Court of the United States has crafted a protection for those violating Constitutional rights: qualified immunity. The Supreme Court provides the definition:

Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law” (internal citations and quotation marks

⁹⁸ Simone Weichselbaum, *The Big Problems with Police That Washington Can’t Fix*, TIME (Mar. 12, 2019) <https://time.com/police-shootings-justice-department-civil-rights-investigations/>.

⁹⁹ 42 U.S.C.S. § 1983.

omitted).¹⁰⁰

Qualified immunity was created by the Supreme Court in 1967 in *Pierson v. Ray*, which was a suit originally brought in 1961, the midst of the Civil Rights Movement, by a number of Freedom Riders who were arrested for not leaving a coffee shop that white police officers did not want them shopping in.¹⁰¹ While the Court in *Pierson* did not develop the phrase “qualified immunity,” it created an exception to the statute whereby an officer in “good faith and with probable cause in making an arrest under a statute that they believed to be valid” is immune, and so protected the police from liability for falsely arresting the Freedom Riders.¹⁰²

Qualified immunity protects law enforcement from liability unless a nearly exact fact pattern had been before a court previously and found to be unconstitutional. A police officer who tried to shoot a non-threatening dog but shot a child,¹⁰³ a jail guard who sexually assaulted a prisoner,¹⁰⁴ prison guards who locked a prisoner in solitary confinement for complaining that his cell was full of feces,¹⁰⁵ officers who sicced a dog on a surrendering suspect who held his hands up,¹⁰⁶ were all protected by qualified immunity.

However, even if a judge does not grant an officer qualified immunity, the individual officer almost never pays the judgement to the plaintiff out of their own pocket.¹⁰⁷ A 2014 empirical study found that “governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement. Law enforcement officers in...[the] study never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments—even when indemnification was prohibited by law or policy.”¹⁰⁸ So, qualified immunity serves to block the dissuasive power that lawsuits

100 *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).

101 *Pierson v. Ray*, 87 S. Ct. 1213 (1967).

102 *Id.* at 1218.

103 Mariel Fernandez, *How Police Use Qualified Immunity to Get Away with Misconduct and Violence*, NAACP (Nov. 8, 2021), www.naacpldf.org/qi-police-misconduct/.

104 Andrew Cohen, *Who Pays for Jail Rape?* MARSHALL PROJECT (July 17, 2017), <https://www.themarshallproject.org/2017/07/17/who-pays-for-jail-rape>.

105 *Mitchell v. Nev. ex rel. Nev. Dep’t of Corr.*, No. 2:17-cv-00986-JAD-BNW, 2020 U.S. Dist. (D. Nev. May 7, 2020).

106 Eric Boehm, *The Cops Who Sicced a Dog on a Surrendered Suspect Got Qualified Immunity. SCOTUS Won’t Hear the Case*, REASON.COM (June 15, 2020), <https://reason.com/2020/06/15/police-qualified-immunity-supreme-court-clarence-thomas-baxter/>.

107 Raymond J. Fadel, *Police Indemnification*, 89 N. Y. UNIV. L. REV. 885 (Aug. 6, 2018), available at www.nyulawreview.org/issues/volume-89-number-3/police-indemnification/.

108 *Id.*

provide: if officers do not have to worry that their actions could result in financial liability then they are more likely to engage in the behaviors which are incentivized, whether Constitutional or not.

While the municipality may be on the hook for the settlements or judgments, they too benefit from qualified immunity, which limits the number of suits they need to be concerned about. However, municipalities and States do pay out millions each year¹⁰⁹—yet they are not incentivized to reform their policing schemes. Professor Daryl Levinson of New York University argues that governments do an analysis and conclude that the benefits of Constitutional rights violations outweigh the cost of payouts, and so governments are happy to budget for violations of Constitutional law.¹¹⁰ He writes:

“So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.”¹¹¹

The Baltimore Sun, after the City of Baltimore paid millions to a victim of police torture, noted: “the \$5.7 million in taxpayer funds paid out...would cover the price of a state-of-the-art rec center or renovations at more than 30 playgrounds.”¹¹² The implication: police payouts prevent the government from using those funds on social services and public goods because, “Rather than the police department budget, these funds mostly come from [municipal] general funds”¹¹³ which would otherwise have been available for public services. Thus, they affect the people most benefited by social services and public goods—often the very people targeted by police

109 *Tracking Police Misconduct Settlements That Cost Cities Millions*, NPR (Feb. 27, 2021), <https://www.npr.org/2021/02/27/972144994/tracking-police-misconduct-settlements-that-cost-cities-millions>.

110 Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *UNIV. OF CHICAGO L. REV.* 365 (2000), available at <https://chicagounbound.uchicago.edu/uclrev/vol67/iss2/2>.

111 *Id.* at 370.

112 Mark Puente, *Sun Investigates: Undue Force*, *BALTIMORE SUN* (Sept. 28, 2014), <https://data.baltimoresun.com/news/police-settlements/>.

113 Rashawn Ray and Clark Neily, *A Better Path Forward for Criminal Justice: Police Reform*, *BROOKINGS INST.* (Apr. 30, 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-police-reform/>.

misconduct. If we apply this reality to Professor Levison's cost-benefit analysis, we see that the powerful receive benefits from police abuse while the costs to the city budget are felt most significantly by the victims of police abuse. So, because the people most affected by the cost of police misconduct lawsuits are the very communities most often overly policed, governments (and their ranking officials) are happy to continue benefiting the majoritarian powerful¹¹⁴ (who are funding reelection campaigns,¹¹⁵ lobbying to use state assets for business interests,¹¹⁶ and hiring into think tanks¹¹⁷) at the expense of the lower class and Black and brown people.

Conclusion: A Way Forwards is to Change the Incentives

Historically, policing has been leved heavily against Black and brown people as an intentional and overt mechanism to maintain a racist caste system. Because of the prevailing results of centuries of overt racism, even if every racist was removed from policing and if every current law was genuinely race-neutral, the career and financial incentives provided

114 *Author's Note*: I use the phrasing "majoritarian powerful" to respect the vocabulary used in Levison's scholarship, but to also annotate that the phrase "majority" may not be appropriate or accurate. The Sentencing Project found that "about 5.2 million Americans are disenfranchised in 2020. When we break these figures down by race and ethnicity, it is clear that disparities in the criminal justice system are linked to disparities in political representation." *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENTENCING PROJECT, www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/ (last visited Apr. 24, 2023). Additionally, "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence." Martin Gilens and Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 564-81 (2014). Given the importance of political economy and social power in implementing government policy, it may be that the disenfranchised are left out of the cost-benefit analysis. So, when looking at who benefits the most from Constitutional rights violations, it may or may not actually be the *numerical majority* that sees the benefit, but rather the predominantly white and the predominantly wealthy groups.

115 Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, GUARDIAN (June 23, 2020), <https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la>.

116 Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URBAN AFFAIRS REV. 41 (2019) ("The theory presented by supporters of 'quality of life' policing is that such policing... improv[es] the appearance and business climate of urban areas.").

117 Jonathan Mahler, *How One Conservative Think Tank Is Stocking Trump's Government*, N.Y. TIMES, (June 20, 2018), <https://www.nytimes.com/2018/06/20/magazine/trump-government-heritage-foundation-think-tank.html>.

by public leaders to police departments ensures that policing will remain disproportionately harmful to Black and brown people particularly those in low-income areas. Because the powerful white and wealthy case has forced Black and brown people to disproportionately face financial strain and the impact of the carceral state, and because police officers receive financial and career benefits from targeting low-income people and locking people into the carceral state, policing will remain a racist, classist system, regardless of the intent of any individual officer of patrol.

The silver lining: incentives can be changed. If incentives can be changed, behaviors will follow, and so too the system of policing and incarceration. Naturally, financial incentives alone cannot solve all the issues at play in the criminal justice system. But they can have a significant impact. Four main incentives could be removed from policing, then predatory policing would steadily decline. First, if police departments are prevented from enforcing quotas and are not permitted to use citations and civil asset forfeiture to bolster budget shortfalls, then the predatory policing practices designed to extract wealth will no longer be incentivized. Second, if patrol officer promotions are not tied purely to numbers (such as number of arrests and citation), but instead to factors indicative of public safety (such as de-escalation skills or lack of citizen-complaints) then police would not view their job as arrest-making and money-generating. Third, if federal grants are not tied so strongly to numbers (such as number of drug arrests), but instead to factors more relevant to public safety (such as a decline in violent crimes time), then police departments would be incentivized to solve crimes and reduce conflict rather than hunt for (or even fabricate by falsifying evidence) an excuse to make an arrest. Finally, the prison industry needs to be decoupled from public leadership, so that political leaders with the power to effectuate change are not incentivized to support the carceral industry at the expense of the public.

If a police officer is acting in her own self-interest, then she will act on whatever behavior will most benefit her—if she gets promotions for making arrests, then she will make arrests; if she is not rewarded from earning the trust of a community, then she will not try to earn that trust. However, if good behavior and public safety are incentivized and rewarded with arrests and incarceration seen as a last resort rather than a daily goal, that police officer, still acting in her own self-interest, will engage in the rewarded behavior. She will act with discretion if she gets promoted for displaying good judgment, rather than for the total number of citations written. She will get out of her squad car and engage with the community if she is rewarded for the number of people on her beat who trust her, rather than the number of people on her beat she arrests.

Changing the incentives may even alter the sort of person drawn to policing: the right-wing extremists the FBI warns are joining police departments may not desire to join the police department if they are expected to serve Black and brown people rather than imprison them. Changing incentives may not solve all the issues in policing—it may not even directly change the policing or carceral system. But it is a way to encourage and increase positive interactions and public safety rather than violence and incarceration. Best of all—with the right organization, activism, and public support—the public officials with the power to change the incentives can be pushed to enact these incentive changes, and so significantly change the behaviors of police officers as they interact with the public.

Background: Sabyne “Free” Pierre is an organizer, law student, and poet at heart. free uses art to process their personal experiences to advocate for legal, systemic changes. In their poem, “we been knew the cops”, they interact with a younger version of themselves, who still exists somewhere and grapples with the lasting effects of police presence in their elementary and middle school in Irvington, NJ.

We been knew the cops

so tyrek was mad again and
the principal let him be handcuffed and
sit inside the cop car to
see what it was like. and nobody
said nothing
he cried
we laughed
we was all red and loud

and felix was a big boy
but that lunch period you’d a
mistaken boy for bird
kid for kite
for threat
something you let go of and forget
then BOOM
BOOM
he came down and that year we
found out a body slam get you a transfer to the High school

me, I never said nothing
I slid through metal detectors with rocks
on my tongue and pebbles cascading through my ribcage

what if there was a wrong way to say good morning?

Involuntary Civil Commitment as Mass Incarceration

Tristan Campbell

INTRODUCTION

Involuntary civil commitment in the United States is a legal intervention by which a judge may order that a person whom the judge believes is demonstrating symptoms of a serious mental disorder, and meeting other specified criteria, be confined in order to receive treatment for this disorder for some period of time.¹ Involuntary commitment lies at the intersection of public health and the criminal legal system, acting as a “healthcare-to-prison pipeline” that further exacerbates racial disparities and reinforces white supremacy. The systems, structures, practices, and policies of structural oppression as seen through the exercise of involuntary commitment increase the power of the carceral state and further infringe on the liberty of individuals and communities to address behavioral and mental health crises without involving the police.

I. INVOLUNTARY CIVIL COMMITMENT

The law surrounding civil commitment has traditionally been based on two distinct but equally important sources of state power: the state acting as *parens patriae* (“parent of the country”) in caring for the individual and the state acting through its police power in protecting society.² Although dangerousness to self or others is the most common basis for commitment, many states permit commitment in other contexts such as an inability to care for oneself. Depending on the state, the permitted maximum duration of treatment ranges from less than one month to more than one year for both initial and subsequent civil commitment orders.³ Hearings for involuntary civil commitments have been described as a “charade” with the average length of the hearing ranging from 4 to 9 minutes long.⁴ An involuntary civil com-

1 United States Substance Abuse and Mental Health Services Administration (SAMHSA), *Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice*, 1 (2019).

2 Jonathan Cantarero, *The Ethics of Civil Commitment*, 16 J. OF HEALTH AND BIOMEDICAL L. 105, 111 (2020).

3 Paul P. Christopher et al., *Nature and Utilization of Civil Commitment for Substance Abuse in the United States*, 43 THE J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 313, 313 (2015).

4 Michael L. Perlin, “Who Will Judge the Many When the Game is Through?”: Consider-

mitment hearing must be held within some number of hours or days after commencement of custody. Not every state requires a hearing, however. In New York, hearings are held only upon request. Individuals who are medically certified for admission may be held for up to 60 days without any court order, although they are assigned legal counsel and may request a hearing at any time.⁵ Retention beyond 60 days must be authorized by a court, but no hearing need be held unless requested.⁶

Although often overlooked, confinement in a mental health institution can actually be more severe than the criminal penalty one would receive for similar misconduct.⁷ Thus, some argue that commitment should be used as a last resort when judges and doctors are extremely confident that commitment is the only viable option, and states should implement a constitutional limitation on the length of confinement prior to a rehearing.⁸ This would allow individuals who are facing liberty and property deprivations due to mental illness the ability to receive—at a *minimum*—similar protections as those who face such deprivations through the criminal legal system.⁹

A. Challenges to Public Tracking of Civil Commitment

It is difficult to determine both the scope and frequency of the use of involuntary civil commitment due to several complications including “patient privacy concerns, decentralized systems of mental health care, and variable commitment criteria across jurisdictions.”¹⁰ In 1976, George Dix published an article that identified that “vigorous legal scrutiny of systems for involuntary treatment of mental illness has created an increased need for information from the behavioral sciences. Unfortunately, little such information is available.”¹¹ Almost half a century later this is still the case as there is little to

ing the Profound Differences Between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts, 41 SEATTLE U. L. REV. 937, 937 (2018).

⁵ SAMHSHA, *supra* note 1, at 12.

⁶ *Id.*

⁷ Samantha M. Caspar & Artem M. Joukov, *Worse than Punishment: How the Involuntary Commitment of*

Persons with Mental Illness Violates the United States Constitution, 47 HASTINGS CON.

L.Q. 499, 501

(2020).

⁸ *Id.*

⁹ NY Mental Hygiene Law, §9.33

¹⁰ Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 PSYCHIATRIC SERVICES 741, 741 (2020).

¹¹ George E. Dix, “Civil” Commitment of the Mentally III and the Need for Data on the Prediction of Dangerousness, 19 AM. BEHAV. SCIENTIST 318, 318 (1976).

no aggregation of national statistics relating to civil commitment.¹²

In 2019, Gi Lee and David Cohen shared that “the number of people detained nationally has never been reliably estimated” and used what scarce information was available to extrapolate that there are more than *one million* instances of civil commitment every year.¹³ These researchers later published an article in 2021 which found that the most recent and complete set of data on emergency detentions in the US was from 2014 and based on 24 states.¹⁴ During that year, those 24 states (representing 51.9% of the US population) reported 591,402 detentions.¹⁵ This can be extrapolated to for the entire US population which is notably close to the one million estimate in 2014.

Regardless of how accurate this estimate is, there is no publicly available federal data on civil commitment and no evidence that the federal government is even tracking it. A 2016 study by Leslie C. Hedman notes that an analysis of civil commitment interventions “depend[s] on several factors: the statutory criteria and their application, the accuracy of the process for triggering an emergency hold . . . and the relationship of holds and hold procedures to health and treatment outcomes. There is little research aimed at measuring these factors.”¹⁶ Notably, the federal government and all states gather and publish at least some data related to arrests and incarceration.¹⁷ At the federal level, this data also includes “distributions of prisoner age, sex, race-ethnicity, location, citizenship, and offense characteristics.”¹⁸ Despite civil commitment often mirroring—and sometimes substituting for—incarceration, there is almost no data in comparison. One article explains this by suggesting that the “discretionary rather than mandatory nature of commitment laws . . . reflects society’s ambivalence toward coerced care” and this ambivalence extends to a failure of the state to gather any meaningful data about whom they are detaining.¹⁹

12 See, e.g., Morris, *supra* note 10.

13 Gi Lee & David Cohen, *How Many People Are Subjected to Involuntary Psychiatric Detention in the U.S.? First Verifiable Population Estimates of Civil Commitment*, Society for Social Work and Research 23rd Annual Conference, San Francisco (Jan. 18, 2019).

14 Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 *PSYCHIATRIC SERVICES* 61, 63 (2021).

15 *Id.*

16 Leslie C. Hedman et al., *State Laws on Emergency Holds for Mental Health Stabilization*, 67 *PSYCHIATRIC SERVICES* 529, 532 (2016).

17 Morris, *supra* note 10, at 743.

18 *Id.*

19 Lee & Cohen, *supra* note 13, at 66.

B. Quality of Counsel at Traditional Civil Commitment Hearings

The lack of accountability after civil commitment takes place as evidenced by the insufficient collection of data is also present *during* civil commitment proceedings in the form of inadequate counsel. Michael L. Perlin notes that empirical research demonstrates that “most lawyers prepared much less for civil commitment cases than for other cases, many did not speak to clients before the hearing, and they rarely took an adversary role to obtain release of their clients whom psychiatrists had recommended for commitment.”²⁰ Counsel is often described as “woefully inadequate . . . disinterested, uninformed, roleless, and often hostile.”²¹ In addition to the effect this has on their clients, ineffective counsel also results in a diminished amount of case law because few civil commitment cases are taken to trial. For example, Virginia has a slightly larger population than Minnesota, yet Virginia has ~98% fewer published and litigated cases on questions of mental hospitalization; one possible explanation is that, unlike Virginia, Minnesota “has a tradition of providing vigorous counsel to persons with mental disabilities.”²²

On the other side of the bench, judges are described as having “little judicial experience and little incentive to develop expertise in this area” which conveys that “patients’ rights . . . are not important.”²³ One study identified that “fewer than one-third of judges told patients of their right to counsel, fewer than one-fourth told patients of their right to voluntary status, and about two-fifths told patients of their right to appeal.”²⁴ In summary, civil commitment hearings are the “disfavored stepchild in the large family of concerns that must be addressed by the justice system.”²⁵

II. CRITICAL RACE THEORY AND INVOLUNTARY COMMITMENT

In the context of involuntary civil commitment, critical race theory (“CRT”) can be used as “a framework to theorize and understand the racial logics that are used to maintain the existence of an unethical and ineffective

²⁰ Perlin, *supra* note 4, at 940-941.

²¹ *Id.* at 941.

²² *Id.*

²³ *Id.* at 942.

²⁴ *Id.* at 943.

²⁵ *Id.* at 945.

health law such as involuntary commitment”.²⁶ Specifically, how “ethnoracial statistics have historically been used to justify or even uphold the use of involuntary commitment.”²⁷ The “racialization of involuntary commitment is a feature not an error of the law.”²⁸ The subordination of Black people in the legal system is co-existent with that of people who have mental health issues. Perlin argues that this is reflective of individual judges’ explicit or implicit bias against people who fall outside the types of people that judges want to see in their community.²⁹

While there is extensive research detailing the disproportionately large rate of imprisonment for African American men and other minorities, there is relatively little legal analysis on the use of mass involuntary civil commitment. However, involuntary commitment sites of confinement often mirror traditional prisons in regard to whom they target and confine, and the way in which they do it. In some cases, these sites are operated within correctional institutions even though the patients are not legally incarcerated.³⁰ Caspar describes this as an “impending catastrophe” where “confinement in a mental health institution can be more likely and more severe than the punishment a convict would receive for similar misconduct.”³¹ Civil commitment may last longer than incarceration yet most states apply only a clear and convincing evidence standard as opposed to the criminal beyond a reasonable doubt standard.³² This lower standard could be one explanation for the numerous cases where individuals have been committed based on a single misdiagnosis by a psychologist.³³

The lower standard for a grant of civil commitment results in scenarios like the one presented by Wahbi & Beletsky where a Black man was killed six minutes and thirty seconds after an involuntary commitment order was issued.³⁴ Ronald Armstrong was a 43-year-old Black man who had been diagnosed with bipolar disorder and paranoid schizophrenia.³⁵ In April 2011, he allegedly stopped taking his medication for five days.³⁶ His sister convinced him to go to the hospital to be assessed because she believed that there was

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Perlin, *supra* note 4, at 942-943.

³⁰ Rafik Wahbi & Leo Beletsky, *Involuntary Commitment as “Carceral-Health Service”: From Healthcare-to-Prison Pipeline to a Public Health Abolition Praxis*, 50 *THE J. OF LAW, MED. & ETHICS* 23, 26 (2022).

³¹ Caspar & Joukov, *supra* note 5, at 500-501.

³² *Id.* at 501.

³³ *Id.*

³⁴ Wahbi & Beletsky, *supra* note 30, at 24.

³⁵ *Id.*

³⁶ *Id.*

evidence he had been self-harming.³⁷ According to the police report, during an initial evaluation he became nervous and frightened by the environment, so he left the hospital.³⁸ As a result, the examining physician determined that Armstrong was a danger to himself and began the involuntary commitment process; the police were also called.³⁹ When the police encountered Armstrong, the order had not yet been processed so they engaged him in conversation and tried to convince him to return to the hospital.⁴⁰ However, once they received word that the commitment order had been processed, they moved to detain Armstrong.⁴¹

The five officers present tried to remove Armstrong from a post he had wrapped himself around.⁴² The police report noted that Armstrong was “anchored to the base of a stop signpost . . . in defiance of the [commitment] order” despite there being no evidence that Armstrong was capable of understanding that there was a commitment order issued and much less that he was defying it.⁴³ Just 30 seconds after the police were notified that the commitment order had been finalized, they deployed a taser on Armstrong five separate times.⁴⁴ Once they pulled him off the post, they pinned him down and handcuffed him.⁴⁵ While he was being pinned, he stated that he was choking and could not breathe.⁴⁶ The officers left him handcuffed on the ground and returned to their cars.⁴⁷ Armstrong’s sister noticed that he was unresponsive and not breathing.⁴⁸ Approximately six minutes and thirty seconds had passed between the civil commitment order being issued and police murdering Armstrong.⁴⁹

Armstrong’s case primarily focused on whether use of the taser constituted excessive force, and there was no mention of the involuntary commitment order outside of a factual summary.⁵⁰ This was hardly an isolated incident as “law enforcement kill Black men with mental illness at significantly greater rates than white men.”⁵¹ Even when individuals are not killed during

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Estate of Armstrong v. Pinehurst*, 810 F.3d 892, 892 (4th Cir. 2016).

51 Wahbi & Beletsky, *supra* note 30, at 25.

apprehension, “violently restrained individuals are committed to so-called treatment centers for ‘rehabilitation’ but these sites are far from treatment or rehabilitation, but rather another form of prison or jail.”⁵² This is more concerning because the use of involuntary commitment continues to increase even as rates of incarceration stabilize.⁵³

III. INSTITUTIONALIZATION AND INCARCERATION

A. Involuntary Commitment as a Carceral-Health Service

The argument that civil commitment is an extension of the racial carceral system begins by situating it within “the larger history of social, racial, and class control of the earliest penal systems.”⁵⁴ Michael Foucault references a “bad economy of power” where unilateral decisions are made with “regards to criminal doctrine, procedure, and punishment, etc.”⁵⁵ The goals of most penal reform throughout history have been a dispersion of the bad economy of power as opposed to an elimination or transformation.⁵⁶ As a result, reform never seeks to provide more humane treatment but rather “render [the power to punish] more regular, more effective, more constant, and more detailed in its effects; in short . . . increase its effects while diminishing its economic cost and its political cost . . . the new juridical theory of penalty corresponds . . . to a new ‘political economy’ of the power to punish.”⁵⁷

Thus civil commitment is not just a health law with the “power to ‘treat’ individuals with serious mental health issues” but rather an extension of Ben-Moshe’s conception of the political economy of punishment.⁵⁸ This rests within a larger theory from Ben-Moshe that “the project of social control by the state, through the penal system, was connected to the targeted control and elimination of those with disabilities, including psychiatric, developmental, and physical.”⁵⁹ Wahbi & Beletsky argue that “involuntary commitment is not treatment for the sake of public safety, but rather . . . punish[ment] through violence . . . [specifically] violence on people and bodies that are deemed deviant.”⁶⁰ This expansion of the carceral state is described as having

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Wahbi & Beletsky, *supra* note 30, at 26.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Liat Ben-Moshe, *Disabling Incarceration: Connecting Disability to Divergent Confinements in the USA*, 39 *CRITICAL SOC.* 385, 385 (2011).

⁵⁸ Wahbi & Beletsky, *supra* note 30, at 26.

⁵⁹ *Id.*

⁶⁰ *Id.* at 27.

three characteristics:

(1) that carceral expansion is not related to crime rates, (2) that the investment in punishment is directly related to divestment in other aspects of society that create equitable opportunity, and (3) that it is targeted toward the literal capture and metaphorical containment of black and other people of color, Indigenous peoples, transgender and gender-non-conforming people, young people from poor communities, people with mental health issues, and other groups who are disadvantaged by institutionalized oppression, and as such, it is an artifact of social control and exclusion.⁶¹

This theory of capture and control is not limited to prisons and institutions but rather carceral-type services that “replicate the control, surveillance, and punishment of the Prison Nation . . . thus, punitive and social services can become indistinguishable.”⁶²

1. Abolishing Carceral-Health Services

Prison industrial complex abolition is “more than just eliminating laws such as involuntary commitment, or getting rid of armed officers that respond to mental health crises.”⁶³ Rather, it is “preventing further harm and violence from happening, and when it does occur, to not respond with more violence.”⁶⁴ This “positive project” of abolition involves supporting existing systems of care and creating new ones that are more effective.⁶⁵ A possible solution to civil commitment as a carceral-health service is an integrated evidence-based health and social service model in tandem with non-carceral community-based emergency and crisis response teams.⁶⁶ The use of alternative approaches serves to “address the issues, instead of caging them away.”⁶⁷ These approaches can be expanded to include “alternate crisis response systems (988 number), funding harm reduction services, supervised consumption sites, expanding access to medication for addiction treatment, and much more.”⁶⁸

61 Beth E. Richie & Kayla M. Martensen, *Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice*, 35 *AFFILIA* 12, 12 (2019).

62 Wahbi & Beletsky, *supra* note 30, at 27.

63 *Id.* at 28.

64 *Id.*

65 *Id.*; for a discussion on effectiveness, *see infra* Part IV.A.2.

66 Wahbi & Beletsky, *supra* note 30, at 28.

67 *Id.*

68 *Id.*

2. Prisoners with Disabilities at the Intersection

An analysis of imprisonment from the lens of disability studies begins with looking at “the social and economic conditions of disablement and incarceration rather than looking at disability as a cause for criminal acts.”⁶⁹ Thus, disability within a carceral abolition framework is not “a natural biological entity, but related to economic and social conditions that lead to an increased chance of both disablement and imprisonment.”⁷⁰ Not to mention the cyclical nature of incarceration or civil commitment where “conditions of confinement may cause further mental deterioration in prisoners . . . [and] this further distresses those incarcerated and worsens their mental and physical health overall.”⁷¹

B. Political Economy and the Institution-Prison-Industrial Complex

Political economy is another “explanatory scheme for the growing usage of confinement in capitalist societies.”⁷² This involves a shift from “our understanding of disability oppression from discussions of stigma and deviance to that of systematic economic exclusion of people with disabilities.”⁷³ In brief, a neo-Marxist⁷⁴ analysis provides that “disability is an ideology upon which the capitalist system rests because it can regulate and control the unequal distribution of surplus by invoking biological difference as the ‘natural’ cause of inequality.”⁷⁵ This does not mean that the capitalist system regards people with disabilities as unproductive, rather “disability supports a whole industry of professionals that keeps the economy afloat, such as service providers, case managers, medical professionals, health care specialists, etc.”⁷⁶ Thus, disability is now used to describe a population which must be “surveilled for political-economic reasons.”⁷⁷ From the point of view of the institution-industrial complex, “disabled people are worth more to the gross domestic product when occupying institutional ‘beds’ than they are in their own homes.”⁷⁸ This helps to explain some of the underlying motivation for

69 Ben-Moshe, *supra* note 57, at 397.

70 *Id.*

71 *Id.*

72 *Id.* at 390.

73 *Id.*

74 In this context, neo-Marxist relates to economic surpluses which are absorbed by imperialistic and militaristic government tendencies.

75 *Id.* at 391.

76 *Id.*

77 *Id.* at 392.

78 *Id.* at 393.

carceral civil commitment.

IV. THE ETHICS OF CIVIL COMMITMENT AND CIVIL COMMITMENT ALTERNATIVES

Joseph M. Livermore describes involuntary confinement as “the most serious deprivation of individual liberty that a society may impose.”⁷⁹ He goes on to identify that the “philosophical justifications for such a deprivation by means of the criminal process have been thoroughly explored. No such intellectual effort has been directed at providing justifications for societal use of civil commitment procedures.”⁸⁰ This lack of effort is exacerbated by what Susan Hawthorne and Amy Ihlán describe as a “social and medical context in which care for serious mental illnesses is at best inconsistent.”⁸¹ The authors outline that because of the uniquely deficient role the courts have played in addressing mental illness, the “ethics of civil commitment for involuntary treatment . . . needs to go beyond the traditional focus on individual freedom and the harms of government coercion.”⁸² Their article recognizes that the “public debate over involuntary treatment or confinement for mental illness reflects important shared assumptions of US constitutional law and popular political culture, where protection of individual freedom and the limitation of state power are primary concerns.”⁸³ As a result, they suggest “an alternative way of thinking about the purposes and practices of civil commitment under an ethics of care, where the conceptual focus shifts from individual autonomy to a recognition of social interdependence and the moral value of caring relationships”.⁸⁴

There are three primary issues in tension when considering civil commitment: (1) how to maintain respect for individual liberty and autonomy; (2) concern for public safety; and (3) providing appropriate and effective treatment for mentally ill patients whose capacity to make their own treatment choices is contested.⁸⁵ There are also three “general social purposes”: (1) protecting the public from dangerous persons; (2) providing treatment for mental illness; and (3) providing for the basic physical needs of those unable to care for themselves.⁸⁶ The coalescence of these issues and purposes can be

79 Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 75 (1968).

80 *Id.*

81 Susan Hawthorne & Amy Ihlán, *Rethinking Civil Commitment: The Radical Resources of the Ethics of Care*, 1 PUB. PHIL. J. 1, 1 (2018).

82 *Id.*

83 *Id.*

84 *Id.* at 2.

85 *Id.*

86 *Id.*

seen in *O'Connor v. Donaldson* where the US Supreme Court held that “a State cannot constitutionally confine . . . a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”⁸⁷ However, when considering the ethics of civil commitment, this decision should represent the start of the discussion rather than the end. Because civil commitment takes place within the context of an adversarial legal system, there is a concern that the “needs for care and treatment of persons who have mental illness may often get lost in polarized ideological battles over the appropriate power of government and the provision of public resources to support mental health.”⁸⁸

A. The Ethics of Care

1. Relational Autonomy & Dignity

An ethics of care contends (or perhaps recognizes) that individuals are not solely and independently autonomous but rather, reliant on each other in “profound and ethically significant ways.”⁸⁹ This is related to a feminist recognition of both individual and community interdependence.⁹⁰ This interdependency necessarily extends beyond physical existence to “our ways of thinking and communicating, our received values, and aspects of our personhood established through social reciprocities.”⁹¹ By expanding an ethic of care beyond familial relationships, difficulties arise with regard to justice, freedom, and autonomy.⁹² Under an ethics of care, the government is responsible for individual welfare, but this is accompanied by a tension between “the partiality of individualized caring and the impartiality (arguably) required for justice and fairness.”⁹³ This tension introduces difficulty into the context of civil commitment as it may be “ethically justified for a caring, attached family to ‘win’ a civil commitment case and quite another matter for an uncaring, manipulative family to do so.”⁹⁴

An ethics of care approach also introduces confrontation with the overarching narrative of US law and political culture that state intervention

87 *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

88 Hawthorne, *supra* note 81, at 4.

89 *Id.* at 5.

90 *Id.*

91 *Id.* at 6. Contrast this with a European view of autonomy which emphasizes “solidarity, dignity, integrity, and vulnerability” as opposed to those views advanced in most US legal and political contexts.

92 *Id.*

93 *Id.*

94 *Id.*

in an individual's choices or actions infringes on liberty and autonomy.⁹⁵ In contrast, a relational view of autonomy only allows state intervention when it is beneficent from the perspective of the involved persons. This cooperative model which honors "the various relationships between the people who have mental illness, their families, friends, and caregivers, as well as mental health systems, government agencies, and the courts" will be further developed later in Section B.⁹⁶ The ultimate goal of this model is for "mentally ill persons to participate or collaborate in their care and treatment in a way that respects their contextualized capacities for agency."⁹⁷ This contextualized approach applies a sliding scale for competence in contrast with the "current adversarial commitment process under which individuals are considered either completely self-determining or effectively reduced to wards of the state."⁹⁸

This approach should not be construed to mean that individuals lacking the ability to exercise mental and physical independence are not deserving of autonomy. In contrast, the current civil commitment system says that those with serious mental illness lack autonomy and thus it is permitted or even *encouraged* to override their expressed wishes. This system results in a complication where actions "understood as caring by the courts could be disempowering paternalism in disguise."⁹⁹ A Kantian perspective would hold that "the dignity people intrinsically possess provides sufficient reason for treating people well" but is generally applied in a way that ties dignity to rationality rather than agency.¹⁰⁰ This conception of dignity further "recapitulates the disempowerment of those whose rationality is impaired or impugned".¹⁰¹ One response is that there is a directive to care for others not as a consequence of dignity but rather resulting from the care we ourselves need; rather than rationality, the source of dignity has been argued to be "the ability of a being to . . . receive care."¹⁰² An individual's dignity can be protected from paternalism through "maximizing their involvement in defining their own needs and making their own care decisions."¹⁰³

95 *Id.*

96 *See infra* Part IV.B.

97 Hawthorne, *supra* note 81, at 7.

98 *Id.*

99 *Id.* at 8.

100 *Id.* Contrast this with a Catholic perspective that dignity is not based on rationality but is an innate characteristic of those with the *potentiality* of rationality.

101 *Id.*

102 Interview with Eva F. Kittay, *Critical Ethics of Care* (Jun. 16, 2013).

103 Hawthorne, *supra* note 81, at 9.

2. Effective Care

An ethics of care requires that the care being provided actually be effective in meeting the needs of the person receiving care.¹⁰⁴ This legitimizes civil commitment only when the program to which a person is committed is effective.¹⁰⁵ As outlined in Part I, Section A it is difficult to determine effectiveness when data analysis is almost non-existent.¹⁰⁶ And even if the data were available, there are a number of issues related to effectiveness: the meaning of “effective” varies by context, the “effectiveness” standard is difficult to meet for the treatment of many mental illnesses, and there is a need for ethical assessment of practical limits on providing effective care when it is unavailable.¹⁰⁷ Briefly returning to a dignity analysis, “effectiveness” needs to be determined relative to goals and needs in ways that express the wishes of the cared-for individual as closely as possible.¹⁰⁸ When those other than the individual being committed set the terms, it increases the risk of paternalistic or coercive treatment.¹⁰⁹ By clearly identifying “need for treatment” standards, there is a better chance of intervention “before the crisis of imminent dangerousness to self or others” and this may be accompanied by an existence for the individual that is “higher than ‘survival in freedom.’”¹¹⁰

Additionally, an ethics of care provides a counter to libertarian reasoning which allows citizens the “freedom to neglect those who have a mental illness.”¹¹¹ This allows for a shift in the “ethical and legal thinking about civil commitment for involuntary treatment of serious mental illness”.¹¹² If civil commitment proceedings are able (or can be made) to recognize a relational understanding of autonomy, they can better support the committed individual even if this support involves restrictions on individual liberty; but this necessitates respect of the individual’s dignity. The ethics of care is not merely the provision of care but rather the provision of *effective* care which emphasizes that “the care needed by people who have mental illnesses cannot be the responsibility of just a few . . . [but rather] the responsibility accrues to wider society to provide adequate funding and systems so that people who have mental illness are not neglected.”¹¹³

104 *Id.*

105 *Id.*

106 *See supra* Part I.A.

107 Hawthorne, *supra* note 81, at 9.

108 *Id.*

109 *Id.*

110 *Id.* at 10.

111 *Id.*

112 *Id.* at 12.

113 *Id.*

B. Mental Health Courts as an Alternative to Involuntary Commitment

One possible solution is the use of mental health courts (MHC). Although there is no single prototype, virtually all MHCs include a special docket handled by a particular judge, with the primary goal of diverting defendants from the criminal legal system and into treatment.¹¹⁴ Because MHCs can divert persons with mental disabilities out of the criminal legal or involuntary commitment system, they provide an alternative to confinement. The MHC judge may function as “part of a mental health team that assesses the individual’s treatment needs”; then “the team formulates a treatment plan, and a court-employed case manager and court monitor track the individual’s participation in the treatment program and submit periodic reports to the judge concerning his or her progress.”¹¹⁵ One judge describes an MHC as requiring: (1) a therapeutic environment and dedicated team; (2) an environment free from stigmatizing labels; (3) opportunities for deferred sentences and diversion away from the criminal system; (4) the least restrictive alternatives; (5) decision-making that is interdependent; (6) coordinated treatment, and (7) a review process that is meaningful.¹¹⁶ The ultimate goal of MHCs is to divert persons with mental disabilities out of the criminal legal system.¹¹⁷ This is accompanied by proceedings in which “defendants participate more actively and directly than in typical criminal courts, often speaking directly with the judge instead of sitting silently while their defense attorney speaks for them.”¹¹⁸

1. Procedural Justice

Procedural justice is the theory that “people’s evaluations of the resolution of a dispute are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the ‘right’ outcome was reached.”¹¹⁹ Perlin argues that “individuals with mental disabilities, like all other citizens, are affected by such process values as participation, dignity, and trust, and that experiencing arbitrariness in procedure leads to social malaise and decreases people’s willingness to be integrated into

114 Perlin, *supra* note 4, at 947.

115 *Id.* at 947-948.

116 *Id.* at 949.

117 *Id.* at 950.

118 *Id.* at 951.

119 *Id.* at 954.

the polity, accepting its authorities and following its rules.”¹²⁰ The traditional civil court does not give patients the same opportunities for procedural justice afforded by MHCs.¹²¹

2. Therapeutic Jurisprudence

Therapeutic jurisprudence is a “model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.”¹²² The ultimate goal of this model is to “determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.”¹²³ The context of this model involves: (1) the extent to which legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles; (2) how the law actually impacts people’s lives; (3) whether the court system supports an ethic of care;¹²⁴ and (4) the extent to which the legal system abides by voice, validation, and voluntariness.¹²⁵ This perception of a fair hearing is therapeutic because “it contributes to the individual’s sense of dignity and conveys that he or she is being taken seriously.”¹²⁶

CONCLUSION

Civil commitment is one example of how health, medicine, and the law intersect to perpetuate the Institution-Prison-Industrial complex. Engaging in civil commitment abolition is made especially difficult by the lack of accessible data around the issue. Still, even without this information, “enough is known for action”¹²⁷ and both the legal and medical communities have an obligation to prevent civil commitment from continuing to be used as a form of mass incarceration. The disestablishment of white supremacy is not possible without abolition of the healthcare-to-prison pipeline.

120 *Id.* at 955.

121 *Id.* at 957.

122 *Id.*

123 *Id.*

124 *See supra* Part IV.A.

125 Perlin, *supra* note 4, at 957-958.

126 *Id.* at 926; for a discussion on dignity, *see supra* Part IV.A.1.

127 Andrew Hahn et al., *Dropouts in America: Enough Is Known for Action. A Report for Policymakers and Grantmakers*, The Institute for Educational Leadership (1987).

THE EVOLUTION OF A SOLUTION

By Kinetik Justice ¹

After 20 plus years of educating and organizing throughout the Alabama prison system, one of the most frequently asked questions I get is, “What is a work stoppage like?” Well, it’s surreal, it’s really hard to put into words and I don’t want to be cliché about it, but I’ll do my best.

It’s 12:01: an announcement is made amongst the prisoners, in every Dorm- IT’S OFFICIAL, WE’RE NO LONGER ON ADOC TIME, WE’RE ON FREEDOM TIME.

Around 1 a.m. the COs (correctional officers) come around to call for kitchen workers. There is this intense thickness in the prison where everybody’s on point to see if the kitchen workers went to work and how the police are going to respond. It’s just this extreme tension that’s so thick. It’s hard to explain but, everybody starts looking around at each other and nobody moves toward the door. Everyone begins chanting, “WE AIN’T GOING”. This feeling of euphoria starts to become contagious. It spreads around the Dorm as everyone realizes it’s on. We’re making a stand.

Then, reports from other Dorms confirm that people didn’t go to work, and so forth, it’s exhilarating and gives this extreme sense of power to hopeless people and that’s dangerous because that’s powerful.

What effect, if any does shutting a prison down, have on those incarcerated?

When you have powerless people who are hopeless and now, they

¹ Kinetik Justice Amun has been imprisoned and serving life without parole since he was twenty years old, but has not allowed his circumstances to deter him from fighting for justice, for himself and others. For almost all that time, he has been in segregation for once concocted reason or another. While in segregation, he has organized at least two prison strikes, appeared several times on “Democracy Now” and been interviewed by other news sources. Under the most adverse circumstances, he remains optimistic and upbeat, even when prison guards nearly killed him and left him with permanent eye damage that prison doctors have treated only sporadically.

are imbued with all this power, because we began to realize that we are the ones who control the institutions. These officers are here at our leisure, at any moment we could decide that nah, we ain't doing this no more. Then, it would be on them to try to run these prisons and they can't do it. Just that knowledge, that empowerment, changed the power relationship dynamic on a day-to-day basis between officers and brothers incarcerated, because the veil of false authority was lifted.

How many prison strikes have you been a part of?

I took part in strikes during 1999, 2002, 2007, 2014, 2015, 2016, 2018, 2021 and 2022. So, I've been directly involved in around nine different strikes within the Alabama Department of Corrections (ADOC), since I was introduced to the art of work stoppages as a tactic.

At Holman, in the nineties, the Tag plant was one of the most lucrative enterprises in the entire Alabama prison system. With this understanding, whenever things didn't go the way the tag plant workers wanted them to at Holman, they just didn't go to work. Effectively using their labor as leverage. When it was reported that the Tag plant was shut down, Montgomery would instantly send their representative to Holman to see what the problem was, give the workers what they wanted, rectify it, and the prison would go back to normal. It's been a tactic throughout the state of Alabama, it's like the evolution of a solution.

How did you arrive at Work Stoppages as the best method to address the conditions?

I was exposed early in my incarceration to work stoppages as a tactic, along with other demonstrations and tactics, such as hunger strikes, letter writing campaigns, litigation, and trying to get lobbyists to pass legislation. Through the process of elimination and through trial and error. I found the most effective tactic was work strikes. So, that's what we placed a lot of our focus on, trying to organize people around their labor and show them how their incarceration was about economics.

We learned that the most effective way to organize on the inside was to maximize religious and educational community times in the classroom. We used those platforms to educate people legally and politically. We taught people about our inhumane treatment and living conditions, and prompted critical thinking and problem analysis. For instance, if we have a problem, we identify the problem, then we work to identify solutions. Once we identify the solutions, we do diagnostics on implementation of it and see how these things work out. Then we have an open dialogue with brothers on the

inside who are the most influential.

What kind of progress have you all gained from work strikes?

When you're dealing with work strikes, organizing, or activism work, it can be really hard to quantify results because advancing everywhere, especially in prison can be painstakingly slow. But over the last ten years of my doing this work, there have been great strides that I've seen in progress towards a change. They seem incremental in phases, if you look at them through little gaps. But looking at the big picture in the historical context, I'm really proud of the work that we've done in Alabama in organizing, educating and exposing a lot of the things going on and trying to foster change in society, at large.

How were you able to help organize the 2016 National Prison Strikes from solitary confinement?

As a part of our advocacy, we hosted a bi-weekly Blogtalk Show. This brought us into contact with advocates, organizations and other prisoners across the country. All of this was done from segregation with the use of smartphones. While ADOC may claim that access to cell phones needs to be prohibited to prevent those incarcerated from facilitating criminal activity from their cells, the use of phones to expose injustices, organize prisoners and demand their rights is the real fear. ADOC does not allow journalist access to prisoners to express their grievances for the same reason. In any event, being in segregation wasn't a real obstacle as long as we had access to technology, I have been able to network just like I was in a population.

Are there any ongoing organizing efforts among prisoners?

There's always communications and dialogues going on with different organizations and different groups throughout the institutions. It's an organic environment that is always changing. So, there's always dialogue about the things that are going on. For example, somebody got killed here, somebody got assaulted there, the police lied on someone here. You know, all of these issues have come up and all of them are on the table and anyone of them could serve as the catalyst for action. Therefore, every day interactions become opportunities for organizing.

What are some of the drawbacks of using the tactic of work strikes?

Shutdowns brings out the worst in some people, in regards to their emotions and levels of discipline. One must be gifted with the inclination

for Understanding and Patience NATURALLY, then use each day to nurture and maintain it. I tell no lies to you, trying to lift up your comrades with one arm while trying to fight a behemoth with the other arm is a formidable task and can seem like a romantic futility. The system doesn't want change and the enslaved don't desire to know they need to and can bring about change.

The frustration that is integral to prison organizing can be a real challenge. The apathy amongst the incarcerated is debilitating. On many days, I think of quitting the whole Activism demo and finding a new passion. The Pros/Cons chart would back that decision. But, something internal compels me. The principle of Justice does really drive me.

However, one of the most frustrating things about a shutdown is the need for constant intervention, the need for constant pep-talks. It gets frustrating when we have over 100 men in a dorm and maybe 80 or 85 of them are not as committed to the struggle but, they are with the cause and their resistance is breaking down. They are ready to give in to their drug habit. They are ready to give in to their lust or, ready to move around and try to do something. You have to constantly stop all the run ins between dudes because frustrations run high. And then you have to give talks of why are we doing this? Is this going to work? What happened last time? And, there's just a lot of negative individuals and so forth that you have to eliminate. A lot of fires you have to put out. You have to become a peacemaker. You have to become a man of many hats during the shutdown because a lot of people turn to you for guidance and instruction on what to do, how to maneuver in these situations, and how to deal with this situation.

What was the reaction from prison officials?

It may be surprising, but many "correctional" officers support the prisoners demands and even strikes. Depending on the institution, you could have maybe 50-50, 60-40 sometimes. However, the majority are going to be understanding and supportive of what we are doing on the inside as they understand the situation and circumstances. And then you might have a percentage who just want to undermine the efforts of prisoners just because they don't acknowledge the humanity of those incarcerated. But no one has really just taken strong opposition, the opposition has always been from Wardens. As they are charged with keeping the prison generating revenue.

But, there stance always seems to be, "This may not be the right way to do it, let's let the lawyers do this", it's always conciliatory, to try to get things back to normal and everybody back working. During an actual shutdown, I have yet to experience a real hostile situation myself personally.

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I have heard of brothers who have received hostile responses from certain officers and so forth. But for the most part, it's like 50-50, with one half being a little sneaky and deceptive and trying to undermine by back-biting and gossiping and whispering and so forth and others being more supportive, even if they have to give their support on the down low.

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