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Inequality by Unnatural Selection: The Impact of Tax Code Bias on the Racial Wealth Gap

Phyllis C Taite, *Oklahoma City University School of Law*



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INEQUALITY BY UNNATURAL SELECTION:
THE IMPACT OF TAX CODE BIAS
ON THE RACIAL WEALTH GAP

*Phyllis C. Taite**

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* Phyllis C. Taite is a Professor of Law at Oklahoma City University School of Law. She received her J.D. from Florida State University College of Law and her LL.M. in Taxation from the University of Florida Levin College of Law. Special thanks to the Kentucky Law Review for inviting me to participate in the symposium and publish in the Kentucky Law Journal. She gives special thanks to Professors Katherine Pratt and Theodore Seto for the invitation to participate and present this Article in the Fall 2021 Loyola Tax Policy Colloquium. She also thanks the participants of the National Tax Association Annual Conference. She gives my heartfelt thanks to Professor Tim Gattton and his research team for invaluable research assistance. The views reflected in this Article are her own.

INTRODUCTION

Social justice issues have gained more support as a broad range of equal justice issues have come under public scrutiny; however, economic justice has not received as much attention and support. This lapse may be attributed to an overall acceptance of the status quo or American antipathy toward providing financial assistance to racial minorities and low-income households.² The American principle that success is determined by strength, work ethic and self-sufficiency is rooted in Social Darwinism.³

This Article will explain why the principles of Social Darwinism, as commonly understood, should not apply to people who are not truly similarly situated because of inherent inequalities and disproportionately imposed obstacles. This Article will explore these principles and demonstrate how tax code bias, facilitated by government action or inaction, has impacted the natural order of wealth mobility by implementing laws and policies that disproportionately benefit wealthy white taxpayers.

Tax policy is replete with examples of laws and policies that disadvantage minorities and low-income households.⁴ This Article contributes to the discourse in two ways. First, by identifying and analyzing laws and policies—directly and indirectly related to tax policies—that have completely obstructed or imposed barriers to wealth mobility for minority households. Biased laws and policies that promote wealth for white households and inhibit opportunities for Black households

² Alma Carten, *How Racism Has Shaped Welfare Policy in America Since 1935*, THE CONVERSATION (Aug. 21, 2016, 8:21 PM), <https://theconversation.com/how-racism-has-shaped-welfare-policy-in-america-since-1935-63574> [<https://perma.cc/D9SQ-ECG2>] (“Because of the strong American work ethic, and preference for a ‘hand up’ versus a ‘hand-out,’ the means-tested, cash assistance programs for poor families—and especially ADC renamed AFDC—have never been popular among Americans.”); see also Robert A. Moffitt & Peter T. Gottschalk, *Ethnic and Racial Differences in Welfare Receipt in the United States*, in 2 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 152, 152 (Neil J. Smelser, William Julius Wilson & Faith Mitchell eds., 2001) (“The general public in the United States has long linked welfare and race. This association has played a major role in attitudes toward the welfare system and in the politics of welfare reform. Attitudes toward welfare spending are correlated with racial attitudes . . . and opposition to welfare among White voters has been shown to be related to attitudes toward race. . . . Many analysts have noted that the general popular perception that minority racial and ethnic groups dominate the welfare rolls has been historically incorrect, for minorities have historically accounted for no more of the welfare caseload than White families.” (citations omitted)).

³ Gregory Claeys, *The “Survival of the Fittest” and the Origins of Social Darwinism*, 61 J. HIST. IDEAS 223, 226 (2000).

⁴ See generally Phyllis C. Taite, *Tax Code Bias and Its Starring Role in Perpetuating Inequalities*, 72 S.C. L. REV. 735, 737–39 (2021) [hereinafter Taite, *Tax Code Bias*] (assessing whether Congress has responded to previously identified economic justice issues stemming from tax policies); Phyllis C. Taite, *Saving the Farm or Giving Away the Farm: A Critical Analysis of the Capital Gains Tax Preferences*, 53 SAN DIEGO L. REV. 1017 (2016) (discussing how capital gains tax preferences have contributed to wealth inequalities); John W. Lee, III, *Class Warfare 1988–2005 Over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47 (2006) (discussing tax policy modifications that redistributed income from middle- and lower-income households to top income households); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004) (discussing chronic minority under-participation in employer-provided pension plans, which provide myriad tax benefits).

cause wealth inequalities by unnatural selection and contribute to the racial wealth gap.

Second, this Article will identify several biased laws and policies that impact wealth mobility, explain the intersection with tax policy and propose solutions to mitigate generational wealth erosion and increase wealth mobility in minority communities. Part I will describe social Darwinism and provide the framework to apply the relevant principles in this Article. Part II will outline and demonstrate the intersection between mass incarceration, tax policy and the racial wealth gap. Parts III expounds on the depth of mass incarceration and its impact on the racial wealth gap, and Part IV offers proposed solutions. Part V concludes with a call for intentional government action to facilitate income and wealth mobility for marginalized communities.

I. SOCIAL DARWINISM

Social Darwinism evolved from Charles Darwin’s theory of natural selection to apply to humans.⁵ Economists, philosophers and scholars have analyzed Social Darwinism from various perspectives.⁶ One perspective promotes free market competition between individuals in laissez-faire capitalism, to allow the market to determine success.⁷ Herbert Spencer’s version is based in the idea that people are inherently strong or weak and those strengths and weaknesses determine their fate in life through the process of natural selection.⁸ In other words, competitive individualism is best because the strongest will emerge as natural leaders and the weak will be weeded out because they are inferior by biology or laziness; in other words a “survival of the fittest.”⁹ Richard Hofstadter used Social Darwinism to reject such competitive individualism in favor of collectivism but ultimately concluded that Social Darwinism was “neutral” and “capable of supporting opposite” views.¹⁰

⁵ ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* 5 (1979).

⁶ *Id.* at 4–7; see also D.A. Stack, *The First Darwinism Left: Radical and Socialist Responses to Darwin, 1859–1914*, 21 *HIST. POL. THOUGHT* 682, 685 (2000) (examining socialist interpretations of Darwin’s theory of natural selection).

⁷ Claeys, *supra* note 3, at 234.

⁸ BANNISTER, *supra* note 5 (“A social Darwinist, for present purposes, is anyone who embroidered his (and, far less frequently, her) message with the phrases ‘natural selection,’ ‘the struggle for existence,’ or ‘the survival of the fittest,’ or who otherwise invoked the authority of Charles Darwin or the *Origin of Species* in discussing social policy.”); see also William Sweet, *Herbert Spencer (1820–1903)*, *INTERNET ENCYCLOPEDIA OF PHIL.*, <https://iep.utm.edu/spencer/> [<https://perma.cc/Z8P9-UBVA>] (“British philosopher and sociologist, Herbert Spencer was a major figure in the intellectual life of the Victorian era. He was one of the principal proponents of evolutionary theory in the mid nineteenth century, and his reputation at the time rivaled that of Charles Darwin. Spencer was initially best known for developing and applying evolutionary theory to philosophy, psychology and the study of society—what he called his ‘synthetic philosophy’ (see his *A System of Synthetic Philosophy*, 1862–93).”).

⁹ Sweet, *supra* note 8; see also Claeys, *supra* note 3, at 227 (describing how Herbert Spencer believed in individual competition and believed that characteristics key to survival were genetically inherited).

¹⁰ Thomas C. Leonard, *Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter’s Social Darwinism in American Thought*, 71 *J. ECON. BEHAV. & ORG.* 37, 38 (2009).

For the purpose of this Article, Social Darwinism refers to competitive individualism commonly referred to as “survival of the fittest” from the Spencer-based ideology. Wealthy people have supported the ideals of Social Darwinism because it maintains the class divide and strengthens the status quo.¹¹ Others likely support the principles based on their perceptions of a mutual starting position and competitors should face similar obstacles. Based on the belief that the strongest will and should survive, it is easy to promote the ideals of Social Darwinism because fair competition should yield a just outcome. Based on these misperceptions, Social Darwinism has been the ideal justification to deny assistance to poor and minority households and maintain the racial wealth divide through oppressive acts.¹²

Even though Spencer’s version of Social Darwinism opposed government involvement, the American capitalism-based society that supports Social Darwinism is not free from government involvement. American capitalism has built-in government support for the wealthiest households, especially in tax policy, while opposing government support for the poor.¹³ America has a history of deeply rooted racial oppression that built the foundation for one community and destroyed the foundation of others.¹⁴ It is inherently unfair to place obstacles in the path of one group and not the other, and then expect the same level of performance.

When a physical obstacle is placed in a path, it is easy to see and the unfairness of the competition would be obvious. On the other hand, invisible obstacles and impediments are more difficult to discover during competition and they mask the competitive advantages. With invisible obstacles, it would be easy to conclude the winner won fairly while the others were naturally weak or did not prepare properly. When racial bias is factored in, it is even easier to conclude that poor minorities are economically deficient because they are lazy criminals who drain resources living on government assistance.

The wealthy have used ideologies of Social Darwinism to justify laws and policies that directly benefitted wealthy, primarily white, households and financially

¹¹ See Camilla Boisen & Matthew C. Murray, *Apartheid of Thought: The Power Dynamics of Knowledge Production in Political Thought*, THEORIA J. SOC. & POL. THEORY, Mar. 2017, at 41, 47 (“Social Darwinists argued that individuals and groups, just like plants and animals, competed with one another for success in existence. They used seemingly innocuous assertion to justify the status quo of ‘natural’ procedures by claiming that the individuals or groups of individuals at the top of the social, economic or political hierarchies belonged there, as they competed against others and had proven themselves best adapted.”).

¹² *Id.* (“The turn from Darwinism to Social Darwinism was a move by its proponents to give social practices procedural certainty by legitimising these practices of subordination, domination and extinction in analogous, observable and measurable ‘natural’ phenomena.”).

¹³ Vada Waters Lindsey, *The Widening Gap Under the Internal Revenue Code: The Need for Renewed Progressivity*, 5 FLA. TAX REV. 1, 24 (2001).

¹⁴ ANGELA HANKS, DANYELLE SOLOMON & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, SYSTEMATIC INEQUALITY: HOW AMERICA’S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 1 (2018) <https://americanprogress.org/wp-content/uploads/2018/02/RacialWealthGap-report.pdf> [<https://perma.cc/9SZU-E3WD>]; see also DEDRICK ASANTE-MUHAMMAD, CHUCK COLLINS, JOSH HOXIE & EMANUEL NIEVES, PROSPERITY NOW & INST. FOR POL’Y STUD., THE ROAD TO ZERO WEALTH: HOW THE RACIAL WEALTH DIVIDE IS HOLLOWING OUT AMERICA’S MIDDLE CLASS 7 (2017) https://prosperitynow.org/files/PDFs/road_to_zero_wealth.pdf [<https://perma.cc/89K4-PLLJ>] (explaining that median wealth amongst “Black and Latino families” has been decreasing for the past three decades, while median “White wealth has slowly increased”).

oppressed lower income households, disproportionately minority.¹⁵ Laws and policies that disproportionately benefit wealthy, white households interrupt the natural order of wealth building by creating and/or facilitating inequalities that plague minority households for generations. To add insult to injury, certain laws are promoted as instruments for wealth mobility for lower income households and instead further the racial wealth gap.

II. REAL ESTATE INVESTMENT TRUSTS AND MASS INCARCERATION

A. *What Is a Real Estate Investment Trust?*

The Real Estate Investment Trusts Act, implemented in 1960, afforded tax-favored treatment to real estate investment trusts (REITs) to match tax-favored treatment already provided to other investment companies.¹⁶ REITs were given favored tax status to provide opportunities for non-wealthy taxpayers to diversify their portfolios.¹⁷ By design, REITs are similar to other investment instruments in that individual investors have the opportunity to invest in real estate through publicly or privately held companies instead of individual purchases of real estate.¹⁸ In fact, REITs are described as the mutual funds of real estate investing.¹⁹

REITs were initially designed as passive entities, but the Tax Reform Act of 1986 reformed REITs to allow them to own and operate their own property.²⁰ REITs are codified in the Internal Revenue Code (IRC) which outlines specific structural and income requirements to qualify.²¹ Basic REITs are ordinarily equity-based and either

¹⁵ Boisen & Murray, *supra* note 11, at 47–48.

¹⁶ MARK JICKLING, CONG. RSCH. SERV., RL33380, REAL ESTATE INVESTMENT TRUSTS (REITs): CONSIDERATIONS FOR THE FEDERAL EMPLOYEES THRIFT SAVINGS PLAN (TSP) (2006) (available at <http://congressionalresearch.com/RL33380/document.php?study=Real+...+Considerations+for+the+Federal+E+employees+Thrift+Savings+Plan+TSP>) [<https://perma.cc/533H-6F89>].

¹⁷ BITTKER, EMORY & STRENG, FEDERAL INCOME TAXATION OF CORPORATIONS & SHAREHOLDERS: FORMS § 1.03 (2021), Westlaw FTXCORP FORM WGL (“The purpose of this legislation was to allow small investors to pool their investments in real estate, to derive the same benefits that might be obtained by direct ownership, to diversify their risks, and to obtain professional property management.”).

¹⁸ JICKLING, *supra* note 16 (explaining that REITs were exempted for taxation at the entity level and taxed at the shareholder level, similar to stock treatment).

¹⁹ *Id.* (“REITs may be either private or publicly held companies. Shares of publicly held REITs are traded on the stock markets like shares of any other corporation. As of the end of February 2006, there were 202 REITs listed on the stock exchanges, with a total market value of \$368 billion.” (footnote omitted)).

²⁰ Tax Reform Act of 1986, Pub. L. No. 99-514, § 662(a)(i), 100 Stat. 2085, 2300–01; *see also* CONG. RSCH. SERV., R44421, REAL ESTATE INVESTMENT TRUSTS (REITs) AND THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA): OVERVIEW AND RECENT TAX REVISIONS 2 (2016) (“Over time, the rules governing REITs have been relaxed, both by legislative and regulatory changes, to allow more involvement not just in holding real estate assets, but also in managing properties and services. REITs were originally designed to be passive real estate owners (if they did not simply own mortgages), with properties operated by others. The Tax Reform Act of 1986 allowed REITs to perform customary services and, thus, to operate their properties directly rather than to employ independent contractors.”).

²¹ I.R.C. § 856 (“‘Real estate investment trust’ means a corporation, trust, or association—

(1) which is managed by one or more trustees or directors;
 (2) the beneficial ownership of which is evidenced by transferable shares, or by transferable certificates of beneficial interest;

own or have an equity interest in real estate such as hotels, hospitals and shopping malls.²² Alternatively, a taxable REIT subsidiary (TRS) is authorized for a broader range of income sources.²³ Specifically, a TRS expands the range of REITs because it is authorized to engage in activities and provide services that would make a REIT ineligible for its income tax status.²⁴

For example, at least ninety-five percent of a REIT's income is required to come from passive income sources.²⁵ A TRS, on the other hand, may provide a broader range of services and receive income deemed ineligible income for REITs.²⁶ For example, a TRS may direct tenant services and receive service-related income from activities such as personal training, child care centers, and house cleaning, whereas these are deemed ineligible income sources for REITs.²⁷

REITs also have multiple tax preferences that reduce tax liabilities and loopholes that avoid tax liability.²⁸ As previously mentioned, a qualifying REIT is a corporation

- (3) which (but for the provisions of this part) would be taxable as a domestic corporation;
- (4) which is neither (A) a financial institution referred to in section 582(c)(2), nor (B) an insurance company to which subchapter L applies;
- (5) the beneficial ownership of which is held by 100 or more persons;
- (6) subject to the provisions of subsection (k), which is not closely held (as determined under subsection (h)); and
- (7) which meets the requirements of subsection (c)."

²² ERNST & YOUNG, ECONOMIC CONTRIBUTION OF REITs IN THE UNITED STATES IN 2020 at 2 (2021) ("Public listed equity REITs constitute the bulk of today's REIT market. As of year-end 2020, equity REITs accounted for approximately 78% of all U.S. public listed REIT gross assets and nearly 95% of the nearly \$1.25 trillion of equity market capitalization."); *see also* JICKLING, *supra* note 16 (explaining the two basic types of REITs are equity, which owns and operates income-producing property, and mortgage, which loans or acquires mortgage-backed securities).

²³ Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 543, 113 Stat. 1860, 1943-44 (noting that § 543, in relevant part, defines a taxable REIT subsidiary as a trust that "directly or indirectly owns stock in such corporation, and such trust and such corporation jointly elect that such corporation shall be treated as a taxable REIT subsidiary"); *see also* Thornton Matheson, *Taxable REIT Subsidiaries: Analysis of the First Year's Returns, Tax Year 2001*, SOI BULL., Spring 2005, at 114, 114, <https://www.irs.gov/pub/irs-soi/01reit.pdf> [<https://perma.cc/N2T7-ASSR>] (explaining a TRS is subject to corporate tax but not subject to strict requirements of regular REITs).

²⁴ BITTKER ET AL., *supra* note 17, § 1.03[1][b][iv].

²⁵ I.R.C. § 856(c)(2) (qualifying income means ninety-five percent must derive from passives sources such as rent from real estate, interest, dividends, sales, and foreclosures); *see also id.* § 856(c)(3) (requiring at least seventy-five of gross income from real estate sources including rents from real property, interest from mortgages, gains for sale or disposition of real property, dividends or distributions from REITs, property tax refunds, foreclosures, loan agreements and qualified temporary investment income).

²⁶ Matheson, *supra* note 23, at 114 ("REIT's [sic] are restricted in terms of the kinds of services they can provide their tenants. Specifically, a REIT may provide 'customary real estate services' to its tenants, but providing more than a de minimis amount of impermissible services (for example, housekeeping services) at a particular property prevents rents from that property from qualifying as rents under the REIT income tests.")

²⁷ BITTKER ET AL., *supra* note 17, § 1.03[1][b][iv].

²⁸ STAFF OF THE J. COMM. ON TAX'N, JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024 AT 8 (2020), <https://www.jct.gov/CMSPages/GetFile.aspx?guid=ec4fb616-771b-4708-8d16-f774d5158469> [<https://perma.cc/Y2H6-4S43>] ("Certain entities treated as corporations (such as regulated investment companies, real estate investment trusts, and cooperatives) are in some circumstances allowed a dividends-paid deduction, which generally results in their paying little to no corporate tax.")

but not taxed at the entity level.²⁹ Further, REITs may deduct dividends paid during the taxable year, and consequently, REIT taxable income is reduced or eliminated.³⁰ Next, income may receive twenty percent deduction for qualified business income.³¹ Finally, the sale or exchange may result in reduced or no taxation when amount realized does not exceed the basis invested in the property.³² While these select tax preferences are not unique to REITs, they partially demonstrates why REITs are popular investments.³³

Today, REITs are a trillion-dollar industry.³⁴ In the United States alone, REITs own over \$3.5 trillion in real estate assets.³⁵ This Article, however, does not focus on the merits or economic consequences of REITs. The introductory information was provided as foundation to explain the intersection of REITs and mass incarceration (discussed later in this Article)³⁶ and how they impact the racial wealth gap.

Private Letter Ruling (PLR) 201320007 is important to the connection between REITs and mass incarceration.³⁷ In this PLR, Taxpayer and its direct and indirect subsidiaries—which owned private prisons and detention centers—requested rulings regarding its eligibility to be taxed as a REIT.³⁸ The private prison and detention centers were already under government contracts for periods ranging from one to twenty-five years.³⁹ Under the typical government contract, the government paid

²⁹ JICKLING, *supra* note 16 (explaining that even though it may be a corporation, a REIT is exempted from entity level taxation and dividends are taxable to shareholders).

³⁰ See I.R.C. § 857(a)(1).

³¹ BITTKER ET AL., *supra* note 17, § 1.03[8][b] (“IRC § 199A, enacted by the TCJA, generally permits a REIT shareholder to deduct (1) up to 20 percent of qualified business income from pass-through entities and (2) up to 20 percent of REIT dividends and PTP income, effective for tax years beginning after December 31, 2017.”).

³² *Id.* (“To the extent that we make a distribution in excess of our current and accumulated earnings and profits, the distribution will be treated first as a tax-free return of capital, reducing the tax basis in the U.S. stockholders’ shares of common stock, and the amount of each distribution in excess of a U.S. stockholder’s tax basis in its shares of common stock will be taxable as gain realized from the sale of its shares of common stock.”).

³³ FRANCIS R. PARENTE, REAL ESTATE INVESTMENT TRUSTS: A REPORT ON THEIR ACTIVITIES AND PERFORMANCE, INCLUDING SELECTED REFERENCES 1–2 (1971) (explaining favorable income tax treatment and money market condition contributed to REIT popularity); Matheson, *supra* note 23, at 116 (“Total taxes paid by TRS’s established before 2001 were \$75.7 million; total taxes paid by newly established TRS’s were \$9.8 million.”); CONG. RSCH. SERV., *supra* note 20, at 4.

³⁴ Thomas R. Arnold, David C. Ling & Andy Naranjo, *Private Equity Real Estate Fund Performance: A Comparison to REITs and Open-End Core Funds*, 47 J. PORTFOLIO MGMT., Oct. 2021, at 107, 108 (2021) (“The US-listed real estate market has grown at an equally fast rate. According to Nareit, the market capitalization of listed equity real estate investment trusts (REITs) was \$9 billion at the end of 1991. By year-end 2020, this market capitalization has increased to \$1.2 trillion.”).

³⁵ ERNST & YOUNG, *supra* note 22, at 2.

³⁶ See *infra* notes 90–97 and accompanying text.

³⁷ I.R.S. Priv. Ltr. Rul. 2013-20-007 (Feb. 11, 2013).

³⁸ *Id.* (“Taxpayer has requested rulings that (1) the Facilities are not ‘lodging facilities’ as defined in section 856(d)(9)(D)(ii) or ‘health care facilities’ in whole or in part under section 856(l)(4)(B); (2) the amounts received under Taxpayer REIT’s (as defined later) contracts with government tenants for the Facilities will be treated as ‘rents from real property’ for purposes of section 856(d)(1); (3) the payments Taxpayer REIT collects on behalf of its TRSs for the Services (as defined later) the TRSs provide at a Financed Facility (as defined later) will not be disqualified income for purposes of the REIT income tests; and (4) Taxpayer REIT’s cash and stock distribution election will be treated as a distribution of property with respect to its stock under section 301.”).

³⁹ *Id.*

Taxpayer for the facilities and services to run the institution or paid a per diem rate based on actual or minimum occupancy levels used.⁴⁰ Taxpayer indicated its intent to be taxable as a REIT and to create TRSs to provide services to run the private prisons.⁴¹ Taxpayer received a favorable ruling which permitted them to convert to REITs for tax purposes and create TRSs to collect ineligible income.⁴²

B. What Is the Relationship Between Mass Incarceration and Tax Policy?

i. The Rise of Private Prisons and Detention Centers

President Ronald Reagan's War on Drugs generated public support for tougher laws on drug related offenses.⁴³ In response, state and federal governments implemented laws to restrict judicial discretion on drug related sentencing.⁴⁴ Naturally, increased arrests and incarceration rates, along with longer sentences, led to increased demand for prison space.⁴⁵ Government run agencies did not have the capacity to deal with the influx; therefore, overcrowding and substandard conditions led to outsourcing prisons and detentions centers to private entities.⁴⁶

In the early 1980s, Corrections Corporation of America (CCA) built its first private prison and detention center for holding immigrant detainees.⁴⁷ CCA successfully secured government contracts to operate private prisons and detention centers.⁴⁸ By the late 1980s, Wackenhut Corrections Corporation (GEO Group) also secured government contracts to run private prisons and detention centers.⁴⁹ Between

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (establishing a national approach designed to increase enforcement of drug crimes); see also *infra* note 99 and accompanying text (discussing how the War on Drugs led to overall public support for higher incarceration rates).

⁴⁴ Stephen Rahe, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 215 (2010) ("Fueled by misinformation and sensational media portrayals of crime, voters in the 1980s became fixated on lengthy prison sentences for convicted offenders, providing vote-seeking legislators an incentive to advocate for longer sentences. Culminating in Lee Atwater's fear-based Willie Horton campaign during the 1988 presidential election, public opinion increasingly reflected insecurity about personal safety and a belief that imprisonment was the most effective solution. In addition to public anxiety about crime in general, drug policy increasingly occupied center stage in criminal justice policy debates, with federal and state lawmakers in a seeming competition to craft the harshest drug sentencing regime." (footnotes omitted)).

⁴⁵ KARA GOTSCH & VINAY BASTI, THE SENT'G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018) [hereinafter CAPITALIZING ON MASS INCARCERATION], <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [<https://perma.cc/KVF6-MWKN>] ("The War on Drugs and harsher sentencing policies, including mandatory minimum sentences, fueled a rapid expansion in the nation's prison population beginning in the 1980s. The resulting burden on the public sector led to the modern emergence of for-profit private prisons in many states and at the federal level.").

⁴⁶ JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUST. ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 1-2 (2001) [hereinafter ISSUES ON PRIVATIZED PRISONS], <https://www.ojp.gov/pdffiles1/bja/181249.pdf> [<https://perma.cc/4F9K-3TQD>].

⁴⁷ See Rahe, *supra* note 44, at 214.

⁴⁸ *Id.*

⁴⁹ *Id.*

1980 and 2003, the prison population grew by more than three hundred percent.⁵⁰ The federal government was a major source of revenue for private prisons and immigration detention centers.⁵¹ Both CCA and Geo Group converted to REITs but later withdrew after the value of the REIT stocks suffered substantial losses.⁵² In following years, CCA restructured and reemerged to respond to the national market for prison beds.⁵³ By 2013, CCA and Geo Group again converted to REITs.⁵⁴

The CCA detention centers contracted with the Immigration and Naturalization Service, now referred to as Immigration and Customs Enforcement (ICE), to detain alleged illegal immigrants.⁵⁵ Similar to the growing population of private prisons, immigration reform caused a substantial population increase for detention centers.⁵⁶ The success of these facilities relied on government contracts and a high number of

⁵⁰ *Id.* at 215–16 (“By 2003, drug offenders constituted twenty percent of state prisoners and fifty-five percent of the federal prison population, representing a twelve- and seventeen-fold increase, respectively, since 1980. All told, this period of tough-on-crime politics saw the nation’s total prison population increase from 319,598 in 1980 to 1.4 million in mid-2003—an increase of 334 percent.” (footnote omitted)); *see also* ISSUES ON PRIVATIZED PRISONS, *supra* note 46, at 3–4 (“In 1987, the total number of inmates in privately operated prisons and jails worldwide was approximately 3,100. By December 31, 1998, that number had increased to more than 132,000. . . . Although 14 private correctional facility firms existed at that time, 2 companies (Corrections Corporation of America and Wackenhut Corrections Corporation) accounted for more than three-fourths of the entire worldwide market . . .”).

⁵¹ CORECIVIC, 2018 ANNUAL REPORT 36 (2019) [hereinafter CORECIVIC ANNUAL REPORT] (“We currently derive, and expect to continue to derive, a significant portion of our revenues from a limited number of governmental agencies. The three primary federal governmental agencies with correctional and detention responsibilities, the BOP, ICE, and USMS, accounted for 48% of our total revenues for the year ended December 31, 2018 (\$890.5 million). ICE accounted for 25% of our total revenues for the year ended December 31, 2018 (\$465.0 million), USMS accounted for 17% of our total revenues for the year ended December 31, 2018 (\$315.4 million), and BOP accounted for 6% of our total revenues for the year ended December 31, 2018 (\$110.1 million.”); *see also* THE GEO GRP., INC., 2018 ANNUAL REPORT 22 (2019) [hereinafter GEO GROUP ANNUAL REPORT] (reporting \$2,331,386 in total revenue); *see also infra* note 57.

⁵² Raher, *supra* note 44, at 219 (“CCA and Wackenhut both experimented with [REITs] and ultimately saw their stock prices decline precipitously due to investor disapproval.”).

⁵³ *See id.*

⁵⁴ CORECIVIC ANNUAL REPORT, *supra* note 51, at 5 (“We began operating as a REIT effective January 1, 2013. We provide services and conduct other business activities through taxable REIT subsidiaries, or TRSs.”); *see also* GEO GROUP ANNUAL REPORT, *supra* note 51, at 4 (“We have been a leading owner, lessor and operator of correctional, detention and reentry facilities and provider of community-based services and youth services in the industry since 1984 and began operating as a REIT for federal income tax purposes effective January 1, 2013.”).

⁵⁵ Raher, *supra* note 44, at 214 (“The modern advent of privately operated adult secure facilities came in 1979 when the Immigration and Naturalization Service (‘INS’) ‘began contracting with private firms to detain illegal immigrants pending hearings or deportation[.]’ In the 1980s, the INS issued a contract to Wackenhut, an international security firm, for the operation of an immigrant detention facility near Denver, Colorado. The Corrections Corporation of America (‘CCA’) incorporated in 1983 and began operations under its first contract the next year in Houston, Texas. From its inception, the private prison market has always been thin, with two dominant firms—CCA and Wackenhut Corrections Corporation. Wackenhut started as a subsidiary of the Wackenhut Corporation and is now an independent entity, recently renamed ‘The GEO Group.’ Over the years, many smaller firms have been acquired by CCA and Wackenhut.” (footnotes omitted)).

⁵⁶ *See* CAPITALIZING ON MASS INCARCERATION, *supra* note 45, at 5–6 (“From 2000 to 2016 the number of people housed in private prisons increased five times faster than the total prison population. Over a similar timeframe, the proportion of people detained in private immigration facilities increased by 442 percent.”).

prisoners and detainees.⁵⁷ Between 2000 and 2016, the number of ICE detainees increased from 4,841 to 26,249, predominantly comprised of Hispanic people.⁵⁸ CoreCivic (formerly known as CCA) reported over twenty-five percent of its revenue for 2019 was from ICE contracts.⁵⁹

Finally, juvenile detention and correctional centers were also substantially privatized.⁶⁰ Similar to adult private prisons and detention centers, juvenile detention centers are only profitable if the facilities are occupied.⁶¹ The school-to-prison pipeline filled this demand, in part, with its zero tolerance policies.⁶² Similar to the adult facilities, Black children were disproportionately referred to detention centers.⁶³ Black children were sacrificed because of discrimination, implicit racial bias, and their lack of political and economic status.⁶⁴ Professor Deborah Archer identified the pipeline as “one of the most urgent civil rights challenges we face.”⁶⁵

ii. Show Me the Money!

What do the war on drugs, immigration reform, and zero tolerance for drugs and violence have in common? They were all politically acceptable justifications to hide

⁵⁷ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/TB6T-AYW9>] (reporting that in 2015 CoreCivic, the largest private prison company, received fifty-one percent of its total annual revenue from federal contracts and forty-two percent from state contracts, and GEO Group, the second largest, reported \$1.4 billion of its \$1.84 billion in annual revenue was from U.S. corrections and detention facility contracts).

⁵⁸ CAPITALIZING ON MASS INCARCERATION, *supra* note 45, at 5; Raheer, *supra* note 44, at 226 n.138.

⁵⁹ Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration/> [<https://perma.cc/L75C-2H2E>].

⁶⁰ SARAH HOCKENBERRY, MELISSA SICKMUND & ANTHONY SLADKY, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2012: SELECTED FINDINGS 2–3 (2015), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/247207.pdf> [<https://perma.cc/N23W-QX96>].

⁶¹ CORECIVIC ANNUAL REPORT, *supra* note 51, at 32 (“We are subject to fluctuations in occupancy levels, and a decrease in occupancy levels could cause a decrease in revenues and profitability. While a substantial portion of our cost structure is fixed, a substantial portion of our revenue is generated under facility ownership and management contracts that specify per diem payments based upon daily occupancy. We are dependent upon the governmental agencies with which we have contracts to provide offenders for facilities we operate. We cannot control occupancy levels at the facilities we operate.” (emphasis omitted)).

⁶² Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2010) (“The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation’s schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system. There are both direct and indirect avenues through the pipeline. Directly, schools put students into the pipeline through excessive police involvement in imposing discipline and zero-tolerance policies that often end in arrest or referral to the juvenile justice system.”).

⁶³ *Id.* at 869 (“Studies have shown that African American students are disproportionately suspended, expelled, or arrested for conduct similar to that of their white classmates. And although African American students represented only 17% of public school enrollment nationwide, they accounted for 34% of school suspensions in 2000.” (footnote omitted)).

⁶⁴ Ashley Maria Buchanan, *More Than What Meets the Eye: An Examination of Characteristics That Impact Juvenile Justice Detention Decisions* 5–6, 10, 12 (Aug. 2018) (M.A. thesis, Old Dominion University) (reporting race as the greatest predictor of any factor in determining whether juveniles were sent to a detention facility).

⁶⁵ Archer, *supra* note 62, at 869.

the invisible obstacles and the real threats. Were there other underlying motives for the war on drugs, immigration reform, and crackdown on school violence? Professor Michelle Alexander pointed out the war on drugs was waged against crack cocaine before the drug was widely distributed.⁶⁶ Let's follow the money.

The industry would not have exploded and privatized control would not have profited without bodies in the building and cooperation at multiple government levels.⁶⁷ The financial data for CCA indicated contracts for beds grew from 1,715 in 1987 to 52,890 in 1997, and revenue grew from \$17 million in 1987 to more than \$462 million by 1997.⁶⁸ A 2007 study demonstrated the government “spent almost \$70 billion annually” on mass incarceration.⁶⁹

The American Civil Liberties Union (ACLU) published a report detailing the racial implications of the War on Marijuana for every state.⁷⁰ The report detailed over-policing and racial disparities in marijuana-related arrests.⁷¹ For example, 52% of drug-based arrests were for marijuana, and 46% of all drug-based arrests were for nonviolent offenses.⁷² In the year 2010, there were substantially more arrests for marijuana than all violent offenses.⁷³ The War on Drugs began with the aggressive pursuit of crack, primarily in communities of color, and progressed to a war on marijuana.⁷⁴ The ACLU report indicates the War on Marijuana was essentially “a war on people of color” despite comparable marijuana use by white people.⁷⁵ In states with the worst racial disparities, a Black person was thirty times more likely to be arrested for marijuana based offenses than a white person in the same county.⁷⁶

The ACLU deemed the War on Drugs a losing battle that had devastating effects on the health and wealth of communities of color, and Black communities in particular.⁷⁷ State governments spent billions enforcing the drug laws and Black

⁶⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 5 (rev. ed. 2012).

⁶⁷ David N. Khey, *Privatization of Prison*, in *THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 1, 3 (Wesley G. Jennings ed., 2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118519639.wbecpx175> [<https://perma.cc/4URR-S7SY>] (“In order for private prisons to function well, a number of important individuals such as business managers, political figures, state officials, and correctional researchers have to cooperate.”).

⁶⁸ ISSUES ON PRIVATIZED PRISONS, *supra* note 46, at 29.

⁶⁹ Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 *ARK. L. REV.* 55, 60 (2015).

⁷⁰ EZEKIEL EDWARDS, WILL BUNTING & LYNDA GARCIA, ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 48–49, 130 (2013) [hereinafter *WAR ON MARIJUANA*], https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [<https://perma.cc/2XLV-L9W7>].

⁷¹ *Id.* at 130.

⁷² *See id.* at 4 (“The report finds that between 2001 and 2010, there were over 8 million marijuana arrests in the United States, 88% of which were for possession. Marijuana arrests have increased between 2001 and 2010 and now account for over half (52%) of all drug arrests in the United States, and marijuana possession arrests account for nearly half (46%) of all drug arrests.”).

⁷³ *Id.* at 8–9 (“In 2010 alone, there were 889,133 marijuana arrests—300,000 more than arrests for all violent crimes combined—or one every 37 seconds. There were 140,000 more marijuana arrests in 2010 than in 2001, and 784,021 of them, or 88%, were for possession.”).

⁷⁴ *Id.* at 8 n.7.

⁷⁵ *Id.* at 9.

⁷⁶ *See id.*

⁷⁷ *Id.* at 7.

people were “3.73 times more likely to be arrested for marijuana possession than a white person.”⁷⁸ Perhaps these governments were satisfied with losing the war because they won the battles. The arrests and convictions that led to filling private prison beds, making the industry more profitable, also subjugated Black wealth simultaneously.⁷⁹

Even as the perception of marijuana has changed,⁸⁰ racial disparities in arrests persist.⁸¹ In 2018, marijuana arrests still outpaced all violent crime arrests combined.⁸² Moreover, the ACLU reports a Black person was still “3.64 times more likely to be arrested for marijuana possession than a white person” even when accounting for county size, wealth status and population size.⁸³ Even in states that legalized or decriminalized marijuana,⁸⁴ racial disparities in arrests persisted.⁸⁵

Beyond the obvious profit motives for private prisons, large government contracts for private prisons create a prime environment for corruption.⁸⁶ In one of the largest conspiracies related to private prisons, a government official was arrested and convicted for bribes and kickbacks for private prison contracts and related activity.⁸⁷ Two state judges were convicted for sentencing children to harsher

⁷⁸ *Id.* at 4.

⁷⁹ ASHLEY NELLIS, THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 4, 15 (2021) [hereinafter *COLOR OF JUSTICE*], <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [https://perma.cc/24QN-6M59].

⁸⁰ Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/YN8J-KBEZ] (reporting ninety-one percent of American adults support either recreational and medical use marijuana, or medical use only marijuana).

⁸¹ EZEKIEL EDWARDS, EMILY GREYTAK, BROOKE MADUBUONWU, THANIA SANCHEZ, SOPHIE BEIERS, CHARLOTTE RESING, PAIGE FERNANDEZ & SAGIV GALAI, ACLU, *A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM* 8, 32 (2020) [hereinafter *TWO COUNTRIES*], https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [https://perma.cc/JZ2B-AVWE].

⁸² *Id.* at 5 (“In 2018, there were almost 700,000 marijuana arrests, which accounted for more than 43% of all drug arrests. In fact, in 2018, police made more marijuana arrests than for all violent crimes combined, according to the FBI.”).

⁸³ *Id.*

⁸⁴ Michael Hartman, *Cannabis Overview*, NAT’L CONF. OF STATE LEGISLATURES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [https://perma.cc/2J9A-FDRN] (reporting “eighteen states, two territories, and the District of Columbia have legalized small amounts of [marijuana] for adult recreational use,” and “[t]wenty-seven states . . . have decriminalized [possession of] small amounts of marijuana”).

⁸⁵ *TWO COUNTRIES*, *supra* note 81, at 8 (“In some legalized states, such as Maine and Massachusetts, the racial disparities in marijuana possession arrests were larger in 2018 than in 2010. In other legalized states, such as California and Nevada, the disparities narrowed, although Black people were still more likely to be arrested for marijuana possession than white people.”).

⁸⁶ Jimmie E. Gates, *Chris Epps Sentenced to Almost 20 Years*, CLARION LEDGER (May 24, 2017, 6:02 PM), <https://www.clarionledger.com/story/news/2017/05/24/chris-epps-sentencing/341916001/> [https://perma.cc/2P8A-MK44].

⁸⁷ *Id.* (“His fall from grace began in November 2014 when a 49-count federal indictment accused Epps of taking at least \$1.4 million in bribes and kickbacks to steer more than \$800 million worth of state prison contracts.”); see also Press Release, U.S. Attorney’s Office, Mississippi Doctor Sentenced to Prison for Bribery of Former Corrections Commissioner, (Dec. 15, 2017), <https://www.justice.gov/usao-sdms/pr/mississippi-doctor-sentenced-prison-bribery-former-corrections-commissioner> [https://perma.cc/KNZ5-USD5] (“Reddit

sentences in exchange for kickbacks from private detention centers.⁸⁸ As a result, more than 4,000 convictions from these two judges were overturned.⁸⁹ In an industry this large, there are likely many more who were not caught.

Because of hidden threats, racism, corruption and greed in the legal system, people of color were disproportionately impacted. The easy explanation is that Black people are more inclined to engage in criminal activity.⁹⁰ Misperceptions about people of color influence interactions with the criminal justice system from the initial encounter—where persons of color are more likely to be detained—to sentencing, where persons of color are more likely to receive longer sentences.⁹¹ Media outlets have perpetuated public fear that minorities, particularly Black people, are inherently criminals when statistically this has not been proven to true.⁹²

Leaders in the private prison industry did not make laws. They did, however, have the opportunity to influence lawmakers to pass favorable laws that were implemented and/or retained. The two largest private immigration detention corporations, Geo Group and CoreCivic, were responsible for making significant campaign contributions to members of Congress.⁹³ GEO and CoreCivic were also

was a part owner of an inmate health care services provider known as Health Assurance, LLC. Reddix began paying bribes and kickbacks to Epps in 2012 to obtain contracts for Health Assurance to provide inmate health care services at East Mississippi Correctional Facility and Marshall County Correctional Facility.”).

⁸⁸ Michael Rubinkam, *Kids-For-Cash Judge Loses Bid for Lighter Prison Sentence*, ABC NEWS (Aug. 26, 2020, 1:28 PM), <https://abcnews.go.com/US/wireStory/kids-cash-judge-loses-bid-lighter-prison-sentence-72623201> [<https://perma.cc/9NHE-G59C>] (“In what came to be known as the kids-for-cash scandal, Ciavarella and another judge, Michael Conahan, shut down a county-run juvenile detention center and accepted \$2.8 million in illegal payments from the builder and co-owner of two for-profit lockups. Ciavarella, who presided over juvenile court, pushed a zero-tolerance policy that guaranteed large numbers of kids would be sent to PA Child Care and its sister facility, Western PA Child Care.”).

⁸⁹ *Id.*

⁹⁰ NAZGOL GHANDNOOSH, *THE SENT’G PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* 5 (2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> [<https://perma.cc/2JTA-X6ZQ>] (“White Americans, who constitute a majority of policymakers, criminal justice practitioners, the media, and the general public, overestimate the proportion of crime committed by people of color and the proportion of racial minorities who commit crime.”).

⁹¹ See COLOR OF JUSTICE, *supra* note 79, at 12–13 (“Racialized assumptions by key justice system decision makers unfairly influence outcomes for people who encounter the system. In research on presentence reports, for example, scholars have found that people of color are frequently given harsher sanctions because they are perceived as imposing a greater threat to public safety and are therefore deserving of greater social control and punishment. And survey data has found that, regardless of respondents’ race, respondents associated African Americans with terms such as ‘dangerous,’ ‘aggressive,’ ‘violent,’ and ‘criminal.’” (footnote omitted)).

⁹² *Id.* at 13 (“Since three-quarters of the public say that they form their opinions about crime from the news, this misrepresentation feeds directly into the public’s crime policy preferences.”); see also Eileen E.S. Bjornstrom, Robert L. Kaufman, Ruth D. Peterson & Michael D. Slater, *Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage*, 57 SOC. PROBS. 269, 276–77 (2010) (hypothesizing that Blacks and Hispanics are more likely to be depicted on news programs as perpetrators of violent crimes, while Whites are more likely to be portrayed as victims, in large part because white news media owners view these events as the most “newsworthy”).

⁹³ *CoreCivic Inc.*, OPEN SECRETS, <https://www.opensecrets.org/orgs/totals.php?id=D000021940&cycle=2018> [<https://perma.cc/Q569-NAVJ>]; *GEO Group*, OPEN SECRETS, <https://www.opensecrets.org/orgs/totals.php?id=D000022003&cycle=2018> [<https://perma.cc/H4FV-XY3C>].

responsible for campaign contributions to voting members of the House Appropriations Homeland Security Subcommittee, which is responsible for funding private immigration detention centers.⁹⁴ In fact, CoreCivic and Geo Group have spent millions for lobbying efforts and supporting political campaigns.⁹⁵

This road leads us back to REITs. Members of Congress have supported private prisons and detention centers by awarding government contracts and maintaining the tax preferences for private prison REITs.⁹⁶ Different congressional members, in multiple years, introduced legislation to end tax breaks for private prisons, and none of the bills passed even after multiple issues, including corruption with private prisons, were exposed.⁹⁷ This demonstrates congressional members were aware of the corruption and dangers associated with the private prison industry and ignored them at best or supported them at worst.

C. The Intersection of Mass Incarceration, REITs, and the Racial Wealth Gap

There is no question that people of color are disproportionately represented in jail and prison populations.⁹⁸ The War on Drugs led to overall public support for higher incarceration rates for drug related offenses that culminated in a massive

⁹⁴ Rachel Cohrs, *Company That Runs Immigration Detention Centers Is Top Donor for Three Texas Congressmen*, DALL. MORNING NEWS (June 21, 2018, 4:30 PM), <https://www.dallasnews.com/news/politics/2018/06/21/company-that-runs-immigration-detention-centers-is-top-donor-for-three-texas-congressmen> [<https://perma.cc/9FK5-FBCD>] (“Culberson received the most funding from GEO out of Texas members of Congress, but GEO is also the top donor this cycle for U.S. Rep. Henry Cuellar, D-Laredo, who received \$32,400, and Round Rock Republican Rep. John Carter, who received \$31,600. Both Culberson and Cuellar serve on the House Appropriations Homeland Security Subcommittee, which funds private immigration detention centers. Culberson is also the chairman of and Carter serves on the House Appropriations subcommittee on commerce, justice and science, which oversees funding for private prisons. . . . CoreCivic PACs have given less money to candidates than GEO, but still contributed to three Texans, according to OpenSecrets.org: Culberson with \$11,000, McCaul with \$3,500 and Cuellar with \$1,500.”)

⁹⁵ Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/> [<https://perma.cc/VC8K-2E4V>] (noting that CCA and Geo Group have “funneled more than \$10 million to candidates since 1989 and have spent nearly \$25 million on lobbying efforts”).

⁹⁶ CAPITALIZING ON MASS INCARCERATION, *supra* note 45, at 11 (“[P]rivate prison companies at times have joined with lawmakers, corporations, and interest groups to advocate for privatization through the American Legislative Exchange Council (ALEC). This organization is a nonprofit membership association focused on advancing ‘the Jeffersonian principles of free markets, limited government, federalism, and individual liberty.’ This is pursued in part by advocating for large-scale privatization of governmental functions.”)

⁹⁷ See Ending Tax Breaks for Private Prisons Act, S. 3247, 114th Cong. (2016); Ending Tax Breaks for Private Prisons Act, H.R. 4255, 115th Cong. (2017); Ending Tax Breaks for Private Prisons Act, S. 2075, 115th Cong. (2017); Ending Tax Breaks for Private Prisons Act, S. 1827, 116th Cong. (2019).

⁹⁸ ISSUES ON PRIVATIZED PRISONS, *supra* note 46, at 41 (reporting that 47.7% of inmates held public prisons in the year 1995 were Black and that 43.9% of inmates held in private prisons in the year 1997 were Black); see also U.S. DEP’T OF COM., MINORITY POPULATION GROWTH: 1995 TO 2050, at 2 (1999), <https://www.mbda.gov/sites/default/files/migrated/files-attachments/MinorityPopulationGrowth1995to2050.pdf> [<https://perma.cc/YJJ4-5PPQ>] (indicating that the Black population was thirteen percent of the total population).

attack on Black people in urban neighborhoods.⁹⁹ As recently as 2018, more than 600,000 people were arrested for marijuana possession.¹⁰⁰ Even when statistics demonstrate similar levels of criminality among the different races, the incarceration rate for Black people is substantially higher.¹⁰¹

President Joe Biden, in the first days of his administration, acknowledged the history of racial inequalities and issued executive orders to address them.¹⁰² On January 26, 2021, one of such executive orders included a mandate for the Justice Department to phase out private prison contracts at the federal level.¹⁰³ President Biden acknowledged private prisons and detention centers are disproportionately filled with people of color.¹⁰⁴ Other policymakers have recognized that mass incarceration has exacerbated racial inequities.¹⁰⁵ Government officials were complicit in making the incarceration business profitable and participated in the ultimate oppression of minorities.¹⁰⁶ By subsidizing the private prison industry as the

⁹⁹ ALEXANDER, *supra* note 66, at 55–56 (arguing the War on Drugs was a subterfuge to gain public support for its increased law enforcement activity in inner urban neighborhoods).

¹⁰⁰ COLOR OF JUSTICE, *supra* note 79, at 17.

¹⁰¹ Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 957–58 (2019) (explaining that crime rates for drug use between Blacks, Whites and Latinos are similar, but noting that imprisonment rates based on drug charges for Blacks were nearly six times the rate of whites); *see also* DANILO TRISI & MATT SAENZ, CTR. ON BUDGET & POL’Y PRIORITIES, ECONOMIC SECURITY PROGRAMS REDUCE OVERALL POVERTY, RACIAL AND ETHNIC INEQUITIES: STRONGER POLICIES NEEDED TO MAKE FURTHER PROGRESS 7 (2021), <https://www.cbpp.org/sites/default/files/atoms/files/1-28-21pov.pdf> [<https://perma.cc/4G6F-Q9JT>] (“Discriminatory policies and practices in the criminal justice system have fueled the disproportionate mass incarceration of people of color, even when people of color and white people commit crime at similar rates.”).

¹⁰² *Fact Sheet: President Biden to Take Action to Advance Racial Equity and Support Underserved Communities*, THE WHITE HOUSE (Jan. 26, 2021) [hereinafter *Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/26/fact-sheet-president-biden-to-take-action-to-advance-racial-equity-and-support-underserved-communities/> [<https://perma.cc/5XTG-E5NS>] (“President Biden will sign four executive actions this afternoon to advance racial equity and take first steps to root out systemic racism in housing and criminal justice. He will direct the Department of Housing and Urban Development (HUD) to take steps necessary to redress racially discriminatory federal housing policies that have contributed to wealth inequality for generations. The President will sign an Executive Order to end the Department of Justice’s (DOJ) use of private prisons. He will recommit the federal government to respect Tribal sovereignty and strengthen the Nation-to-Nation relationship between the United States and Tribal Nations. And, President Biden will take action to combat xenophobia against Asian Americans and Pacific Islanders.”).

¹⁰³ *Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, 86 Fed. Reg. 7,483 (Jan. 29, 2021); *see also* Press Release, Joseph Biden, President of the U.S., Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities (Jan. 26, 2021), <https://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/> [<https://perma.cc/Z9FS-WRQF>] (“The Attorney General shall not renew Department of Justice contracts with privately operated criminal detention facilities, as consistent with applicable law.”).

¹⁰⁴ Press Release, *supra* note 103 (“More than two million people are currently incarcerated in the United States, including a disproportionate number of people of color.”).

¹⁰⁵ COLOR OF JUSTICE, *supra* note 79, at 15.

¹⁰⁶ Jeff Amy, *Ex-Lawmaker Irb Benjamin Gets 6 Years in Bribery Scandal*, CLARION LEDGER (Mar. 3, 2017, 6:30 PM), <https://www.clarionledger.com/story/news/local/2017/03/03/ex-lawmaker-irb-benjamin-gets-years-bribery-scandal/98715362/> [<https://perma.cc/B4GH-9F6E>] (“Benjamin said Friday that Epps also threatened to withhold inmates from Chickasaw County unless officials signed a prison phone contract with a

largest supplier of government contracts and tax breaks, the government is indebted to the families harmed by these actions.

Mass incarceration has generational effects on the families. Obviously, removing one or more financial contributors from the household has an immediate financial effect.¹⁰⁷ Even when prisoners are released, they may not be simply re-inserted back into the life they once had.¹⁰⁸ Incarceration deprives the incarcerated of time and opportunity to obtain an education (primary and secondary) and thereby positively impact household income. In many cases these lost opportunities may never be fully reinstated because time can never be turned back and negative experiences may not be forgotten.¹⁰⁹

III. THE IMPACT OF INCARCERATION ON THE RACIAL WEALTH GAP

A. *The Racial Wealth Gap*

The median racial wealth gap between Black and white households has persisted over time.¹¹⁰ Recent data confirms the racial wealth gap remains vast.¹¹¹ Median white wealth is reported as \$188,200 compared to median Black wealth of \$24,100 and \$36,100 of median Hispanic wealth.¹¹² White family wealth concentration remains protected, despite survey and research data identifying contributing factors within the government's authority to change.¹¹³ This wealth gap is insurmountable without substantial intervention.

business operated by Sam Waggoner of Carthage. Waggoner pleaded guilty in 2015 to bribing Epps and in January was ordered to serve five years in prison, pay a \$100,000 fine and forfeit \$200,000.”)

¹⁰⁷ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STAT., PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (2010), <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/EV5H-3FC3>] (reporting approximately half of parents in state and federal prisons were the primary financial providers for their minor children and seventy-five percent were employed before prior to incarceration); see also NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 6 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter GROWTH OF INCARCERATION] (discussing the correlation “with negative social and economic outcomes for former prisoners”).

¹⁰⁸ Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PAPERS PREPARED FOR THE “FROM PRISON TO HOME” CONFERENCE 77, 79, 81 (U.S. Dep't of Health & Hum. Servs. ed., 2002) (“Thus, in the first decade of the 21st century, more people have been subjected to the pains of imprisonment, for longer periods of time, under conditions that threaten greater psychological distress and potential long-term dysfunction, and they will be returned to communities that have already been disadvantaged by a lack of social services and resources.”).

¹⁰⁹ *Id.* at 83 (“For some prisoners, incarceration is so stark and psychologically painful that it represents a form of traumatic stress severe enough to produce post-traumatic stress reactions once released.”).

¹¹⁰ Family and household references by race refer to median wealth rather than every household for the respective races. Most of the discussion will focus on white and Black wealth because they represent the top and bottom, respectively.

¹¹¹ See Edward N. Wolff, *The Declining Wealth of the Middle Class, 1983–2016*, 39 CONTEMP. ECON. POL'Y 461, 462, 465, 475 (2021) (indicating the richest 1% owned 39.6% of household wealth in 2016).

¹¹² Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), <https://doi.org/10.17016/2380-7172.2797> [<https://perma.cc/2BT3-RA2F>].

¹¹³ *Id.* (“The SCF data provide a snapshot of families’ wealth at a point in time. This point-in-time observation is a result of many complex societal, governmental, and individual factors that play out over the life

The foundation for wealth accumulation consists of earnings from income, inheritance and family assistance, homeownership, retirement savings, and emergency savings.¹¹⁴ Tax code bias has impacted each aspect by imposing barriers for low-income households, which are disproportionately Black households.¹¹⁵

As previously discussed, Black household income faced significant barriers on multiple levels. Mass incarceration removed Black males from households.¹¹⁶ Thus, it follows that mass incarceration removed the income earning potential of Black males from households.¹¹⁷ Further, children from minority households are disproportionately diverted from school to juvenile detention centers.¹¹⁸ These men and children were sacrificed for the private prison industry to profit from mass incarceration subsidized by government contracts and tax favored REITs. While REITs were purportedly introduced as investment tools to facilitate mass investing in real estate for investors of modest means, similar to other areas of tax laws and policies, corporations and wealthy investors are the primary recipients.¹¹⁹ This is not the first time tax policy has been promoted as creating opportunities for low and middle-income households but has primarily benefitted wealthier households.¹²⁰

B. Income and Wealth Mobility

Income mobility is directly tied to the labor market. Income mobility has been stagnant or decreased for middle and low-income households.¹²¹ Black income

cycle and even across generations. Among other factors, inter-generational transfers, homeownership opportunities, access to tax-sheltered savings plans, and individuals' savings and investment decisions contribute to wealth accumulation and families' financial security.”)

¹¹⁴ *Id.*

¹¹⁵ Taite, *Tax Code Bias*, *supra* note 4, at 739–40, 742, 748–49, 756.

¹¹⁶ GLAZE & MARUSCHAK, *supra* note 107, at 13.

¹¹⁷ *Id.* at 3, 14.

¹¹⁸ Buchanan, *supra* note 64, at 4–5.

¹¹⁹ Su Han Chan, Wai Kin Leung & Ko Wang, *Institutional Investment in REITs: Evidence and Implications*, 16 J. REAL EST. RSCH. 357, 371–72 (1998) (“Wang, Erickson and Chan (1995) report that there are relatively fewer institutional investors investing in REIT stocks than in the general stock market. In addition, they also report that REIT stocks with a higher percentage of institutional ownership perform better than other REIT stocks with fewer (or no) institutional investors. From the evidence reported in the literature, it appears that the participation of institutional investors increases the control and monitoring ability of shareholders, and hence, increases the value of REIT stocks.”)

¹²⁰ See generally Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915 (2018) (examining the disparities between city neighborhoods receiving tax benefits and those that do not receive benefits); Phyllis C. Taite, *Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice?*, 36 W. NEW ENG. L. REV. 201, 202 (2014) (explaining that “home mortgage interest deduction[s], capital gains exclusions from [home sales], and the estate tax” all function to “perpetuate income and wealth inequality”); Dan Quinley, *More Power to the Wealthy: Renewable Energy Tax Programs, Market Distortions, and the Ramifications on the Cost of Electricity*, 40 ENVIRONS: ENV'T L. & POL'Y J. 185, 188 (2017) (explaining that disparities exist between people able to “take advantage of the renewable energy tax policies” and those who must continue to rely on “the traditional utility model”).

¹²¹ Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/N6GQ-U2UL>].

mobility has consistently lagged behind white income mobility.¹²² Between 1970 and 2018, the aggregate share of income for middle-income households decreased from sixty-two percent to forty-three percent.¹²³ On the other hand, the aggregate income for low-income households decreased slightly over the same time period, from ten percent to nine percent.¹²⁴ Income mobility is an essential component of wealth mobility, and any impediments to meaningful employment or access to education negatively impacts both.¹²⁵

Incarceration significantly impacts income and ultimately wealth mobility, especially for Black men.¹²⁶ First, incarceration has a negative impact on employment prospects.¹²⁷ An arrest or criminal conviction creates a permanent record and gives potential employers a reason to deny employment.¹²⁸ Black men with a criminal record are denied employment opportunities at twice the rate of white men with a criminal record.¹²⁹ To emphasize the point, in a situation with two similarly credentialed applicants, a white person with a criminal record has a higher callback rate for employment than a Black person without a record.¹³⁰ Even ban-the-box reforms in employment laws, which delay or prohibit questions about arrests or criminal history on employment applications, have not mitigated the challenges to gaining meaningful employment because unexplained absence from the workforce is a red flag.¹³¹

Next, incarceration affects preparedness to enter or re-enter the job market.¹³² Absence from the labor market not only signals a red flag to prospective employers but also erodes job skills and impedes development of new skills.¹³³ Attempts to gain education to close the gap also have barriers. The effects of the War on Drugs did

¹²² David Card, Ciprian Domnisoru & Lowell Taylor, *The Intergenerational Transmission of Human Capital: Evidence from the Golden Age of Upward Mobility* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25,000, 2018) (“We show that average mobility rates at mid-century were substantially lower for black families than for whites or Asian Americans—a pattern that contributed to the persistence of lower education levels for African Americans for at least another generation.”).

¹²³ Horowitz et al., *supra* note 121.

¹²⁴ *Id.*

¹²⁵ Bobby L. Dexter, *Intent, Inequality, and the Berlin Walls of the Mind*, 48 PEPP. L. REV. 949, 957–59, 974–76 (2021).

¹²⁶ TRISI & SAENZ, *supra* note 101, at 1–7 (“Mass incarceration also increases barriers to employment, particularly for Black people. An experimental study comparing people with equivalent credentials demonstrated that having a criminal record reduced the likelihood of receiving a callback for a potential job by half for white people compared to nearly two-thirds for Black people.”).

¹²⁷ GROWTH OF INCARCERATION, *supra* note 107, at 233.

¹²⁸ *See id.* at 255–56.

¹²⁹ Khaing Zaw, Darrick Hamilton & William Darity Jr., *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 RACE & SOC. PROBS. 103, 104–05 (2016) (“For example, Pager (2003) uses evidence from a set of field experiments to demonstrate that when presented with a black male job applicant who reported prior incarceration, employers were twice as likely *not* to offer the applicant a call back for a job interview than a similarly qualified white male applicant who also reported prior incarceration.”).

¹³⁰ *Id.*

¹³¹ TRISI & SAENZ, *supra* note 101, at 21 (explaining that Ban-the-Box law do not provide sufficient protections to prevent employers from refusing to hire ex inmates).

¹³² GROWTH OF INCARCERATION, *supra* note 107, at 235 (discussing how incarceration, absence from the labor market and traumatic experiences negatively impact job readiness).

¹³³ *Id.*

not end with a conviction and time served. Any drug conviction disqualifies the individual from federal benefits, including financial aid for education.¹³⁴ Without higher education, it is difficult to find stable jobs.¹³⁵

Even without a conviction, access to education has been filled with barriers for Black households.¹³⁶ As such, zero tolerance policies that fed the school-to-prison pipeline further exacerbated access to education in these households.¹³⁷ Studies show that children who suffer criminal detention are more prone to drop out of high school and suffer mental illness and other health concerns.¹³⁸ This is especially true of Black children.¹³⁹

Limited employment opportunities coupled with no financial assistance to gain higher education create additional barriers to building wealth.¹⁴⁰ Wealth mobility remains highest for upper-income individuals because household wealth is so concentrated.¹⁴¹ The substantial tax breaks implemented in the 1990s coincide with the substantial increase in private prison and detention center populations.¹⁴² Between 1989 and 2016, the wealth gap increased substantially; with the wealthiest garnering \$2.3 million compared to \$20,300 for the lowest income.¹⁴³ This time period overlaps with private prisons' conversion to REITs and prison and detention center populations exploding.¹⁴⁴

¹³⁴ Bradley D. Custer, *The History of Denying Federal Financial Aid to System-Impacted Students*, 50 J. STUDENT FIN. AID 1, 6 (2021) ("There are reportedly upwards of 162 programs from the Department of Education alone that can be denied, including Pell Grants, federal loans, work study, other educational grants programs (e.g., for adult, vocational, and migrant education), and eligibility for the Upward Bound program In other words, as part of a person's criminal sentence, a judge can temporarily or permanently terminate a person's financial aid eligibility." (citation omitted)).

¹³⁵ Andrew Elmore, *Labor Redemption in Work Law*, 11 U.C. IRVINE L. REV. 287, 295 (2020) ("People with criminal record histories have poor employment outcomes for many reasons, beginning with a bleak labor market at the bottom of the income scale. Most incarcerated individuals lack a high school degree, and many struggle with drug addiction, physical disabilities, and mental illness. Many individuals with criminal records lack sufficient education to qualify for meaningful, stable jobs. The disproportionate number of people who have been previously incarcerated and who are African American and Latinx must also contend with race discrimination by employers." (footnotes omitted)).

¹³⁶ Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181, 188–90 (2008).

¹³⁷ See Archer, *supra* note 62, at 868.

¹³⁸ See *id.* at 868–70.

¹³⁹ Colton Merrill, *The Effects of Incarceration on Educational Attainment* 1, 14, 19–20 (Spring 2018) (Senior project, Orfalea College of Business), <https://www.cob.calpoly.edu/economics/wp-content/uploads/sites/27/2019/11/Merrill-1.pdf> [<https://perma.cc/G4PB-C9F8>] (reporting incarceration before the age of eighteen strongly correlated to decreased level of schooling by 1.37 years and a decrease of 2.4 years for Black children); see also *Kids Deserve Better: Why Juvenile Detention Reform Matters*, THE ANNIE E. CASEY FOUND. (Dec. 5, 2018), <https://www.aecf.org/blog/kids-deserve-better-why-juvenile-detention-reform-matters> [<https://perma.cc/G763-MB22>] (noting minority children are more likely to be detained).

¹⁴⁰ COLOR OF JUSTICE, *supra* note 79, at 9.

¹⁴¹ Wolff, *supra* note 111, at 465 (indicating the richest 1% owed 39.6% of household wealth).

¹⁴² Raher, *supra* note 44, at 215; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860.

¹⁴³ Horowitz et al., *supra* note 121.

¹⁴⁴ See *supra* notes 47–54 and accompanying text.

Removal of men from homes is an efficient way to erode generational wealth because they are more likely to be the primary earners.¹⁴⁵ One of the largest groups of incarcerated parents is men between twenty-five to thirty-four in age.¹⁴⁶ The division is more pronounced after race and ethnicity are taken into account because, in state and federal prisons, male parents are predominantly Black or Hispanic.¹⁴⁷

Systemic racism has negatively impacted economic development and wealth mobility, and mass incarceration has contributed to the racial wealth gap.¹⁴⁸ Research shows that Black men who were never incarcerated often have lower wealth than white men who were previously incarcerated.¹⁴⁹ Research further shows that low wealth increases the likelihood of incarceration.¹⁵⁰ Either way, Black communities and Black wealth suffer. Systemic racism, especially in the justice system, is a threat to income and wealth mobility that continues to exacerbate the racial wealth gap.¹⁵¹

IV. PROPOSALS

“More than two million people are currently incarcerated in the United States, and a disproportionate number of these individuals are people of color. Mass incarceration imposes significant costs on our society and communities, while private prisons profiteer off of federal prisoners in less safe conditions for prisoners and correctional officers alike. President Biden is committed to reducing mass incarceration while making our communities safer. That starts with ending DOJ’s reliance on private prisons. The Order directs the Attorney General not to renew Department of Justice contracts with privately operated criminal detention facilities.”¹⁵²

The Biden administration took an exceptional step by publicly acknowledging biased and prejudicial laws and policies.¹⁵³ This was a promising first step. To reduce

¹⁴⁵ GLAZE & MARUSCHAK, *supra* note 107, at 5.

¹⁴⁶ *Id.* at 3 (reporting information from a survey indicating sixty-four percent of state inmates and seventy-four percent of federal inmates between the age of twenty-five to thirty-four reported being parents of minor children).

¹⁴⁷ *Id.* (“For men held in state prison, the likelihood of being a parent varied across racial categories . . . Hispanic (57%) and black (54%) men were more likely than white (45%) men to report being a parent. Findings were similar for men held in federal prison. White men (48%) in federal prison were the least likely of all male inmates to report having children. Black (70%) and Hispanic (69%) men were equally likely to be parents.”).

¹⁴⁸ Zaw et al., *supra* note 129, at 111 (“A previous record of incarceration is associated with substantially lower wealth levels, and previously incarcerated blacks have significantly less wealth than previously incarcerated whites.”).

¹⁴⁹ *Id.* at 112–13; see also Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/MG92-NHZV>] (comparing wealth accumulation by race and ethnicity for men who were incarcerated to men who were never incarcerated).

¹⁵⁰ Zaw et al., *supra* note 129, at 104, 111 (“Additionally, as the data in the NLSY79 demonstrate, low wealth is associated with an increase in the likelihood of incarceration, which in turn can depress wealth accumulation.”).

¹⁵¹ HANKS ET AL., *supra* note 14, at 17.

¹⁵² CAPITALIZING ON MASS INCARCERATION, *supra* note 45.

¹⁵³ *Fact Sheet*, *supra* note 102.

racial bias in the criminal justice system and mass incarceration requires major restructuring. The directive to stop renewing criminal detention facility contracts is good, but it is not the same as ending the practice and does not make it clear whether juvenile and/or immigration detention centers are included. An abrupt cancellation may not be possible because these long-term contracts are legally binding, but people of color remain vulnerable. Therefore, the threat to Black communities, as previously described, persists. The following proposed solutions, not proposed in sequential order, would go a long way towards restoration of the devastated communities.

First, there is no reason to delay ending the tax breaks. Congress should promptly disqualify private prisons and detention centers from participation in REITs, including TRSs, currently and prospectively. Even though Geo Group and CoreCivic have voluntarily withdrawn from REIT status, there is nothing that would preclude them from reconvertng nor prevent other institutions from converting to REITs.¹⁵⁴ Providing tax preferred status to an industry with a business model that requires high incarceration rates to make a profit provides perverse incentives to incarcerate and detain as many people as possible.

Data demonstrates that Black households are disproportionately arrested, detained, and incarcerated for longer periods of time.¹⁵⁵ Implicit biases about Black people, and perceived notions about their criminality, have resulted in government complacency at best—and complicity at worst—for their lack of response to a clear and present danger for these communities. Ending REITs for private prisons and detention centers requires minimal effort.

Next, systemic problems warrant systemic solutions. In addition to ending contracts and REITs for private prisons and detention centers, the U.S. Attorney General (USAG) should investigate and take action against agency leaders that promote or do not address significant racial disparities within their respective agencies. To manage this huge task, the USAG should require Racial Impact Statements (RIS) for each agency.¹⁵⁶ Some states have already adopted legislation for RISs in sentencing and proposed actions.¹⁵⁷

¹⁵⁴ Kimberly Chin, *Geo Group Plans to End REIT Status, Become Taxable C Corp*, MARKETWATCH (Dec. 2, 2021, 6:47 AM), <https://www.marketwatch.com/story/geo-group-plans-to-end-reit-status-become-taxable-c-corp-271638445669> [<https://perma.cc/FX8S-NUML>] (“GEO Group Inc. said its board has approved a plan to end its real-estate investment trust status to become a taxable C corporation by the end of the year.”); *CoreCivic Change in Structure and Capital Strategy Opens New Opportunities*, CORECIVIC (Aug. 6, 2020, 11:36 AM), <https://www.corecivic.com/news/corecivic-change-in-structure-and-capital-strategy-opens-new-opportunities> [<https://perma.cc/SKV3-S4FC>] (“While our decision to become a REIT in 2013 was right at the time, I believe this move puts our company in a better position to improve our already strong financial position over time, and ultimately move our share price back to levels that reflect our strong fundamental business.”).

¹⁵⁵ COLOR OF JUSTICE, *supra* note 79, at 4.

¹⁵⁶ William Kennedy, Gillian Sonnad & Sharon Hing, *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. 154, 157 (2013) (“Racial impact statements systematically analyze how racial and ethnic groups are affected by an existing or proposed action, policy, or practice.”).

¹⁵⁷ Nicole D. Porter, *Racial Impact Statements*, THE SENT’G PROJECT (June 16, 2021), <https://www.sentencingproject.org/publications/racial-impact-statements/> [<https://perma.cc/3DN9-BCZF>] (“Nine states—Iowa, Colorado, Connecticut, Florida, Oregon, Maine, Maryland, New Jersey and Virginia—have implemented mechanisms for the preparation and consideration of racial impact statements; in addition, the Minnesota Sentencing Guidelines Commission develops racial impact statements without statutory guidance. In recent years, legislators in several states have introduced legislation to adopt racial impact statements policies.”).

The proposed RIS in this Article would require an annual RIS from agencies including, but not limited to, law enforcement, correctional and detention centers, school boards and State Attorneys General (SAG), or equivalent position for every person's interaction (no matter the time length) with the agency. The RIS adds transparency from the first phase and continues through any criminal system interaction. The oversight and potential punitive action will force the agencies to create alternatives to incarceration for behavioral, minor and nonviolent offenses.

The SAG would be responsible for monitoring charging officials, investigating, and taking action against agency officials using measurable standards. For example, if the racial disparities are beyond two percentage points higher than the state average of racial representation in the state for similar offenses, the agency must take corrective actions. In counties with predominantly Black residents, the numbers should not exceed more than two percentage points of counties with predominantly white residents. The SAG must submit a comprehensive RIS report, including investigatory material and actions taken, to the USAG. If the USAG finds that SAGs have not effectively enforced or knowingly disregarded racial disparities, then the USAG may initiate action including an initial warning, filing a state bar complaint, criminal action,¹⁵⁸ or civil rights violation lawsuits¹⁵⁹ to provide accountability.¹⁶⁰

The SAG may enlist Citizen Review Boards (CRB) for assistance.¹⁶¹ As such, it would expand the scope of traditional CRBs but may be necessary to help provide oversight and accountability.¹⁶² For law enforcement, racial disparities in interaction must not exceed two percentage points for race or ethnic representation for the precinct or county. The leading law enforcement official must submit the RIS with

¹⁵⁸ 18 U.S.C. § 242; Parker Yesko, *Will Doug Evans Face Accountability?*, APM REPS. (Oct. 14, 2020), <https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability> [<https://perma.cc/VWM3-P4ZF>].

¹⁵⁹ Hans Sherrer, *Tulia Travesty Settled for \$6 Million*, PRISON LEGAL NEWS (Mar. 15, 2003), <https://www.prisonlegalnews.org/news/2003/mar/15/tulia-travesty-settled-for-6-million/> [<https://perma.cc/X5QQ-DBJX>] (“In the years following the arrests during the July 23, 1999 sweep, several federal civil rights lawsuits were filed against a variety of defendants by people who were arrested but not convicted. As the Tulia cases unraveled from June 2000 to August 2003, a multitude of cities, counties and individuals became vulnerable to a lawsuit, because the Tulia drug investigation was paid for, and conducted under the auspices of The Panhandle Regional Narcotics Trafficking Task Force (Task Force). Thirty cities and counties were members of the Task Force. The city of Amarillo, 44 miles from Tulia, was the lead Task Force member and the one with the deepest pockets, so it was facing the largest potential liability.”); *see also* Press Release, Off. of Pub. Affs. Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law (June 25, 2021), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory> [<https://perma.cc/S7A2-5HDV>] (“The United States’ complaint contends that several provisions of Senate Bill 202 were adopted with the purpose of denying or abridging the right to vote on account of race. The Justice Department’s lawsuit alleges that the cumulative and discriminatory effect of these laws—particularly on Black voters—was known to lawmakers and that lawmakers adopted the law despite this.”).

¹⁶⁰ *But see* Yesko, *supra* note 158 (discussing a dismissed federal civil rights lawsuit brought against a prosecutor who repeatedly struck jurors on the basis of race).

¹⁶¹ PETER FINN, NAT’L INST. OF JUST., *CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION*, x–xi (2001), <https://www.ojp.gov/pdffiles1/nij/184430.pdf> [<https://perma.cc/277W-FG9M>] (reporting CRBs provide oversight for citizen allegations of police misconduct, address community concerns and improve the quality of internal investigations).

¹⁶² *Id.* at 69.

proposed corrective action before submission to a CRB. The CRB would submit its report with a recommendation to the SAG. The SAG would provide the final review and take necessary action. The SAG would forward only its comprehensive RIS report to the USAG.

For state correction and detention centers, including those under state government contract, the SAG would receive the annual RIS from the lead agency officer. The RIS must include any disciplinary actions and actions that lead to death and/or extended prison time. Federal correction and detention centers, including those under federal government contract, report directly to the USAG. These agencies must take corrective action for racial disparities beyond two percent of the representative population.

To reduce or eliminate the school to prison pipeline, schools should also be required to provide a RIS tailored to institutional educational goals. Educational institutions are designed to educate and build, not destroy. Placement in juvenile detention centers has become normalized instead of a last resort alternative.¹⁶³ Schools should be a safe space for children, not a source for trauma. For schools, the RIS should require written justification for every police call, arrest, or referral to a juvenile detention facility to determine whether schools or districts demonstrate significant racial disparities. Further the RIS must include in-school disciplinary actions. Similar to the prior proposals, the RIS should include race, age, and ethnicity of each student and the annual report must be provided to the school board at the end of each school year.

If racially disparate treatment for punitive actions exceeds two percentage for race or ethnic representation for the district, the board is responsible for imposing corrective action, including any sanctions, before submission to a CRB. If the CRB finds no significant racially-disparate treatment or finds the school board responded appropriately, it would submit a final report to the SAG with a recommendation of no further action. If significant racially-disparate treatment is found and the school board did not respond adequately, the CRB would submit the report with a recommendation to the SAG. The SAG would provide the final review and take necessary action. The SAG would forward only the portion of the report for police action and referrals to juvenile detention centers to the USAG.

Next, Congress should legalize recreational marijuana use for adults. States are already moving in that direction,¹⁶⁴ and there is overwhelming public support.¹⁶⁵ The Cannabis Administration and Opportunity Act (CAOA) proposes declassification as Schedule I controlled substance, imposing a minimum age, maximum retail transaction amount and a progressive excise tax.¹⁶⁶ A top rate ten percent excise tax

¹⁶³ *Juvenile Detention Explained*, THE ANNIE E. CASEY FOUND. (Mar. 26, 2021), <https://www.aecf.org/blog/what-is-juvenile-detention> [<https://perma.cc/JGH7-X628>] (explaining the majority of young people placed in detention centers for non-violent offenses such as truancy).

¹⁶⁴ Daniller, *supra* note 80.

¹⁶⁵ WAR ON MARIJUANA, *supra* note 70, at 11–12.

¹⁶⁶ SEN. CORY BOOKER, SEN. RON WYDEN & SEN. CHUCK SCHUMER, CANNABIS ADMINISTRATION AND OPPORTUNITY ACT DISCUSSION DRAFT 1 (2021), <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> [<https://perma.cc/MT7R-WYKB>].

would be imposed on enactment with five percent annual increases to a maximum of twenty-five percent after five years.¹⁶⁷

Similarly, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2020 would legalize marijuana, expunge federal criminal records for cannabis offenses, and impose lower excise taxes.¹⁶⁸ The top excise tax proposed in the MORE Act of 2020 is five percent for the first two years increasing by one percent in each of the following years for a maximum of eight percent after four years for cannabis products produced in or imported into the United States.¹⁶⁹ The Congressional Budget Office (CBO) estimates a federal revenue increase of \$13.7 billion over a ten year period and reduction in prison time for federal inmates by “73,000 person-years[] among existing and future inmates.”¹⁷⁰ The CBO estimates a net savings of more than \$1 billion over a nine year period.¹⁷¹

Both the CAO and MORE Act of 2020 propose programs to facilitate restoration for people adversely impacted by the War on Drugs; however, this Article will address the most relevant proposal aimed to provide direct support to affected individuals.¹⁷² The Community Reinvestment Grant Program (CRGP) is one of three grant programs and would fund nonprofits to provide legal services, including expungement, job training, and other reentry services.¹⁷³ CAO would require resentencing and expunging records for nonviolent marijuana offenses.¹⁷⁴ Similarly, the MORE Act of 2020 would require resentencing and expungement of records for nonviolent marijuana offenses for federal inmates.¹⁷⁵

Such releases would reduce mass incarceration and start the process of restoration. Release, expungement, and other related services would provide freedom and cleared criminal records. But that is not enough to provide restorative justice. Interaction with the criminal justice system from arrest to incarceration are the primary harms and the collateral damage, such as lost opportunities, generational

¹⁶⁷ *Id.* at 18 (“The general rate of tax would be 10 percent for the year of enactment and the first full calendar year after enactment. The tax rate would increase annually to 15 percent, 20 percent, and 25 percent in the following years. Beginning in year five and thereafter, the tax would be levied on a per-ounce rate in the case of cannabis flower, or a per-milligram of THC rate in the case of any cannabis extract. The applicable rate for year five and thereafter would be a per-ounce or per-milligram of THC amount determined by the Secretary of the Treasury equal to 25 percent of the prevailing price of cannabis sold in the United States in the prior year.”).

¹⁶⁸ Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).

¹⁶⁹ *Id.* § 5901(a) (“There is hereby imposed on any cannabis product produced in or imported into the United States a tax equal to—(1) for any such product removed during the first 5 calendar years ending after the date on which this chapter becomes effective, the applicable percentage of such product’s removal price, and (2) for any product removed during any calendar year after the calendar years described in paragraph (1), the applicable equivalent amount.”).

¹⁷⁰ CONG. BUDGET OFF., H.R. 3884, THE MORE ACT OF 2020, AS PASSED BY THE HOUSE OF REPRESENTATIVES ON DECEMBER 4, 2020 ESTIMATED BUDGETARY EFFECTS (2020), <https://www.cbo.gov/system/files/2020-12/hr3884.pdf> [<https://perma.cc/2UMB-59GD>].

¹⁷¹ *Id.* (“Finally, the act would reduce the Bureau of Prisons’ costs to house inmates by reducing both the number of inmates in federal facilities and the aggregate time they serve. CBO estimates that provision would result in net savings of about \$1 billion over the 2021–2030 period, assuming appropriation actions consistent with anticipated changes in prison populations.”).

¹⁷² See H.R. 3884; CONG. BUDGET OFF., *supra* note 170.

¹⁷³ See H.R. 3884.

¹⁷⁴ *Id.*

¹⁷⁵ CONG. BUDGET OFF., *supra* note 170.

wealth erosion, and more, inflict more lasting damage.¹⁷⁶ Neither the CAO A nor MORE Act of 2020 proposed redress and reparation for individual harms or generational impact and this must be an integral part of the solution.

The Civil Liberties Act of 1988 (CLA of 1998) provided redress and reparations for Japanese Americans for their incarceration during World War II.¹⁷⁷ Among the stated purposes of the Act were acknowledgement of fundamental injustices, apology for the acts associated with incarceration, and restitution.¹⁷⁸ In justifying the payments, former Representative Robert Matsui reminded Congressional members that “[r]edress compensation also reflects the most basic concept of our judicial system—that one party, even if that party is the government itself, who injures another party shall be held accountable. There would be no accountability, and no justice, in the redress bill without compensation.”¹⁷⁹ The same principle still holds true.

Numerous studies and reports have exposed the racial injustices imposed on the Black community and ultimately, Black wealth under the subterfuge of a War on Drugs.¹⁸⁰ Both the CAO A and MORE Act of 2020 acknowledge the disparate impact and devastation on communities of color, and both propose trust funds to receive the excise tax to support services for reintegration and cannabis business, but neither propose direct redress to harmed individuals. State and federal governments have a shared responsibility to facilitate economic integration into society and redress compensation. CAO A’s proposed trust fund would allocate the excise tax to fund the grant program, CRGP, for the purpose of providing services related to reintegration, and two other grants programs to support loans and licensing for cannabis business.¹⁸¹ The MORE Act of 2020 proposed trust fund would allocate the funds between the USAG and Small Business Administration.¹⁸²

Individuals who were incarcerated for marijuana use and/or possession should receive the proposed reintegration assistance and at least \$50,000 in compensatory redress—comparable to amounts awarded under the CLA of 1988, when adjusted for inflation.¹⁸³ Living individuals would submit proof of incarceration for marijuana offenses. Descendants of deceased individuals may apply for redress through the estate. Government complicity and/or complacency was a consistent theme with

¹⁷⁶ See COLOR OF JUSTICE, *supra* note 79, at 13; WAR ON MARIJUANA, *supra* note 70, at 11; Daniller, *supra* note 80; TWO COUNTRIES, *supra* note 81, at 13.

¹⁷⁷ Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. §§ 1989b–1989c-8).

¹⁷⁸ *Id.*

¹⁷⁹ 134 CONG. REC. H6308 (daily ed. Aug. 4, 1988) (statement of Rep. Robert Matsui).

¹⁸⁰ See *supra* notes 70–92 and accompanying text.

¹⁸¹ See BOOKER ET AL., *supra* note 166, at 11 (“Sec. 301 also creates two programs to be implemented by the Small Business Administration (SBA). The Cannabis Opportunity Program will provide funding to eligible states and localities to make loans to assist small businesses in the cannabis industry owned by socially and economically disadvantaged individuals. The Equitable Licensing Grant Program will provide funding to eligible states and localities to implement cannabis licensing programs that minimize barriers for individuals adversely affected by the War on Drugs.”).

¹⁸² Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).

¹⁸³ See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 906 (codified as amended at 50 U.S.C. §§ 1989b–1989c-8).

barriers and obstacles to wealth mobility.¹⁸⁴ Consequently, government action should be required to rectify past harms by rebuilding the harmed communities.

CONCLUSION

Black people are not inherently criminals. Without transparency and accountability, true restorative justice will not be achieved. Racial injustice has been virtually unchecked in the criminal justice system; it is time to be intentional in reform initiatives. Advanced oversight and accountability will force police, courts, and schools to look for alternative solutions to incarceration. Government leaders have created laws and policies to create and maintain an uneven playing field. Minority communities have borne the brunt of overt, covert, and racially biased laws and practices.¹⁸⁵ This Article has demonstrated the role law and policy played in hindering wealth building for minority households. Subsidizing mass incarceration with lucrative government contracts and permitting private prisons to convert to REITs does not serve societal interests. Instead, mass incarceration has imposed barriers to income and wealth mobility and contributes to the racial wealth gap. Tax policy should reserve tax incentives for activities designed to benefit the public at large. Therefore, correctional institutions must be permanently disqualified from being able to convert to REITs and TRSs to reap these tax benefits.

Tax policy subsidized the private prison industry but has not provided sufficient direct benefits to affected communities—predominantly people of color—to mitigate the economic effects of incarceration. Instead, tax policy has created and facilitated inequalities resulting in wealth erosion for minority communities. This is America's debt to pay, and it is long past due. The method of payment may be debatable but the existence of debt obligation is not. Federally legalizing marijuana and the imposition of an excise tax has the potential to generate the revenue to restore affected communities and positively impact the racial wealth gap. Restitutions for other legal harms attempt to restore the harmed party. There is not enough money to provide full restoration for what these communities lost; however, this does not absolve America's obligation to rebuild them.

Remedies must be designed to provide a foundation for re-building the lost resources through meaningful employment, income equality, increased generational wealth, increased access to education, and the end of mass incarceration for nonviolent offenses. The legal services, including expungement, job training and other reentry services proposed in both CAO and MORE Act of 2020 provide necessary first steps. To get closer to restoration for systemic harms caused by the War on Drugs, and imposed disproportionately on communities of color, redress compensation must be an integral part of the solution.

¹⁸⁴ See *supra* notes 102–106 and accompanying text.

¹⁸⁵ See *supra* notes 70–109 and accompanying text.