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WHITE INVESTMENT IN BLACK BONDAGE

Geiza Vargas-Vargas*

INTRODUCTION

Further [revenue] growth is expected to come from increased focus and resources by the Department of Homeland Security dedicated to illegal immigration, stricter sentencing guidelines, longer prison sentences and prison terms for juvenile offenders, as well as the growing demographic of the 18 to 24 year-old at-risk population. Males between 18 and 24 years of age have demonstrated the highest propensity for criminal behavior and the highest rates of arrest, conviction, and incarceration.\(^1\)—Corrections Corporation of America

Any changes with respect to the decriminalization of drugs and controlled substances or a loosening of immigration laws could affect the number of persons arrested, convicted, sentenced and incarcerated, thereby potentially reducing demand for correctional facilities to house them. Similarly, reductions in crime rates could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.\(^2\)—The GEO Group, Inc.

Black\(^3\) men\(^4\) constitute over forty percent of the U.S. prison population.\(^5\)

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1. Corrections Corp. of America, Form 10-K at 16 (Mar. 12, 2004) [hereinafter CCA, Form 10-K].
3. I am using the term “black” instead of “African-American” because I believe the term more greatly encompasses the African Diaspora.
4. In 2002, 97,491 of the people under the jurisdiction of state or federal correctional authorities were females. Paige M. Harrison & Allen J. Beck, U.S. Dept. of Justice, Prisoners in 2002, at 5, Tbl. 6, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf (last modified Aug. 27, 2003) [hereinafter Prisoners 2002]. Among women, blacks were five times as likely to be in prison as whites. Id. at 9. While the drug trade is largely a male trade, drug offenses have increased female incarceration rates 500-600% since the 1980s. Phyllis Goldfarb, Counting the Drug War's Female Casualties, 6 J. Gender Race & Just. 277, 293 (2002). For an examination of the extraordinary rates of incarceration for women as a result of drug policy and federal sentencing guidelines see Marc Mauer et al., The Sentencing Project, Gender and Justice.
and jail population. In 2003, the U.S. Bureau of Justice Statistics reported that if current incarceration rates remain unchanged, one out of three black men is “expected to go to prison during their lifetime.”

Women, Drugs and Sentencing Policy, available at www.sentencingproject.org/pdfs/9042.pdf (Nov. 1999). I have limited my discussion to black men primarily because private prison operators are not interested in female offenders. See GEO, FORM 10-K, supra note 2, at 4.

We typically refrain from pursuing contracts that we do not believe will yield attractive profit margins in relation to the associated operational risks. For example, we have avoided operating certain juvenile and female correctional facilities which we believe may be prone to increased operational difficulties that may result in increased litigation, higher personnel costs and reduced profitability.

Id. (emphasis added). The epigram that opens the introduction to this paper is further evidence that the private prison market has a marked interest in the population that has the “highest propensity for criminal behaviour” i.e., (black) males ages eighteen to twenty-four. See supra note 1. More importantly, however, I have excluded women because to introduce the black female prisoner would require an introduction of the black female slave and an entirely different kind of investment in bondage. See, e.g., Patricia Allard, The Sentencing Project, Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses, available at http://www.sentencingproject.org/pdfs/9088.pdf (Feb. 2002). The choice to focus exclusively on the systemic racism directed at black men—as opposed to all men of color—is an attempt to incorporate the wisdom of Professor Mari Matsuda who has cautioned activists against casually adding an unfamiliar form of oppression to one’s analysis. Mari Matsuda, Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stan L. Rev. 1183, 1191 (1991). Like Matsuda, I would encourage readers to listen “with special care” to those Latina/o and Native American activists and scholars “who are actively involved in knowing and ending the systems of domination that touch their lives.” Id. For a background in the early racism directed at these two other racial minorities currently filling up U.S. prisons see Documents of American Prejudice: An Anthology of Writings on Race From Thomas Jefferson to David Duke 22-60, 461-96 (S.T. Joshi ed., 1999) [hereinafter Documents of American Prejudice].


6. The incarceration rate for black males ages 20 to 34 are 11,001 to 12,877 per 100,000 black males in the general population. Inmates at Midyear 2002, supra note 5, at 11, Tbl. 14. For white males ages 20 to 34, the incarceration rate is 1,521 to 1,680 per 100,000 white males. Id. For white males the incarceration rate increases by age, but for black males the highest incarceration rate is for those between the ages of twenty-five and twenty-nine. Id.

If we assume the law is rational and fair, then the statistics lead to the inevitable conclusion that there are substantially more black men in prison because substantially more crime is committed by black men. The law, however, is neither rational nor fair, and the conclusion, therefore, is misguided. First, it assumes that crime statistics communicate a universal truth. Second, the conclusion overlooks the law’s historic role in maintaining socially oppressive relations. Third, it ignores the fact that American law is a complex system developed and controlled by white men with specific ideas about blacks and punishment.

The reason why black men constitute almost half of America’s prison population is because investing in black bondage is an American tradition. The law’s relationship with blacks has historically been a violent one. Slavery, the quintessential white legal

8. But see Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 967, 968 (1962) ("It may be stated categorically that there are no statistics on crime per se: there are only statistics on ‘crimes known to the police’. . . . Inequality of justice seems to be the most important factor in making the statistics on Negro crime and white crime not comparable."); Henry Louis Gates, Statistical Stigmata, in Deconstruction and the Possibility of Justice (Drucilla Cornell et al. eds., 1992). As Professor Gates demonstrates, crime statistics communicate a universal truth to the extent that they communicate supports conventional wisdom. When they don’t, when, for example, they demonstrate that “the odds for a capital sentence for a white victim crime is 4.3 times greater than for a black-victim crime,” id. at 333 (summarizing the findings of the Baldus study), then they become “arbitrarily structured little rinky-dink regressions . . . [which] prove nothing other than the truth of the adage that anything may be proved by statistics.” Id. at 334 (quoting Federal District Court Judge Owen Forrester). For a full discussion of the Baldus study in the context of McCleskey v. Kemp, 481 U.S. 279 (1987), see infra notes 292-312 and accompanying text.

9. See A. Leon Higginbotham, Jr., In the Matter of Color: Race & the American Legal Process: The Colonial Period 7 (1978) (documenting “the vacillation of the courts, the state legislatures, and even honest public servants in trying to decide whether blacks were people, and if so, whether they were a species apart from white humans . . . ”).


11. On the white practice of lynching and the public burning of black bodies, see Howard N. Rabinowitz, Race Relations in the Urban South 1865-1890, at 52-60 (U. of Georgia 1996) and Myrdal, supra note 8, at 560-69. In 1st Story: Wargasm, Professor Anthony Paul Farley recounts the public lynching of J.P. “Jim” Ivy, a black man killed for attacking a white woman even though “[s]he was not sure, but thought that he looked like the one who attacked her.”

I watched a Negro burned at the stake at Rocky Ford, Miss., Sunday afternoon. I watched an angry mob chain him to an iron stake. I watched them
structure that sanctioned the exploitation of black bodies for white power and profit, allowed whites to steal labor and recover the wealth produced by a rich economy in tobacco, cotton, and sugar. Slavery fueled a market that, like trade in stocks and bonds, amassed power and aroused pleasure. Slave traders extracted whatever they wanted from black bodies, and slaves were hyper-

pile wood around his helpless body. I watched them pour gasoline on this wood. And I watched three men set this wood on fire.

I stood in a crowd of 600 people as the flames gradually crept nearer and nearer to the helpless Negro. I watched the blaze climb higher and higher encircling him without mercy. I heard his cry of agony . . . . "Oh, God; Oh, God!" he shouted. "I didn't do it! Have mercy!"

. . . Nowhere was there a sign of mercy among the members of the mob, nor did they seem to regret the horrible thing they had done. The Negro had supposedly sinned against their race, and he died a death of torture.

. . . The mob walked away . . .

"I'm hungry," someone complained. "Let's get something to eat."


12. See generally John Hope Franklin, From Slavery to Freedom: A History of Negro Americans 42-213 (3rd ed. 1969). According to Dr. Franklin, while "slavery was widespread during the earliest known history of Africa as well as other continents" id. at 42, slaves in Africa were essentially servants, and the extent of the demand for them depended in a large measure on the wealth of the potential masters. Slavery was, therefore, a manifestation of wealth, and the institution showed little of the harshness and severity that it possessed in areas where it was itself the foundation on which wealth was built.

Id. at 43. See also Norman Redlich, "Out, Damned Spot; Out I Say." The Persistence of Race in American Law, 25 Vt. L. Rev. 475, 478 (2001) ("Where societies hitherto had enslaved the vanquished in a war, or made slaves of the indebted, here we created a race-based concept of slavery, treating slaves as property, and imputing the status of slaves as property to all others with similar pigmentation . . . .")

13. See J. H. Van Evrie, White Supremacy and Negro Subordination, in Documents of American Prejudice, supra note 4, at 295 ("The negro is a creature of the tropics, and his labor is essential to the cultivation of tropical and tropicoid products, which, in turn, are essential to the happiness and well-being of all mankind.").

conscious of such extractions.\(^{15}\)

The American legal system is a well-financed machine\(^{16}\) that creates "the very spectacle—black criminality—upon which it relies to justify its existence."\(^{17}\) As they incarcerate black men, federal

\(^{15}\) See Walter Johnson, \textit{Soul by Soul: Life inside the Antebellum Slave Market} 20 (1999). Johnson provocatively captures the spectacle of the slave auction: "Gazing, touching, stripping, and analyzing aloud, the buyers read slaves’ bodies as if they were coded version of their imagined needs—age was longevity, dark skin immunity, a stout trunk stamina, firm muscles production, long fingers rapid motion, firm breasts fecundity, clear skin good character." \textit{Id} at 149. Johnson further notes, "[f]or the slaves in the market, the examinations were revealing accounts of the buyers themselves, accounts that allowed them to guess what a buyer was looking for and, sometimes, to shape a sale to suit themselves." \textit{Id.} at 161. See also Frederick Douglass, \textit{Narrative of the Life of Frederick Douglass, An American Slave} (1845), reprinted in \textit{Narrative of the Life of Frederick Douglass, An American Slave, and Incidents in the Life of a Slave Girl} 53-54 (Modern Library 2000). In \textit{Narrative of the Life of Frederick Douglass}, the author recalls that because one of his masters did not leave a will indicating how to distribute property, upon the master’s death:

It was necessary to have valuation of the property, that it might equally be divided between Mrs. Lucretia and Master Andrew. . . . We were all ranked together at the valuation. Men and women, old and young, married and single, were ranked with horses, sheep and wine. There were horses and men, cattle and women, pigs and children, all holding the same rank in the scale of being, and were all subject to the same narrow examination. \textit{Id. See also} Herbert supra note 11, at 167 (noting the extraction from male slaves of "every trace of manhood").

\(^{16}\) In 1999, local, state and federal governments expended approximately $146.5 billion on police protection, judicial and legal functions and corrections. U.S. Dep’t of Justice, \textit{The Sourcebook of Criminal Justice Statistics} 2002, at 3-4, Tbl. 1.2, available at \url{http://www.albany.edu/sourcebook/pdf/t12.pdf} (Mar. 27, 2002) [hereinafter \textit{The Sourcebook}]. At the federal government level, expenditures totaled almost $27.4 billion. \textit{Id.} Such sums appear even greater when one considers that ten years earlier total legal expenditures for all levels of government totaled only $71 billion, with the federal government spending just $9.6 billion. \textit{Id. See also} Corrections Corp. of America, Form S-3/A-3 at S-75 (Apr. 30, 2003) [hereinafter CCA, Form S-3/A-3]. According to CCA, the U.S. Marshall’s Service budget for 2003 was $27.5B; the budget for the Bureau of Immigration & Customs Enforcement (formerly INS) during the same year was $1.4B, a twenty-nine percent increase over the prior year; the budget for 2004 for the U.S. Dep’t of Homeland Security, excluding Dep’t of Defense, is $35B. \textit{Id.} Note that CCA’s 2003 annual report stated: "The President’s fiscal 2005 budget places a moratorium on new prison construction while promoting more aggressive BOP contracting with state, local, and private sector prison providers." CCA, Form 10-K, supra note 1, at 17.

and state governments disclaim responsibility\textsuperscript{18} for producing the conditions that spawn criminality and confinement.\textsuperscript{19} Corporations have discovered a deep market in crime.\textsuperscript{20} Prison real estate ownership and management is a billion dollar industry\textsuperscript{21} with tax dollars subsidizing more than one-third of corporate revenues.\textsuperscript{22} The American legal system is once again implicated in the trafficking of bodies,\textsuperscript{23} and black ones are once again generating the sweetest returns.\textsuperscript{24}

\textsuperscript{18} See Plessy v. Ferguson, 163 U.S. 537, 552 (1896) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

\textsuperscript{19} See \textit{S/M, supra} note 17, at 69 (noting that the production of black inferiority "is denied by the producers"). \textit{See also} Alan David Freeman, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine}, 62 MINN. L. REV. 1049, 1049-50 (1977-1978). The heart of Professor Freeman’s study is found in the article’s first paragraph: "[A]s the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law." \textit{Id.} at 1050.

\textsuperscript{20} For an interesting historical account of this discovery see W.J. Michael Cody & Andy D. Bennett, \textit{The Privatization of Correctional Institutions: The Tennessee Experience}, 40 VAND. L. REV. 829, 835 (1987) (describing the early efforts of railroad and mining companies to maximize profits through convict labor).

\textsuperscript{21} The combined 2003 consolidated revenues of CCA and The GEO Group, Inc. alone total $1.7 billion. \textit{See} CCA, FORM 10-K, \textit{supra} note 1, at F-4 ($1,036,737,000 revenues); GEO, FORM 10-K, \textit{supra} note 2, at 2, 15 ($617,490,000 revenues). \textit{See also} \textit{The Sourcebook, supra} note 16, at 3-4, Tbl. 1.2 (showing total state and federal justice system expenditures in 1999 of $146.5B).


\textsuperscript{23} For a look at the practice of “jailboarding” see JailBedSpace.com, \textit{at} http://www.jailbedspace.com/jbs/index.asp ("The purpose of JailBedSpace.com (JBS) is to put the buyers and sellers of ‘County jail bed space’ in touch with each other. Buyers of bed space may be other jail administrators, U.S. Marshal’s service and the Immigration and Naturalization Service to name just a few.") (last visited Feb. 21, 2005). \textit{See also} Terry Corcoran, \textit{Putnam Touts Its Jail on Web}, \textit{The Journal News}, Feb. 15, 2004.

\textsuperscript{24} See Joseph E. Kennedy, \textit{Drug Wars in Black and White}, 66 SUM L AW & CONTEMP. PROBS. 153, 154 (2003) ("[T]he war would be waged far differently—if whites were prosecuted and imprisoned more frequently than has been the case."). Though not the subject of this Article, prison labor is the primary means by which governments profit directly from crime. The federal government operates a private company that specializes in the use of inmate labor to manufacture clothing and textiles, recycle electronic equipment, build office furniture, refurbish trucks, etc. This government-owned business is known both as Federal Prison Industries, Inc. (FPI) and UNICOR. On its website, FPI provides

\textit{It is the mission of Federal Prison Industries, Inc. to employ and provide skills training to the greatest practicable number of inmates confined within the Federal Bureau of Prisons; contribute to the safety and security of our Nation’s correctional facilities by keeping inmates constructively occupied; produce market-price quality goods for sale to the Federal Government; operate in a}
This Article is about the criminal justice system's joint venture with Wall Street. It is about white fantasy, desire and pleasure. It is, in short, about the how the law sanctions white supremacy. In this Article, I argue that as the law processes more and more black bodies, and as prisons further entrench themselves as investment vehicles, the dynamics that distinguished slavery reappear.

In Part I, I argue that white supremacy is fueled by social constructions, or fantasies, of black identity that legitimize the exploitation of blacks for social and economic advantage. Professor Anthony Paul Farley's theories about race and fetishism bolster my argument that white fantasies of blacks are deeply rooted in American history and reflect American values of pleasure consumption. In the ante-bellum era, whites dominated a culture that marked blackness with savagery and inferiority. Clearly, the end of slavery did not eradicate such conceptions. Rather, it marked an opportunity to adopt new ways to objectify blacks—ways which continued to serve whites.

self-sustaining manner; and minimize FPI's impact on private business and labor.


26. The term "white supremacy" is one that bites. I use it because I believe it is inseparable from the privileges afforded whiteness. My purpose is not to attack whites, see GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS viii (Temple University Press 1998) ("[O]pposing whiteness is not the same as opposing white people. White supremacy is an equal opportunity employer; nonwhite people can become active agents of white supremacy as well as passive participants in its hierarchies and rewards."), but to attack the complacency that arises from white privilege, the complacency that feeds and fuels the colorline. See Steiner & Argothy, supra note 17, at 443. For a thorough examination of white privilege and an "understanding of how whiteness itself has been built and maintained," see MATTHEW FRYE JABOBS, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (Harvard University Press 1988).

27. For Professor Derrick Bell, "Slavery is, as an example of what white America has done, a constant reminder of what white America might do." DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).

28. See, e.g., Evrie, White Supremacy and Negro Subordination, in DOCUMENTS OF AMERICAN PREJUDICE, supra note 4, at 291 ("The Negro is a different being from the white man, and therefore, of necessity, was designed by the Almighty Creator to live a different life . . . .").

In Part II, I examine the private prison real estate ownership and management industry. Private prisons mirror our social hierarchy—whites derive economic and political power from these corporations, power systematically denied to blacks. The American economy is about consumption, and from that a market has materialized in the consumption of black crime. The emergence of private prisons, I argue, exhibits a desire to preserve a social, economic, and legal structure through which whites can extract pleasure, profit, and power.

Slave narratives are important accounts of a violent time in U.S. history that many white Americans wish to forget. In this Article, I study a form of narrative written by those who profit from the incarceration of black bodies—private prison owners and operators, whose duty is to increase shareholder profit. The narratives consist of certain annual and quarterly financial reports and registration statements filed with the U.S. Securities and Exchange Commission (SEC). In reading these reports, I am interested in


From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of Heaven and earth. Across the generations we have proclaimed the imperative of self-government, because no one is fit to be a master, and no one deserves to be a slave. Advancing these ideals is the mission that created our Nation. It is the honorable achievement of our fathers.

Id.

33. Risa L. Lieberwitz, The Marketing of Higher Education: The Price of the University’s Soul, 89 Cornell L. Rev. 763, 792 (2004) (“The board of directors of a for-profit corporation has a fiduciary duty to the shareholders to make decisions that increase profits.”).

34. In these reports, one can see traces of the narratives written by slave masters—another unfortunate reminder of white America’s barbaric past. Compare CCA, Form 10-K, supra note 1, at 7 (discussing all the services CCA provides for the betterment of the prisoner’s condition) and id. at 16 (discussing the new, profitable trend of “prison terms for juvenile offenders”) with William Gilmore Simms, Slavery in America, in Documents of American Prejudice, supra note 4, at 279 (“Providence has placed [the slave] in our hands, for his good, and has paid us from his labor for our guardianship.”) (italics omitted) and Dred Scott v. Sanford, 60 U.S. 393, 407 (1857) (“[T]he negro might justly and lawfully be reduced to slavery for his benefit.”).

35. Pursuant to the Securities Act of 1933 and sections 13 and 15(d) of the Ex-
how corporations represent the opportunity to invest in the confinement of (black) human bodies. I also consider narratives produced by the U.S. government. I examine reports about the prison population produced by the U.S. Bureau of Justice Statistics (BJS), a division of the U.S. Department of Justice (DOJ). In reading these statistical reports, I am interested in how our government represents black crime to the public.

In Part III, I argue that the criminal justice system is structured so that black crime perpetually reproduces itself. Part III considers the law as a machine that institutionalizes black crime. I argue that the machine is fueled by two distinct, yet interconnected, dynamics. First, I look at how black crime statistics instigate black crime while simultaneously concealing the role the law plays in the process. Second, I consider how the law has doctrinally disclaimed accountability of the black condition.

Because I find that traditional legal analysis is illusory, this Article follows a deconstructivist method similar to that employed by critical legal theorists.36 It relies on various approaches to legal analysis, including philosophy, economics, sociology, and psychoanalysis. In drawing from these disciplines, I depict features of the law that we do not readily, or choose not to, see.

I. **Black by Operation of the Law**37

> I am given no chance. I am overdetermined from without. I am the slave not of the "idea" that others have of me but of my own appearance.38—Frantz Fanon

> In the U.S., any black is every black. It's not just that we all look alike, but that we're all the same—guilty of the same sins, con-

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36. Traditional legal analysis perpetuates the notion that the law is rational, fair and objective in its derivation and application of rules. See Francisco Valdes et al., *Introduction, Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium, in Crossroads, Directions, and a New Critical Race Theory* 1 (Francisco Valdes et al. eds., 2002) ("Neutrality and objectivity are not just unattainable ideals; they are harmful fictions that obscure the normative supremacy of whiteness in American law and society.").

37. *See Lilies of the Field*, supra note 31, at 1049 (drawing from Plessy v. Ferguson, 163 U.S. 537 (1896)).

38. FRANTZ FANON, BLACK SKIN, WHITE MASKS: THE EXPERIENCES OF A BLACK MAN IN A WHITE WORLD 116 (Charles Lam Markmann trans., 1967).
victed of the same sins.39—Ann duCille

Ordinarily, the color of your skin is not a spiritual experience; ordinarily the color of your skin just offers protection from too much exposure to the sun. For the African in America, this is not so. The color of skin determines everything—where you will live and, then again, how you will live.40—Jamaica Kincaid

A. Criminal Law & White Imagination

Russian philosopher and legal scholar Evgeny Pashukanis argued that criminal law represented the ultimate manifestation of power over an individual.41 Importantly, this was a kind of power that could not be wielded apolitically.42 Instead, “[e]very historically given system of penal policy bears the imprint of the class interests of that class which instigated it.”43 While Pashukanis was concerned with the implications this fact had for the Nineteenth Century Russian proletariat, it poses similar problems for blacks in the United States today.

U.S. history is riddled with state and federal laws that principally served to oppress a so-called inferior race.44 With good rea-

40. JAMAICA KINCAID, The Little Revenge from the Periphery, TRANSITION, Vol. 7, Num. 1, Issue 73, at 73.
41. EVGENY B. PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY 173 (Barbara Einhorn trans., 2003). See also Angela P. Harris, Cluster III: Introduction, 55 FLA. L. REV. 319, 330 (2003) (“[T]he penal state manages power through the marking and management of bodies.”).
42. See Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks”, 6 J. GENDER RACE & JUST. 381, 385 (2002) (“The definition of crime . . . is eminently political.”).
43. PASHUKANIS, supra note 41, at 174. See also THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA 177 (1997). According to Allen,

The hallmark of racial oppression it its colonial origins and as it has persisted in subsequent historical contexts is the reduction of all members of the oppressed group to one undifferentiated social status, a status beneath that of any member of any social class within the oppressor group. It is a system of rule designed to deny, disregard, delegitimate previous or potential social distinctions that may have existed or that might tend to emerge in the normal course of development of a class society.

Id.
44. See Brent Staples, How Denying the Vote to Ex-Offenders Undermines Democracy, N.Y. TIMES, Sept. 14, 2004, at A26. In recounting “the racist backlash in the South during Reconstruction,” Staples notes how “[n]ew statutes barred black Americans from the ballot box with poll taxes, literacy tests, grandfather clauses and laws that took the vote away from people who committed certain crimes.” Id. Such offenses “were carefully selected so they would affect the maximum number of black Americans
son, it can be said that American law, as applied to blacks, is largely a response to a white imagination that perceives blacks as a threat. Justice Harlan, in his *Plessy v. Ferguson* dissent, spoke directly to this underlying fear when he wrote: “Sixty millions of whites are in no danger from the presence here of eight millions of blacks.”

This fear begins to explain the law’s track record of criminalizing certain activities conducted by blacks that it condones when perpetrated by whites. Vast resources have been expended regulating black behavior. This discriminatory law enforcement produces black crime, vindicating a white conception of blacks and criminals as synonymous. Ultimately, the mass production of black crime makes two socially constructed concepts, i.e. crime and race, seem biological. As Professor Farley argues in *The

while exempting as many whites as possible. . . . The legislative intent relied heavily on the unequal enforcement of the law.” *Id.*

45. See PASHUKANIS, supra note 41, at 173; E. Christi Cunningham, *Identity Markets*, 45 How. L.J. 491, 540-42 (2002); HARTMAN, supra note 14, at 165 (“The position occupied by ‘those of African tincture,’ as [George Washington] Cable was wont to describe blacks, was largely as an alien, inferior and threatening element . . . .”) (emphasis added).


47. See Herbert, supra note 11, at 174 (Blacks “are ‘over-policed,’ or surveilled, investigated, detained, arrested, prosecuted, and incarcerated more frequently than other Americans, irrespective of illegality.”). This becomes apparent when one compares the treatment (or lack thereof) of white slavemasters who raped their female slaves with black men suspected of raping white woman. *Compare* WINTHROP JORDAN, *THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 71 (Oxford University Press 1974) (quoting Edward Long) (“He who should presume to shew any displeasure against such a thing as simple fornication, would for his pains be accounted a simple blockhead; since not one in twenty can be persuaded, that there is either sin; or shame in cohabitating with his slave.”) with supra note 11.


49. Banks, supra note 17, at 598 (“[I]ncarceration plays a role in constructing the meaning of race in American society by defining race and crime in terms of each other. The incarceration outcomes of the drug war have made the image of black criminality less an ungrounded stereotype and more a social reality.”).

50. See Nunn, supra note 42, at 430 (“[T]he definition of crime is socially constructed through a process that is politically contested.”).

51. See Black Body, supra note 14, at 464 (“It is the colorline, not nature, which makes people white or black.”).

52. See Maria Grahn-Farley, *The Law Room: Hyperrealist Jurisprudence & Postmodern Politics*, 36 NEW ENG. L. REV. 29, 31 (2001) [hereinafter *The Law Room*] (describing the dangers present “when people start believing that the way they see people being treated is the reflection of an internal essential quality rather than the imposition of an external social order”).
Black Body as Fetish Object, “[b]lackness is presented as a natural object, for it is only where the category of race is deemed natural, that is, independent of social choices, that the hierarchical ordering of things can by enjoyed.”53

Racism can only flourish when a legal structure supports it.54 Whites’ perceptions and values control the legal structure in the United States, and “[o]f all types of law, it is precisely criminal law which has the capacity to affect the individual person in the most direct and unmitigated manner.”55

B. Police: Agents of Fantasy

"[T]he police system of the South was originally designed to keep track of all Negroes, not simply of criminals; and when the Negroes were freed and the whole South was convinced of the impossibility of free Negro labor, the first and almost universal device was to use the courts as a means of reenslaving the blacks."56—W.E.B. DuBois

To be accused was to be convicted, and to be convicted was to be punished. The one always following the other with immutable certainty.57—Frederick Douglass

The Negro’s most important public contact is with the policeman.58—Gunnar Myrdal

The police are important agents in enforcing the structure of the law and ensuring that the ruling “class” is not “dispossessed” of

54. See Maria Grahn-Farley, A Child Perspective on the Juvenile Justice System, 6 J. GENDER RACE & JUST. 297, 300-01 (2002) [hereinafter A Child Perspective] (introducing the idea of the “master norm”—the structural embodiment of white ownership of scarce social resources); Thirteen Stories, supra note 11, at 607 (“The superstructure is a message that is inscribed on the flesh of those it imprisons as black and those it enshrines as white.”). See also Dred Scott v. Sanford, 60 U.S. 393, 404 (1856) (“[T]hey were at that time considered as a subordinate and inferior class of beings . . . and had no rights or privileges but such as those who held the power . . . might choose to grant them.”); W.E.B. DuBois, The Souls of Black Folk 133 (Fawcett Publications 1961); Lani Gunier & Gerald Torres, The Miners Canary: Enlisting Race, Resisting Power, Transforming Democracy 48 (2002).
56. DuBois, supra note 54, at 133.
57. Douglass, supra note 15, at 34.
58. Myrdal, supra note 8, at 535.
its “class rule.” In the United States, the police are the first to paint a black face on crime. Gunnar Myrdal, in his study of the “American Dilemma” began his chapter on the black man’s experience with the police with this observation. It is an important one because it captures a brutal truth—in the United States blacks have never lived free from police surveillance or intrusion. Before the Civil War, Fugitive Slave Acts empowered vigilante white policing. After emancipation, the Black Codes and Jim Crow sanctioned white practices that “reduced blacks to a condition described


60. See Herbert, supra note 11, at 179-94 (“[T]he Supreme Court and lower courts seem quite willing ‘to accept blindly and without question police officers’ accounts of police-citizen interactions as evocative of criminality.”)

61. Myrdal, supra note 8, at 535-46.

62. See Herbert, supra note 11, at 164 (For blacks in the United States, “the notion of freedom from government—specifically police—interference is as foreign as a Plutonian heat wave.”).

63. See Kim Forde-Mazrui, Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations, 92 Cal. L. Rev. 683, 699 n.53 (2004) (“The Fugitive Slave Act of 1793, which was signed by President Washington, was enacted to protect slave owners’ property rights in their human chattel . . . . The Fugitive Slave Act of 1850 expanded the federal government’s involvement in recapturing fugitive slaves.”).

64. See Prigg v. Pennsylvania, 41 U.S. 539, 625 (1842). Responding to a Pennsylvania law which prohibited slave owners from using “self-help” to recapture runaways, the Court held that state “regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States; or with the remedies prescribed by Congress to aid and enforce the same.” Id. For a view of colonial white policing as compelled—rather than merely permitted—see Jordan, supra note 47, at 61-62. (“Principally, the law told the white man, not the Negro, what he must do. It was the white man who was required to punish his runaways, prevent assemblages of slaves, enforce the curfews, sit on special courts, and ride the patrols.”).

65. See Herbert, supra note 11, at 168-69. According to Professor Herbert, The [Black] Codes provided certain limited rights for the newly freed Americans; however, they also punished African Americans either exclusively or much more harshly and were applied in a racist fashion, ultimately creating a modified version of the pre-Civil War slavery in which African Americans would remain subordinated to Whites. Law enforcement controlled and suppressed the new Americans, and mob rule was commensurate with the Black Codes.

Id. (citations omitted). See also Rabinowitz, supra note 11, at 34.

66. While the Black Codes and Jim Crow had the same purpose and effect—“subordinating blacks and depriving them of equal status”—one scholar notes that whereas the former “were formally asymmetric: they heaped disabilities on blacks but not whites,” the latter “was formally symmetric: blacks could not go to School X, but whites were symmetrically barred from attending School Y.” Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 64-65 (2000).
by the Freedman's Bureau officials as worse than slavery.\textsuperscript{67} While segregation is no longer the official law of the land, the drug war now grants police the authority to stalk black neighborhoods\textsuperscript{68} and reduce black men into presumed deviants in need of state supervision, i.e. prison.

In \textit{(E)racing the Fourth Amendment}, Professor Devon Carbado recalls several encounters he had with the police soon after arriving in the United States.\textsuperscript{69} For Carbado, these incidents seemed like "part of a broader informal naturalization process that structured the racial terms upon which [he] became American."\textsuperscript{70} One incident Carbado recounts occurred at his sister's apartment after he picked up two of his brothers from the airport. Eight police officers arrived at the apartment and "pinned" the occupants "against the wall at gunpoint."\textsuperscript{71} Then,

Two officers entered the apartment. After about two minutes, they came out shaking their heads, presumably signaling that they were not at a crime scene... "Look, we're really sorry about this, but when we get a call that there are [black] men with guns, we take it quite seriously. Again, we really are sorry for the inconvenience." With that apology, the officers departed. Our privacy had been invaded, we experienced a loss of dignity, and our blackness had been established—once more—as a crime of identity.\textsuperscript{72}

The cycle is self-sustaining.\textsuperscript{73} The police give flesh to the fan-
tasy that the black man is inherently criminal,\(^7\) thereby justifying "[t]he racial transaction—routinized social power freely expended upon black bodies . . . ."\(^7\)

C. The Right Fantasy of Black

_Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil._—W.E.B. DuBois

In _Black Skin, White Masks_, Frantz Fanon writes that "[t]he feeling of inferiority [of the colonized] is the correlative to the European's feeling of superiority . . . . _It is the racist who creates his inferior._"\(^7\) The right fantasy of black gives whites ownership and possession of not just blackness but of whiteness.\(^7\) Whites' feelings of superiority are rooted in a fantasy that equates their skin complexion with industry, (and therefore) wealth, intelligence, and with law-abiding qualities.\(^7\) Whites also fantasize the law as rational, objective, and race-less.\(^8\) But alas, whiteness is a veil over blue eyes.\(^8\) In the words of Professor Farley: "The veil creates a world between race and criminal activity, then deploying scarce law enforcement resources on the basis of the connection, reinforces it over time).

74. See Carbado, _supra_ note 59, at 955 (describing a police officer's "a priori investment in . . . blackness (that [blacks] were criminals or thugs")

75. _Id._ at 962-63. See also _Myrdal, supra_ note 8, at 532 ("The police system in the South to a great extent served the explicit purpose of supervising Negro slaves and free Negroes and of hindering the former from escape. . . . The police in the South were, by tradition, watchdogs of all Negroes, slave or free, criminal or innocent."); _Harris, supra_ note 41, at 333; _Herbert, supra_ note 11, at 159-66, 181.

76. _DuBois, supra_ note 54, at 8.

77. _Fanon, supra_ note 38, at 93.

78. See _Toni Morrison, Playing in the Dark: Whiteness and the Literary Imagination_ 52 (1992) ("Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less, but historical; not damned, but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.") [hereinafter _Playing in the Dark_]

79. See Steiner & Argothy, _supra_ note 17, at 460 (discussing how whites use racial minorities to construct "their own superior identities"); _Cunningham, supra_ note 45, at 542.

80. Defenders of the status quo are not the only ones to embrace this pervasive fantasy. See Thomas M. Hilbink, _You Know the Type . . .: Categories of Cause Lawyering_, 29 _Law & Soc. Inquiry_ 657, 665 (2004) (describing certain activist lawyers who consider "law and politics as separate phenomena . . . whereby law is believed to be neutral and objective, rational and predictable, superior to politics").

81. See generally _Toni Morrison, The Bluest Eye_ (1994) illustrating how whiteness is also a veil over those who wish their eyes were blue; see also Colleen
in which reality is doubled—black, white, separate, and unequal—and the conditions of communication's possibility have been destroyed, not by the fact of doubling but by the violence out of which the veil is woven."82

Whites fail to recognize that a legal system that consistently offers and protects white privilege will always seem objective and rational from their perspective.83 The criminal justice system, and therefore, society, does not perceive whites as drug addicts or traffickers because drug laws are not enforced against them.84 To be marked white is to "qualify" as legally and socially superior.85 Whites are not first perceived as suspect,86 and their historically superior position means the police are not stalking their neighborhoods or entering their homes and businesses looking for drugs.87 And more important, the police are not making arrests that would reflect the actual occurrence of white crime.88

Black is a loaded word that operates the black body.89 Black is manipulated reality.90 Black is a legal fiction that marks dark skin with white fear, desire, hatred, anger, and perversions.91 White fantasies of black connect past to present supremacy.92 For whites,


82. See Thirteen Stories, supra note 11, at 1031 ("The veil is woven out of the colorline.").
83. See generally Freeman, supra note 19.
84. See Steiner & Argothy, supra note 17, at 444 (stating that white drug use is "seen as a private, health problem").
85. See The Law Room, supra note 52, at 32.
86. See Myrdal, supra note 8, at 552 n.a (noting that, unlike blacks, whites are "presumed to be innocent until the contrary is proven") (quoting a white lawyer from a city in the Black Belt).
87. Nor are white businesses subject to criminal investigations for their involvement in the drug trade. See Chomsky, supra note 30, at 372 ("American bankers are laundering huge amounts of drug money, everybody knows it: how many bankers are in jail? None. But if a black kid gets caught with a joint, he goes to jail.").
88. See Nunn, supra note 42, at 395 ("Most drug arrests are made for the crime of possession. Possession is a crime that every drug user must commit and, in the United States, most drug users are white."). For a look at the historical roots of this dynamic see Myrdal, supra note 8, at 966-79.
89. For a chilling account of how the construction of blackness controls blacks see Black Body, supra note 14, at 499-529.
90. For an examination of the black body and slavery as a means toward white pleasure see supra note 14.
91. See Fanon, supra note 38, at 113; Dubois, supra note 54, at 153 ("[T]hey did not say much,—they only glanced and said, 'Niggers!'").
92. See Playing in the Dark, supra note 78, at 64.
blackness represents a shade of inferiority. Black is criminal. Black is ugly and scary. And most important, black is not white and never can be.

What is white? What is the pleasure of whiteness? Whiteness is meaningless until there is a system that recognizes white privilege. Enter American law, created by, and for, white privilege. A deeply rooted fantasy that marks and equates blacks with criminality has driven the law's present and historical relationship with

[T]here is quite a lot of juice to be extracted from plummy reminiscences of "individualism" and "freedom" if the tree upon which such fruit hangs is a black population forced to serve as freedom's polar opposite: individualism is foregrounded (and believed in) when its background is stereotypified, enforced dependency. Freedom (to move, to earn, to learn, to be allied with a powerful center, to narrate the world) can be relished more deeply in a cheek-by-jowl existence with the bound and unfree . . . .

Id.

93. W.E.B. DuBois captured this assumption when he wrote:

[E]ven the sweeter souls of the dominant world as they discourse with me on weather, weal, and woe are continually playing above their actual words an obligato of tune and tone, saying: "My poor un-white thing! Weep not nor rage. I know, too well, the curse of God lies heavy on you. Why? That is not for me to say, but be brave! Do your work in your lowly sphere, praying the good Lord that into heaven above, where all is love, you may, one day, be born—white!"

Steiner & Argothy, supra note 17, at 452-53 (quoting W.E.B. DuBois, DARK WATER: VOICES FROM WITHIN THE VEIL 30 (Harcourt, Brace, New York 1975)).

94. See PRISONERS 2002, supra note 4; INMATES AT MIDYEAR 2002, supra note 5; PREVALENCE, supra note 7.

95. See FANON, supra note 38, at 112 ("'Mama, see the Negro! I'm frightened!' Frightened! Frightened! Now they were beginning to be afraid of me. I made up my mind to laugh myself to tears, but laughter had become impossible.").

96. For an examination of how other "nonwhites" became white see ALLEN, supra note 43, at 186 (demonstrating how Irish immigrants "explicitly rejected their own national heritage to become part of the system of 'white' racial oppression of African Americans"). For a look at how similar "offers of whiteness" are being made today, see Ian Haney Lopez, White Latinos, 6 HARV. LATINO L. REV 1, 5 (2003) ("[T]he boundaries of whiteness are expanding to incorporate communities and individuals who would have been construed as non-white just a few decades ago.").

97. See JOHNSON, supra note 15, at 115-16. Whiteness becomes meaningful only when there is a contrasted, un-entitled entity. Whiteness therefore, needs (and is defined by) a subaltern: poverty, race classification, or all things Not White, so as to sustain its special significance within the social structure. See Black Body, supra note 14, at 531 ("Whiteness is not a color, it is a sadistic pleasure in humiliating.").

98. See generally ALLEN, supra note 43; LIPSITZ, supra note 26.

blacks. American slavery was the most sadistic expression of that fantasy. Slavery allowed whites to delight in white supremacy, and history has well-preserved the dynamic.

The right imagery of black allows whites to maintain control of who they think they are. Speaking from the position of the fantasized object, James Baldwin wrote that if the black man is not who/what the white man thinks he is, it is traumatic, because it means that the white man is not who he thinks he is:

[T]he danger, in the minds of most white Americans is the loss of their identity. Try to imagine how you would feel if you woke up one morning to find the sun shining and all the stars aflame. You would be frightened because it is out of the order of nature. Any upheaval in the universe is terrifying because it so profoundly attacks one's sense of one's own reality.

Private prisons are almost entirely white enterprises. Prisons full of black bodies provide the assurance that blacks are who/what whites think. The joint venture between private prison mag-

100. See Carbado, supra note 59, at 952 (“[R]acial dis-ease is inflicted on black people ostensibly to cure the problem of crime. Its social effect, however, is to make white people feel good about, and comfortable with, their own racial identity and to make black people feel bad about, and uncomfortable with, being black.”); S/M, supra note 17, at 68-74.


102. Id. In their article, White Addiction, Professors Steiner and Argothy proclaim wealth creation instrumental in the “making” of whiteness. Steiner & Argothy, supra note 17, at 457-58. Whites, and in particular upper class whites, have amassed assets and secured an economic status capable of intergenerational transfer. Id. “What is often not acknowledged is that the accumulation of wealth for some whites is intimately tied to the poverty of wealth for most blacks.” Id. at 457. Laws that restrain black opportunity in the political process, employment markets, education, business development, and housing, for example, open new windows (or keep old ones from closing) for whites. Id. at 457-58.

103. JAMES BALDWIN, THE FIRE NEXT TIME 17 (Penguin Books 1965). See also MYRDAL, supra note 8, at 563.

The South gives indication of being afraid of the Negro. I do not mean physical fear. It is not a matter of cowardice or bravery; it is something deeper and more fundamental. It is a fear of losing grip upon the world. It is an unconscious fear of changing status. Id. (quoting FRANK TANNENBAUM, DARKER PHASES OF THE SOUTH 157 (G.P. Putnam’s Sons 1924)).

nates and federal and state governments not only generates investment dollars; it also generates the Other. Private prisons testify to the fact that in the United States, whites have no intention of relinquishing the social, economic, legal, and political power that they presently possess.

II. THE SLAVE TRADERS?

When every resource of a wealthy nation is put to such destructive ends, it will take more than a few generations to mop up the mess.—Patricia Williams

They were experts at imagining the economy: interest rates, crop yields, and slave sales interacted in their heads, suggesting the revealed principles of a wider market whose mysterious workings they tried to map and predict.—Walter Johnson

Investing in black bondage is a white tradition. In the United States, as the country transitioned out of a slave economy, another economy in bondage emerged: the systematic production of black crime and punishment. According to William Jelani Cobb,
[M]ass black incarceration has its roots in the need to rebuild the Southern economy after the Civil War. Institutions . . . were literally transformed from slave plantations into penal institutions designed not to reform or punish criminals, but to generate revenue for states that had recently lost their sources of free labor . . . . Southern legislatures constructed Byzantine legal codes designed to incarcerate as many black people as possible . . . . Once imprisoned, their labor was sold or "leased" out to local farms where they performed the same tasks as slaves prior to emancipation. Planters made profit on their crops, prisons gained revenue through leasing fees and judges were often paid additional bonuses per-conviction . . . .111

Today, as legal and corporate interests continue to exploit black bondage, one begins to see a Thirteenth Amendment loophole: "Neither slavery nor involuntary servitude [shall exist], except as a punishment for crime whereof the party shall have been duly convicted . . . ."112

In this section, I examine the narratives of drug warriors and drug war profiteers for insights into the production of black bondage. Specifically, I rely on recent reports filed by private prison industry leaders with the Securities Exchange Commission. I look at selected quarterly and annual reports for each corporation113 and their most recent registration statements,114 required by law from companies soliciting capital through additional equity or debt securities offerings. These reports are invaluable to an understand-

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111. William Jelani Cobb, Past Imperfect: Doing Time, available at www.africana.com/columns/cobb/ht20040802time.asp (Aug. 2, 2004). In the ante-bellum era, "[t]he greatest barrier to the imprisonment . . . of Black people was, ironically, slavery itself." MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 109 (1983). While some masters "built jails ('nigger boxes') on their own plantations," it was generally understood that "the loss of a prime fieldhand meant the loss of a capital investment of some importance." Id.

112. U.S. CONST., amend. XIII (emphasis added). Credit for this insight belongs to Professor Cobb. See Cobb, supra note 111.


ing of what drives the investment concept.\textsuperscript{115}

Next, I examine statistics produced by the federal government that purport to explain the incidence of black crime in the United States. I explore how the figures are inflated by structural discrimination. I also explore the story that underlies the data—the perpetuation of white supremacy—that is unremittingly ignored. Together these narratives indicate that the financial success of private prisons is inextricably linked to a consistent supply of black bodies.

A. Private Prisons: The Law’s Joint Venture with Wall Street

The criminal justice system has stimulated the private capital markets with an innovative investment concept: the ownership and management of prison real estate.\textsuperscript{116} While several corporations make-up this market,\textsuperscript{117} two—Corrections Corporations of America (CCA) and The GEO Group, Inc. (GEO)—dominate the


\textsuperscript{116} The phenomenon goes beyond mere ownership and management. Critics call the burgeoning enterprise “the prison industrial complex.” Eric Schlosser, \textit{The Prison Industrial Complex}, THE ATLANTIC MONTHLY, Dec. 1998, at 54. According to Scholesser, the prison industrial complex is

\[\text{[a] set of bureaucratic, political and economic interests that encourage increased spending on imprisonment, regardless of the actual need . . . . It is a confluence of special interests that has given prison construction in the United States seemingly unstoppable momentum. It is composed of politicians, both liberal and conservative, who have used fear of crime to gain votes; impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly $35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market . . . .} \]

\textit{Id.}

\textsuperscript{117} See PHILIP MATTERA \textit{et al}., \textit{GOOD JOBS FIRST, JAIL BREAKS: ECONOMIC DEVELOPMENT SUBSIDIES GIVEN TO PRIVATE PRISONS} app. 2 available at http://www.goodjobsfirst.org/pdf/jba2.pdf (Oct. 2001) (profiling the eight companies which operate at least one correctional facility) [hereinafter JAIL BREAKS, app.2].
construction, ownership, and management industry.\textsuperscript{118}

Headquartered in Tennessee,\textsuperscript{119} CCA is the largest private prison owner and operator in the United States.\textsuperscript{120} It owns forty-one prisons, juvenile detention facilities, and immigration detention centers and operates twenty-one correctional facilities owned by the Federal Bureau of Prisons (BOP), U.S. Marshals Service, the Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service), twenty states, and the District of Columbia.\textsuperscript{121} During the first quarter of 2004, CCA's market capitalization was over $1 billion.\textsuperscript{122}

In 2003, the federal government alone subsidized thirty-seven percent of CCA's total gross revenues.\textsuperscript{123} CCA's management contracts provide that CCA will provide "services, personnel and material necessary for the operation, maintenance and security of the facility and the custody of inmates."\textsuperscript{124} CCA also offers "full logistical support to the facilities [it] manage[s], including security, health care services, transportation, building and ground maintenance, education, treatment and counseling services and food services" in a purported effort to reduce recidivism.\textsuperscript{125} Note that an actual reduction of recidivism would result in reduced earnings for CCA's shareholders. Thus, the policy of reducing recidivism is in direct conflict with the company's fiduciary duty to its

\begin{itemize}
  \item \textsuperscript{118} Id. at 65, 66 (as of 2000, CCA and GEO controlled two-thirds of the private prison market).
  \item \textsuperscript{119} In 1985, CCA offered to lease Tennessee's entire correctional system. See Cody & Bennett, supra note 20, at 841-42 (citing Bruce Dobie, \textit{CCA Offers $250 Million for Prisons}, \textit{Nashville Banner}, Sept. 12, 1985, at 1; Jim Montgomery, \textit{Corrections Corp. Seeks Lease to Run Tennessee's Prisons}, \textit{Wall St. J.}, Sept. 13, 1985, at 45) (CCA promised to pay the State fifty million dollars immediately and another fifty million dollars over the next twenty years. Additionally, the company indicated that it would spend one hundred fifty million dollars to build two maximum security institutions and renovate other facilities.). The terms of the deal included a ninety-nine year lease with rental payments not to exceed $175 million the first year of operations. \textit{Id}. The proposal fell through, but soon after the Tennessee Private Prison Act was adopted. \textit{Id}.
  \item \textsuperscript{120} See \textit{JAIL BREAKS}, app. 2, supra note 117, at 65 (calling CCA "a pioneer in the private prison industry").
  \item \textsuperscript{121} CCA, FORM 10-K, supra note 1, at 5. For a list of assets under management in 2002, see CCA, FORM 10-K, 2003, supra note 22, at 8-12.
  \item \textsuperscript{122} Market capitalization for CCA can be found at finance.yahoo.com/q?s= CXW (last visited Feb. 23, 2005).
  \item \textsuperscript{124} CCA, FORM 10-K, supra note 1, at 7.
  \item \textsuperscript{125} Id. at 5. Management contracts are generally for five years and contain multiple options to renew.
\end{itemize}
shareholders. 126

The GEO Group, Inc. is headquartered in Florida and operates forty-one correctional, detention, and mental health facilities for government agencies in the United States, South Africa, New Zealand, Australia, and Canada. 127 GEO's income is heavily dependent on contracts with the Federal BOP, the Bureau of Immigration and Customs Enforcement, 128 and the Marshals Service. In 2003, contracts with these federal agencies accounted for approximately twenty-five percent of gross revenues. 129 The states of Texas and Florida each accounted for eleven percent of GEO revenues. 130 Australia's Department of Immigration accounted for ten percent. 131 GEO's management contracts also provide other services related to the health and treatment of prisoners. 132 GEO's primary business objective is the construction and management of prisons, rather than the ownership of the real estate product. During the first of quarter 2004, GEO's market capitalization was over $200 million. 133

The business operations of a private prison real estate invest-


127. GEO, FORM 10-K, supra note 2, at 2. Wackenhut, The GEO Group Inc.'s predecessor, has a history with the federal government. Wackenhut provided security for U.S. embassies abroad as well as security for nuclear-weapons facilities. See Schlosser, supra note 116, at 69.

128. Wackenhut's first contract was with the former Immigration and Naturalization Service, to design, build and manage a 150-bed facility. Wackenhut Corrections Corp., Form 10-K at 2 (Mar. 20, 2003) [hereinafter Wackenhut, Form 10-K].

129. GEO, FORM 10-K, supra note 2, at 10. GEO has had fifteen-year relationships with California and Texas, a seventeen-year relationship with the Federal BOP, a nine-year relationship with Florida, and a twelve-year relationship with Australia. Id. at 3.

130. This is down from seventeen and fourteen percent, respectively in 2002. Id. at 10

131. Id.

132. Id. at 9-10.

133. Market capitalization can be found for GEO at finance.yahoo.com/q?s=GGI (last visited Feb. 22, 2005).
ment company are analogous to that of company that owns and manages hotels.134 Profitability and projected earnings for both are tied to occupancy levels, and ensuring that the property is “full” is the heart of operation strategy. Both prisons and hotels have an interest in long-stays or high demand for units.135 For the hotel product, shareholders or investors focus on two measures of profitability, both of which are derived, and in turn, stimulated by, occupancy. Those indices are revenues per available room (RevPAR) and average daily room rate (ADR).136 Hotels that are fully occupied command higher room rates, which then stimulate revenues and earnings.

Profits extractable from the prison real estate product are also tied to occupancy; however, how occupancy is stimulated here obviously differs from the hotel context. Whether a prison is full, and therefore, generating income for shareholders, is a function of government contracts, which are influenced by fiscal and public policies.137 Once a private operator enters into a contract to manage a corrections facility for, say, the Federal Bureau of Prisons, the rate at which the private operator is compensated is generally fixed.138 The BOP decides what it will pay an operator like GEO to manage a federal facility based on how the BOP values each body per imprisoned day.139 The prison operator’s goal, or driving incentive, is


135. See Schlosser, supra note 116, at 65 (discussing the “unanticipated problem” the private prison industry faced in Texas in the early 1990s when the state “began to carry out an ambitious prison construction plan of its own,” thereby “flood[ing] the market”).

136. See generally Four Seasons, supra note 134; Fairmont Hotels, supra note 134.

137. See CCA, Form 10-K, supra note 1, at 20-21; GEO, Form 10-K, supra note 2, at 23-24.

138. See GEO, Form 10-K, supra note 2, at 5.

Under our correctional facility management services contracts, most of our government customers pay us on a per inmate per diem basis, with some of these contracts providing for minimum guaranteed payments regardless of actual occupancy levels. Certain of our contracts also provide for fixed fee payments. Generally, our management services contracts have rate adjustments for increased costs due to inflation.

Id. See also CCA, Form 10-K, supra note 1, at 41 (“[W]e are compensated for operating and managing facilities at an inmate per diem rate based upon actual or minimum guaranteed occupancy levels.”).

139. See CCA, Form 10-K, supra note 1, at 41.
to achieve the highest per diem rate per prisoner, or "compensated man-day," for the longest period of time.  

For the hotel product, profitability is largely dependent upon economic cycles. During a robust economic cycle, individuals are more likely to spend on leisure activities and businesses are more likely to incur travel expenses, putting hotel rooms in greater demand. Hotel revenues, therefore, are significantly healthier during an upswing in the economic cycle, than in a recession, for example. While economic cycles may impact government budgets and appropriations for corrections construction, prison revenues are not susceptible to such cyclical changes because rates of incarceration have proven to be independent of the economy. Corporations like CCA and GEO, then, are most invested in maintaining public policies that produce more and more criminals because volume is the lifeline of prison profitability.

Winning the competition for bodies is equally important. CCA reports that government contracts are based on "cost, quality and range of services offered, experience in managing facilities and reputation of management and personnel." CCA's report does not describe how it obtains its prisoners, but an article by Eric Schlosser in The Atlantic Monthly provides a look at the process:

The private-prison industry usually charges its customers a daily rate for each inmate: the success or failure of a private prison is determined by the number of "man-days" it can generate. In a typical rent-a-cell arrangement a state with a surplus of inmates

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140. See id. at 41-43 (2004) (reporting an average compensated man-day of $50.94 for all properties owned and managed, and $55.25 for only properties owned and managed and $42.34 for only managed); CCA, FORM 10-K, 2003, supra note 22, at 59 (reporting an average compensated man-day rate for 2002 of $49.32); GEO, FORM 10-K, supra note 2, at 2, 32; WACKENHUT, FORM 10-K, supra note 128, at 4, 24. GEO does not disclose average per diem rates or calculate compensated man-day rates.

141. See, e.g., FOUR SEASONS, supra note 134 (indicating future performance is predicated upon "numerous risks and uncertainties, including the rate and extent of the current economic recovery and the rate and extent of the lodging industry's recovery from the terrorist attacks of September 11, 2001 and subsequent terrorist attacks, Severe Acute Respiratory Syndrome (SARS), the civil unrest in Iraq and elsewhere . . .").

142. CCA, FORM 10-K, supra note 1, at 5, 20; GEO, FORM 10-K, supra note 2, at 2, 10. See also JAIL BREAKS, ch. 1, supra note 126, at 3 (quoting CCA Chairman Thomas Beasley) ("We are recession-proof.").


144. See CCA, FORM 10-K, supra note 1, at 21, 36; GEO, FORM 10-K, supra note 2, at 15, 23; WACKENHUT CORRECTIONS CORP., FORM 10-K at 12 (Mar. 28, 1997).

145. CCA, FORM 10-K, supra note 1, at 21.
will contact a well-established bed broker .... The broker will search for a facility with empty beds at the right price. The cost per man-day can range from $25 to $60, depending on the kind of facility and its level of occupancy. ... Bed brokers earn a commission of $2.50 to $5.50 per man-day, depending on how tight the market for prison cells is at the time. The county—which does not operate the prison but simply gives it legal status—sometimes gets a fee of as much as $1.50 a night for each prisoner. 146

Management contracts between the private prison operator and the government effectively reduce human beings into bodies from which value can be extracted; brokers deal in these bodies. It is virtually impossible to ignore the astounding resemblance to the valuation and brokering of slaves. 147 The slave trade largely depended on brokers, large and small, to arrange for and move the supply of bodies. 148 Slave pens or slave yards contained the inventory, 149 providing “room and board for out-of-town traders and their slaves for a fixed daily cost (around twenty-five cents per day per person) and a cut (usually two and a half percent) of the business done in the pens.” 150 Much like CCA and GEO, slave traders competed with each other to attract buyers. 151

147. See Johnson, supra note 15, at 51-57.
148. Id. “After emancipation,” Professor Katherine Franke writes, “formerly enslaved people traveled great distances and endured enormous hardships in order to reunite families that had been separated under slavery.” Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 Yale J.L. & Human. 251, 277 (1999). Today, the relatives of those incarcerated in private prisons often must travel even greater distances and endure comparable hardships in order to reunite families separated by modern brokers. See Deborah Yetter & Mark Pitsch, Prison Riot Followed Increase in Inmates, The Courier-Journal, Sept. 17, 2004 (documenting the grievances of Vermont offenders at a CCA facility in Beatyville, Kentucky who “complained ... that visits from friends and family – who must drive about 1,000 miles to Kentucky – were cut to two hours a week”). But see Patrick Marley, More than 1,000 Prisoners Returned to State / Being Closer to Families Aids in Rehabilitation, Doyle says, Journal Sentinel, June 3, 2004, at 3B.
149. See Johnson, supra note 15, at 51-57. In these pages, Johnson profoundly captures the business of buying and selling slaves, the intimate relationships that developed between brokerage companies and slave owners or dealers. The account was developed through a combination of slave narrative and transaction records held by various Louisiana agencies. Id. at 51 n.15.
150. Id. at 51.
151. See Franklin, supra note 12, at 176. According to Dr. Franklin, The slave traders were a ubiquitous lot. They could be seen at the general stores, the taverns, the county fairs, and on the plantations. Wherever they heard of the possibility of the sale of slaves they were there. ... Their advertisements are suggestive of twentieth century methods. In 1834 Franklin and
Private debt brokered by "commission-taking houses" and "bills of exchange" capitalized this half a billion dollar industry.\textsuperscript{152} Today, GEO obtains capital to build prisons through government appropriations and tax incentives or subsidies; CCA believes it relieves government budgetary constraints by privately funding prison construction.\textsuperscript{153} Capital for other purposes is raised publicly through the issuance of stock or debentures.\textsuperscript{154}

The ability to forecast future income, coupled with the power to reduce or control expenses, makes for a profitable operation.\textsuperscript{155} With a predictable stream of income, managers and directors of corporations are better able to devise business strategies, such as pursuing capital-raising initiatives, construction, acquisitions, or management contract generation, which produce the best value for their shareholders. Incarceration rates determine the profitability of prison real estate. Draconian drug policies,\textsuperscript{156} racial profiling,\textsuperscript{157} and disparate prosecution and sentencing\textsuperscript{158} are legal tools that cre-

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Armfield announced that they would pay cash for five hundred Negroes and would offer higher prices “than any other purchaser who is now, or may hereafter come into the market.”
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\textit{Id.}

\textsuperscript{152} JOHNSON, supra note 15, at 2, 6.

\textsuperscript{153} GEO, FORM 10-K, supra note 2, at 3, 12, 21; CCA, FORM 10-K, supra note 1, at 17, 41.

\textsuperscript{154} Sixty-three percent of CCA’s shares are held by institutional investors and mutual fund owners, including Fidelity Management & Research Group, Barclays Bank, The Vanguard Group, and John Hancock Small Cap Growth Fund. Information on major holders of CCA stock is available at http://finance.yahoo.com/q?s= CXW (last visited Feb. 22, 2005). Seventy-eight percent of GEO’s shares are held by institutional investors and mutual funds, including JP Morgan Chase & Company, Morgan Stanley, State Street Corporation, and Heartland Value Fund. Information on major holders of GEO can be found at http://finance.yahoo.com/q/mh?s= GGI (last visited Feb. 22, 2005). Unlike hotel owners or operators, who can also free capital by selling assets, corporations like CCA and GEO are limited in their ability to sell because more likely than not, the only interested buyer is the government. The nature of the architecture and design of a corrections or detention facility limits the range of refurbishment possibilities. Furthermore, the location of prisons tends to be rural and away from the public eye. Benefits of obscure location include access to cheap labor. Because the operation and management of a prison facility is labor intensive, much like hotel, access to a cheap labor market is essential to keeping costs low.

\textsuperscript{155} See generally Four Seasons, supra note 134; Fairmont Hotels, supra note 134.

\textsuperscript{156} See Fagan et al., supra note 17; Steiner & Argothy, supra note 17; CCA, FORM 10-K, supra note 1, at 16; CCA, 2002 FORM 10-K at 13 (2003); GEO, FORM 10-K, supra note 2, at 21.

\textsuperscript{157} See generally Banks, supra note 17.

\textsuperscript{158} For an examination of the disparity in Federal Sentencing Guidelines for crack and cocaine, see The Sentencing Project, Crack Cocaine Sentencing Policy: Unjustified and Unreasonable, available at www.sentencingproject.org/pdfs/
ate a market for black criminality. These tools satisfy the demands of private corporations and effectively keep black men in chains.159

B. The Black Male Rate of Incarceration

It is necessary to consider all the weaknesses of the statistics on Negro crime because these statistics have been used to buttress stereotypes of Negro criminality and to justify discriminatory practices.160—Gunnar Myrdal

The Federal Bureau of Prisons is the largest prison system in the United States, followed by the states of Texas, California, and Florida.161 Regardless of economic cycles, and regardless of decreases in crime,162 the federal government, and the southern states, capture and confine an ever-increasing number of black bodies.163 The total prison and jail population achieved a new high in 2002, with slightly over two million individuals held for processing or actually incarcerated.164 Close to half were black men.165

Since statistical data began to be collected in 1926, the number of blacks entering the prison population has increased steadily.166

159. SIM, supra note 17, at 69.
160. MYRDAL, supra note 8, at 967.
161. PRISONERS 2002, supra note 4, at 1.
163. Between 1995 and 2002, a period of growth in the U.S. economy, the federal prison population grew by approximately eight percent a year and the state prison population grew by three percent per year. PRISON & JAIL INMATES 2002, supra note 5, at 2.
In 1974, approximately thirteen percent of black men in the U.S. were processed by the criminal justice system. By 2002, a projected one-third of all black men were destined for such a fate. These figures illustrate that black men are processed through the legal system at a staggering rate.

Situating the U.S. incarceration rate in its global context provides further evidence of this country's addiction to black bodies. On December 31, 2002, there were an estimated 3,437 black male prisoners for every 100,000 black males in the U.S. population—roughly four times the incarceration rate of black men during the last year of Apartheid in South Africa. With an overall incarceration rate of 714 inmates per 100,000 people, the United States now has the highest incarceration rate in the world, a dubious distinction for so-called "land of the free."
III. A SYSTEM THAT FUELS ITSELF

Social conditions tend to instigate and confirm wrong habits of thinking by authority, by conscious instruction, and by the even more insidious half-conscious influences of language, imitation, sympathy and suggestion.174—John Dewey

This is part of the roots of self-negation which our kids get even as they grow up. The homes are different, the streets are different, the lighting is different, so you tend to begin to feel that there is something incomplete in your humanity, and that completeness goes with whiteness.175—Steve Biko

The process by which black boys are made into criminals is reminiscent of the process that once made black boys into slaves.176 From youth, the children of slaves knew that blackness did not belong to them, but that they belonged to blackness.177 There was no security for them, as their destiny was bondage: "The trader was all around, the slave pens at hand, and we did not know what time any of us might be in it."178 Similar insecurities are present today as black children witness drug warriors stalk their neighborhoods and drug war profiteers confine their brothers, fathers, and friends. In a recent study on the "reciprocal effects" of crime in New York City, an interdisciplinary team from Columbia University labeled incarceration a "part of the ecological backdrop of childhood socialization, whose effects are multiplied by grinding poverty, and an everyday contingency, particularly for young men, as they navigate the transition from adolescence to adulthood."179

175. STEVE BIKO, BLACK CONSCIOUSNESS IN SOUTH AFRICA 23 (Millard Arnold ed., 1979).
176. Compare Fagan et al., supra note 17, at 1589 ("[I]ncarceration provides a steady supply of offenders for more incarceration. . . . [A]s this cycle spirals forward, incarceration threatens to become endogenous in [poor, black] neighborhoods, or 'grown from within' . . . "), with JOHNSON, supra note 15, at 21. According to Johnson, the process by which a child was made into a slave was often quite brutal . . . . From an early age, enslaved children learned to view their own bodies through two different lenses, one belonging to their masters, the other belonging to themselves. . . . Whether by care or coercion (or by their peculiar combination in the nuzzling violence that characterized slaveholding 'paternalism'), enslaved children were taught to experience their bodies twice at once, to more through the world as both child and slave, person and property.
177. See FANON, supra note 38, at 225.
178. JOHNSON, supra note 15, at 21-22 (quoting Lewis Hayden) (citation omitted).
179. Fagan et al., supra note 17, at 1589. See also Cobb, supra note 111 (describing
According to the Columbia team, in communities with disproportionately high incarceration rates, prison becomes part of the "social and psychological fabric of neighborhood life."180 This condition is vital to a system's ability to fuel itself. Note that when the U.S. government banned the import of slaves in 1807,181 those invested in black bondage did not fear for the institution because they designed slavery to reproduce, both biologically182 and psychologically.183 Black criminality functions similarly today. Regardless of economic cycles and/or decreases in crime, black prison populations grow.184 Black prison populations grow because prisons have become "factories for crime."185 Black prison populations grow be-

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180. Fagan et al., supra note 17, at 1589. See Black Body, supra note 14, at 503 ("The reality of the colorline is, . . . in turn, redeemed only by imbedding itself in nature.").

181. Of course, the "official" end of the African slave trade did not mean its end in fact. See Franklin, supra note 12, at 182-84. For example, in 1836, "it was estimated that 15,000 Africans were annually taken into Texas." Id. at 183. While African slave traders advocated for the repeal of the federal legislation outlawing the practice, [t]he law of 1807 was so weak and the enforcement so lax that a repeal was unnecessary . . . . When offenders were caught they were placed under bond, which they promptly forfeited. Sometimes the cases involving offenders were never brought before the courts. Thus, for all practical purposes the trade was open in the last decade before the Civil War . . . .

Id.

182. See id. at 178 (calling the "breeding of slaves, one of the most fantastic manipulations of human development in the history of mankind"). See also Johnson, supra note 15, at 4 ("They dreamed of people arrayed in meaningful order by their value as property, of fields full of productive hands and a slave quarter that reproduced itself . . . ."). Each decade between 1800 and 1860 the slave population increased by almost thirty percent. See Campbell Gibson and Kay Jung, Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States, available at http://www.census.gov/population/documentation/twps0056/tab01.pdf (Sept. 13, 2002).

183. See Hartman, supra note 14, at 3. Hartman introduces her book with a scene from Frederick Douglass' autobiography where the author's Aunt Hester is tortured and killed at the hands of the Master. Hartman writes, "Douglass establishes the centrality of violence to the making of the slave and identifies it as an original generative act equivalent to the statement 'I was born.'" Id. at 3. See Douglass, supra note 15, at 20-22.

184. See Fagan et al., supra note 17, at 1556 (noting New York City incarceration rates "have been largely unaffected by the City's dramatic declines in crime").

185. See Scholesser, supra note 116, at 77 (quoting Christopher Stone). According to Scholesser,
cause the law controls for growth. And black prison populations grow because the law shapes the conditions of blackness.

In this section, I consider both the blatant effects, as well as "insidious half-conscious influences," of the law on blacks. I propose that the law has institutionalized black crime through two distinct, yet interconnected, practices.

The first practice involves black crime statistics. The data, which is gathered and analyzed by the government, presents an image of blacks as criminals, thereby concealing the law's role in instigating black crime. Statistics on recidivism and prevalence of incarceration among blacks are an indication of a criminal justice system structured to produce and reproduce black crime.

The second practice involves the law's efforts to disclaim responsibility for the effects of slavery and segregation. Centuries of discriminatory laws (and law enforcement) have resulted in the economic and political disenfranchisement of entire communities. From a psychological perspective, mass incarceration creates the...
framework of black life; the law conditions blacks, from infancy through adulthood, to “see in themselves only what others, who despise them see.” Insult is added to injury on a doctrinal scale when colorblind judicial review “den[ies] the existence of racial discrimination and racial inequality at the same time it legitimizes it.”

A. Instigating Crime

*It sends a clear message to repeat criminals. Find a new line of work because we’re going to start turning career criminals into career inmates.*—Former California Governor Pete Wilson

According to the BJS, drug laws primarily account for the increases in the federal prison population between 1995 and 2001. During this six-year period, the number of individuals sentenced for federal drug offenses increased by almost fifty percent. Given these statistics, it hardly surprising that drug policy would be consistently cited as the primary source of increased black crime rates. However, incarceration rates for drug offenses do not accurately reflect the incidence of illicit drug crime. Incarceration reflects the discretion afforded to, and decisions by, police and prosecutors to investigate, arrest, and prosecute drug offenders.

192. See A Child Perspective, supra note 54, at 301. (“The master norm is the norm against which everything . . . is measured.”).
193. WILLIAMS, supra note 48, at 62.
194. Steiner & Argothy, supra note 17, at 454. See also Herbert, supra note 11, at 188-90 (noting the Court’s preference for “the myth-based presumption of a colorblind society”).
195. AGING BEHIND BARS, supra 158, at 3 (quoting Governor Pete Wilson, March 7, 1994, referring to the “Three Strikes” legislation he was signing into law). California has the harshest of “three strikes” laws. Id.
196. PRISONERS 2002, supra note 4, at 11. The statistics also include immigration policy as impacting increases in federal prison populations. Between 1995 and 2001, the number of individuals sentenced for immigration violations increased by 338.9%. Id. See also Fagan et al., supra note 17, at 1562-63 (depicting New York State’s Rockefeller Drug Laws as “the engine behind New York’s historic expansion of its prison population” after 1987); Schlosser, supra note 116, at 56-57 (providing background on the political climate that gave rise to the Rockefeller Drug Laws).
197. PRISONERS 2002, supra note 4, at 11, Table 18.
198. See CCA, FORM 10-K, supra note 1, at 16; CCA, FORM 10-K, 2003, supra note 22, at 13. See also GUNIER & TORRES, supra note 54, at 260, 262-266; SPITZER, supra note 68 (finding similar disparities). The Bureau of Justice Statistics reports that about twenty-three percent of black prisoners are incarcerated for state drug violations whereas about eighteen percent of white prisoners are. PRISONERS 2002, supra note 4, at 10.
199. See Fagan et al., supra note 17, at 1559-60.
Law enforcement makes drug possession, drug use, and trade in illegal substances criminal acts for the black population, while it regards the same activity by whites as a social health problem. Consequently, while blacks are no more prone to drug abuse or drug violations, the law and private prison operators, profit from, and perpetuate, this myth.

Race-based policing essentially "inclines" the "average white policeman" to "increase [black crime] even more in his imagination." Race-based policing is possible because, in a white legal system, it is politically expedient to deploy resources on neighborhoods that are economically blighted, have a history of disenfranchisement, and where one-third of its community is already caught in a cycle of imprisonment. In other words, race-based policing exists largely to create and concentrate crime in black and poor neighborhoods.

In his examination of actuarial models used by the government to "predict" criminality, University of Chicago Professor Bernard E. Harcourt found the following "logic of criminal profiling" compelling:

There is another more powerful reason that the police focus their attention on the inner city. Both for individual officers and for departments, numbers of arrests made have long been a measure of productivity and effectiveness. If it takes more work and longer to make a single drug arrest in Highland Park than in Woodlawn, the trade-off may be between two arrests per month.

200. See Nat'l Inst. on Drug Abuse, Drug Use Among Racial/Ethnic Minorities 35, available at http://www.drugabuse.gov/pdf/minorities03.pdf (Sept. 2003) ("Based on these recent NHSDA data, we can be fairly confident that non-Hispanic Whites, Blacks, Pacific Islanders, and Korean Americans have roughly equivalent prevalence of recently active illegal and extramdule drug use.").


202. Myrdal, supra note 8, at 527. See also Carbado, supra note 59, at 955. The officer looked at my brother and me, seemingly puzzled. He needed more information racially to process us, to make sense of what he might have experienced as a moment of racial incongruity. While there was no disjuncture between how we looked and the phenotypic cues for black identity, our performance of blackness could have created a racial indeterminacy problem that had to be fixed.

Id.

203. See Nunn, supra note 42, at 391. According to Professor Nunn, "Reagan's rhetorical declaration of a war on drugs had a deliberate political effect." Id. See also id. at 390 n.67 ("[O]fficelholders . . . skilled in using rhetoric that blame[s] social ills on minorities . . . make oblique references to housing projects . . . .").
of an officer's time in Highland Park and six arrests per month in Woodlawn. From the perspectives of the individual officer's personnel record and the department's year-to-year statistical comparisons, arrests are fungible, and six arrests count for more than two. . . . Regardless of whether those six arrests are legitimate and proportional to offending in those areas, the effect over time may be to aggravate the disparities between Woodlawn and Highland Park, especially with regard to crimes like drug or gun possession. The actuarial approach may reshape reality.204

Like slavery, black criminality is profitable to the extent that it reproduces itself.205 Accordingly, the criminal justice system expands significant resources to assure that it does so. Government-funded studies and programs assist the law enforcement community in "knowing its criminal."206 Knowledge of the target leads to reduced transaction costs. That the federal government can predict when, how long, and how often black men will go to prison, as well as the impact of public policies on black criminal activity,207 is further evidence of an addiction to the "black body."208

The government's ability to predict the size of prison populations, as well as how certain policies affect rates of incarceration, is extremely valuable to corporations like CCA and GEO. Unlike hotel operators who are subject to market fluctuations and whose success depends largely on speculation, corporations like CCA and GEO can rely on the government to not only forecast, but actually generate, a never-ending supply of "customers." Furthermore, CCA and GEO are better able to influence the market because they know precisely how certain social policies affect their bottom-lines.209 For example, GEO cites changes to current drug and im-

204. Harcourt, supra note 7, at 149-50 (citation omitted).
205. See supra notes 177-87 and accompanying text.
206. One of the most notorious of these training programs was "Operation Pipeline," a brainchild of the Drug Enforcement Administration (DEA) "designed to inform federal, state, and local law enforcement agencies of the best practices for spotting drug traffickers on the highways, in the airports, and on the sidewalks." Jeremiah Wagner, Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases, 22 LAW & INEQ. 73, 76 (2004).
207. See, e.g., PREVALENCE, supra note 7; Patrick A. Langan & David J. Lavin, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 2, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf (June 2002) (indicating that 72.9% of blacks were likely to be rearrested) [hereinafter RECIDIVISM]; GEO, FORM 10-K, supra note 2, at 22; CCA, FORM 10-K, supra note 1, at 16.
208. See S/M, supra note 17, at 69; Steiner & Argothy, supra note 17, at 444.
209. The private prison lobby is a powerful one, not only in its ability to garner contacts, but also in influencing draconian social policies that make such contracts profitable. However, lobbying for harsh penalties is not a purely executive pastime. See
migration law policy as a risk to profitability in its 2003 annual report:

[A]ny changes with respect to the decriminalization of drugs and controlled substances or a loosening of immigration laws could affect the number of persons arrested, convicted, sentenced and incarcerated, thereby potentially reducing demand for correctional facilities to house them. Similarly, reductions in crime rates could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.

Ever bullish on black bondage, CCA, in its 2003 annual report, portrays government projections in the incarceration of certain populations as a positive market indicator:

Further [revenue] growth is expected to come from increased focus and resources by the Department of Homeland Security dedicated to illegal immigration, stricter sentencing guidelines, longer prison sentences and prison terms for juvenile offenders, as well as the growing demographic of the 18 to 24 year-old at-risk population. Males between 18 and 24 years of age have demonstrated the highest propensity for criminal behavior and the highest rates of arrest, conviction, and incarceration.

Both of these excerpts from current and previous SEC reports suggest confidence in the corporations' silent partner, the criminal justice system. On a daily basis, the legal system is ripe with transactions, and in the modern day “slave pen”—the courtroom—the decision to incarcerate is the moment of sale.


210. GEO, Form 10-K, supra note 2, at 21. See also Wackenhut Corrections Corp., Form S-3 at 12 (Jan. 20, 2004); The GEO Group, Inc., Form S-4 at 28 (Nov. 10, 2003) (“The demand for our facilities and services could be adversely affected by the relaxation of criminal enforcement efforts, leniency in conviction and sentencing practices, or through the decriminalization of certain activities that are currently proscribed by criminal laws.”).

211. See Jail Breaks, ch. 1, supra note 126, at 3 (quoting CCA Chairman Thomas Beasley) (“We are recession-proof.”).

212. CCA, Form 10-K, supra note 1, at 16.

213. See generally Prevalence, supra note 7; Recidivism, supra note 207. See also S/M, supra note 17, at 69 (“Whites invest, without limit, in a criminal-industrial complex that produces black recidivism and an education bureaucracy that produces black illiteracy.”).

B. Reproducing Crime

[T]he chief problem in any community cursed with crime is not the punishment of the criminals, but the preventing of the young from being trained to crime.\textsuperscript{215}—W.E.B. DuBois

In the United States, as we can see, the Negro makes stories in which it becomes possible for him to work off his aggression; the white man's unconscious justifies this aggression and gives it worth by turning it on himself, thus reproducing the classic schema of masochism.\textsuperscript{216}—Frantz Fanon

Mass incarceration devastates already disempowered black communities.\textsuperscript{217} Unemployment skyrockets,\textsuperscript{218} increasing dependency on an increasingly undependable safety net.\textsuperscript{219} Furthermore, mass imprisonment strains families as women, if not imprisoned

\textit{Law Review}). According to the report, "prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans," and "shaped by a set of self-perpetuating racial assumptions." \textit{Id.} at 22. In support of these conclusions, the report noted that while "between 1991 and 1993 whites were twice as likely to have used crack nationwide than blacks and Hispanics combined," between "1992-1994, approximately 96.5 percent of all federal crack prosecutions were of non-whites." \textit{Id.} at 24. For an examination of law as a series of decisions, see Harcourt, \textit{supra} note 7. In particular, Harcourt examines legal decision-making with respect to parole boards, fixed sentencing guidelines, and criminal profiling. \textit{Id.} at 110-35.

\textsuperscript{215.} DuBois, \textit{supra} note 54, at 130.

\textsuperscript{216.} Fanon, \textit{supra} note 38, at 176.

\textsuperscript{217.} See A Child Perspective, \textit{supra} note 54, at 307.

\textsuperscript{218.} See Randall Shelden & William Brown, \textit{The New American Apartheid: Part I, The Black Commentator}, (July 8, 2004), \textit{at} http://www.blackcommentator.com/98/98_prisons_1.html ("[A] criminal record, especially a prison record," acts as "a barrier [for those] seeking re-entry into society."). Oddly enough, "when tabulating the official unemployment figures, the government fails to include prisoners . . . ." \textit{Id.} When incarcerated African Americans are included, the unemployment rate for blacks is almost forty percent, and the overall national rate is two to three percent higher. Randall G. Shelden, \textit{Cashing In On Crime III: The Prison Industrial Complex Part}, \textit{ZMag}, Apr. 22, 2004, \textit{at} http://zmag.org/content/print_article.cfm?itemID=5381&sectionID=43 [hereinafter \textit{Cashing In On Crime}]. Furthermore, in addition to the prisoners incarceration takes directly out of the workforce, prisons often force the parent left behind to stop working in order to provide childcare. See Randall Shelden & William Brown, \textit{The New American Apartheid: Part IV, The Black Commentator}, (July 29, 2004), \textit{at} http://www.blackcommentator.com/101/101_prisons_4.html. One black mother of two sons in prison reported that her daughter-in-law couldn't work "because she's got these kids to take care of." \textit{Id.}

\textsuperscript{219.} See Marc Mauer, \textit{Introduction: The Collateral Consequences of Imprisonment}, \textit{30 Fordham Ur. L.J.} 1491, 1493 (2003). In certain jurisdictions, access to resources is cut off for drug offenders. \textit{Id.} at 1493. When the offense is drug related, the "collateral consequences" of incarceration in some jurisdictions include rejection of welfare benefits, access to public housing or financial aid for higher education. \textit{Id.} at 1494. \textit{See also} Fagan et al., \textit{supra} note 17, at 1552-53.
themselves,²²⁰ are left to care for children without adequate support.²²¹ When unemployment, coupled with the deterioration of basic support systems, becomes intrinsic in a community, the cycle of crime is fueled, and the economic power base is eviscerated.²²²

One collateral consequence frequently arising from a prison sentence is political disenfranchisement.²²³ By 1998, 1.4 million black men—thirteen percent of the adult black male population—had lost their the right to vote.²²⁴ This exclusion of black men from the political process not only harms those it impacts directly; it keeps entire communities from receiving the representation and resources they desperately need and deserve.²²⁵

To make matters worse, despite a de facto ban on black inmate voting,²²⁶ the U.S. Census Bureau counts black prisoners in the rural, mostly white towns where they serve their sentences²²⁷ rather than the urban communities from which they come.²²⁸ This increase in “the voting power of rural districts”²²⁹ has led some critics of the practice to point out that the policy of “allowing mostly white rural districts ‘to claim urban black prisoners as residents for purposes of representation resembles the old three-fifths clause of the Constitution that allowed the South extra representation for its

²²⁰. See generally Goldfarb, supra note 4.
²²². See Fagan et al., supra note 17, at 1593. See also A Child Perspective, supra note 54, at 307.
²²³. See Cobb, supra note 111.
²²⁵. Cobb, supra note 111.
²²⁶. See LOSING THE Vote, supra note 224, at 3 (the only two states that allow prisoners to cast ballots are Maine and Vermont). Neither of these two states import prisoners via private prisons and each have black populations of approximately 0.5%. See VERNOM LIVING, VERNOM STATISTICS, at http://www.vtliving.com/stats/ (last visited Sept. 18, 2004); OFFICIAL WEB Site OF THE STATE OF MAINE, MAINE TOWN Populations AND Demographics – 2000, at http://www.maine.gov/portal/facts_history/stats_population.html (last visited Sept. 18, 2004).
²²⁷. See Schlosser, supra note 116, at 58-59. According to Schlosser, approximately ninety percent of the inmates at “Bare Hill Correctional Facility,” which is located in upstate New York, “fifteen miles south of the Canadian border,” actually “come from New York City or one its suburbs, eight hours away: about 80 percent are African-American or Latino.”
²²⁸. CASHING IN ON Crime, supra note 218.
²²⁹. Id.
slaves . . . ."230 Once again, black loss becomes white gain as the former's "crime" increases the latter's political and economic clout.231

To fully grasp how the prison-industrial complex now shapes the identities of black men requires familiarity with the process by which slavery once shaped black identity.232 Integral to the success of slavery was the colonization of black men's minds.233 The "shrewd slave-makers,"234 and the legal system that served them, had to convince black men that they were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ."235 In Dr. Na'm Akbar words,

a systemic process of creating a sense of inferiority in the proud African was necessary in order to maintain them as slaves. This was done by humiliating and dehumanizing acts such as public beatings, parading them on slave blocks unclothed, and inspecting them as though they were cattle or horses.236

The slave traders took great pleasure in gazing at237 and prob-

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230. Id. (quoting the Prison Policy Initiative).
231. See Cobb, supra note 111 (describing the "skewing [of] resources away from inner cities into the rural areas where prisons tend to be located").
233. Plantation owners knew that [A] wild or natural nigger is dangerous even if captured, for they will have the tendency to seek their customary freedom, and, in doing so, might kill you in your sleep. You cannot rest. They sleep while you are awake and are awake while you are asleep. They are dangerous near the family house and it requires too much labor to watch them away from the house. Above all you cannot get them to work in this natural state. Hence, both the horse and the nigger must be broken, that is break them from one form of mental life to another, keep the body and take the mind. In other words, break the will to resist. THE BLACK ARCADE LIBERATION LIBRARY, supra note 232 (emphasis added). To counteract this taking of the mind, "black consciousness" became, or has become, a prominent feature of practically all black liberation movements. See, e.g., Biko, supra note 175.
237. See Black Body, supra note 14, at 473, 523-24; Thirteen Stories, supra note 11, at 609 ("They gazed upon his body and intoxicated themselves with the fantasy of racial superiority."); S/M, supra note 17, at 69. See also Fanon, supra note 38, at 109 ("Look, a Negro!"); Hartman, supra note 14, at 33 (on the gaze); Carbado, supra note 59, at 960 ("The racial product was a familiar public spectacle: white law enforcement officers
ing the naked black body: “searching out hidden body parts, running hands over limbs, massaging abdomens and articulating pelvic joints, probing wounds and scars with fingers was erotic. The buyers were getting closer to the bodies of slaves than any practical consideration could justify.”

Elaine Scarry’s philosophy of pain illustrates how such legally-sanctioned torture produced the enslaved condition. According to Scarry, the infliction of pain disintegrates the victim’s consciousness. The victim “in great pain experiences his own body as the agent of his agony.” The consciousness “contains not only the feeling, ‘my body hurts’ but the feeling ‘my body hurts me.’” The moment when torture breaks, or reeducates, the mind constitutes the ultimate act of self-betrayal: the pained body validates the Torturer’s fictive power. Self-betrayal is the desired outcome because through such acts the Master can sadistically reproduce his power without exerting additional energy. Through the drug war, the criminal justice system has achieved that moment of self-disciplining black men. The currency of their stares purchased for them precisely what it took away from us: race pleasure and a sense of racial comfort and safety.”

238. JOHNSON, supra note 15, at 149.
239. For those who would stop short of calling such practices “torture,” consider this slave-maker advice:

When it comes to breaking the uncivilized nigger . . . [t]ake the meanest and most restless nigger, strip him of his clothes in front of the remaining niggers, . . . tie each leg to a different horse faced in opposite directions, set him a fire and beat both horses to pull him apart . . . . The next step is to take a bullwhip and beat the remaining nigger male to the point of death in front of the female and the infant. Don’t kill him. But put the fear of God in him, for he can be useful for future breeding.

THE BLACK ARCADE LIBERATION LIBRARY, supra note 232.

241. Id. at 47.
242. Id.
243. According to one historian, “If a master was too squeamish to undertake the rugged task of humbling a refractory bondsman, he might send him to a more calloused neighbor or to a professional ‘slave breaker.’” Kenneth M. Stampp, Southern Negro Slavery: To Make Them Stand in Fear, in AMERICAN NEGRO SLAVERY 71 (Allen Weinstein & Grank Otto Gateli eds., 1979).
244. SCARRY, supra note 240, at 46-47; FANON, supra note 38, at 99. See Black Body, supra note 14, at 506; S/M, supra note 17, at 70.
245. See THE BLACK ARCADE LIBERATION LIBRARY, supra note 232 (“[B]y creating a submissive dependent mind of the nigger male slave, we have created an orbiting cycle that turns on its own axis forever . . . .”).
246. While it may be tempting—or even natural—to consider the incredible carnage the drug war is causing in black communities as a kind of “terrible by-product,” such rhetoric obscures the fact that in war “[i]njury is the thing every exhausting piece of strategy . . . is designed to bring into being: it is not something inadvertently pro-
betrayal: black men are now agents of their own pain.247

Statistics now show that black men constitute roughly half of the arrests for murder248 and that close to half of all murder victims are black.249 This "performance of blackness"250 is occurring for at least one of two reasons: blacks are doing the whites' bidding;251 and/or they have chosen their own degradation.252 Either way, blacks are killing blacks, thereby producing their own minstrelized theater of self-betrayal, miming white fantasy and the spectacle of white pleasure.253

247. See FANON, supra note 38, at 149.

248. CRIME IN THE UNITED STATES 2002, supra note 162, at Sec. IV, Tbl. 43.


250. HARTMAN, supra note 14, at 52, 56-57. The performance of blackness is the moment (of sale) where flesh is given to "the nexus of race, subjection and spectacle, the forms of racial and race(d) pleasure, enactments of white dominance and power, and the reiteration and/or rearticulation of the conditions of enslavement." Id. at 57.

251. But see Black Body, supra note 14, at 492-93. Professor Farley notes that "the colorline, like colonialism, has a constitutive contradiction . . . . 'Oppression means, first of all, the oppressor's hatred for the oppressed . . . . [However,] [w]ere the colonized to disappear, so would colonization—with the colonizer.' The system wills simultaneously the death and multiplication of its victims." Id. (citation omitted).

252. In Thirteen Stories, Professor Farley discusses Ota Benga, the African man that was an exhibit at the Bronx Zoo in New York in the early 1900s. Thirteen Stories, supra note 11, at 608 (citing N.Y. TIMES, Sept. 10, 1906). Ota Benga was 23 years old, measured 4 feet 11 inches and weighed 103 pounds. Id. He was brought to the Bronx Zoo from the Kasai River in Congo, Africa. Professor Farley writes:

What if Ota Benga chose his abjection? Would it be healthy for him to adjust his inner life to his out world? Like a stripper he was on display for the crowd. They gazed upon his body and intoxicated themselves with the fantasy of racial superiority. What if Ota Benga had learned to enjoy providing his masters with this fantasy?

Id. at 608-09.

253. See FANON, supra note 38, at 225.

There are times when the black man is locked into his body. Now, "for a being who has acquired consciousness of himself and of his body, who has attained to the dialectic of subject and object, the body is no longer a cause of the structure of consciousness, it has become an object of consciousness."

Id. (citation omitted). See also HARTMAN, supra note 14, at 26-32.
As Professor Farley argues, race is white pleasure.\textsuperscript{254} Black crime is the theatre of white fantasy.\textsuperscript{255} It is the place where blacks, as agents of their own pain, trade "the oppressor's gaze" for their own.\textsuperscript{256}

C. \textit{Disavowing Responsibility}

\textit{The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.}\textsuperscript{257}—Justice Harlan

Equality is a white perversion.\textsuperscript{258} Notions of equality are integral to the process by which inequality reproduces.\textsuperscript{259} Seeking rights and freedoms from the oppressor, and waiting for those rights and freedoms to be recognized, reinforces racial hierarchy.\textsuperscript{260} Ultimately, "antidiscrimination law . . . makes the racism . . . that it does not eliminate seem legitimate."\textsuperscript{261}

The evolution of Fourteenth Amendment jurisprudence reflects the fact that "[e]quality is not automatic"\textsuperscript{262} and that rules do

\begin{itemize}
  \item \textsuperscript{254} See \textit{Black Body}, supra note 14, at 458 ("Race is the preeminent pleasure of our time."). See also \textit{Hartman}, supra note 14, at 49-52, 58.
  \item \textsuperscript{255} See \textit{S/M}, supra note 17, at 70. See also \textit{Scarry}, supra note 240, at 28 (discussing torture as fantasy).
  \item \textsuperscript{256} \textit{Black Body}, supra note 14, at 472-74. See also \textit{Dubois}, supra note 54, at 9 ("It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity.").
  \item \textsuperscript{258} See \textit{Anthony Paul Farley, The Dream of Interpretation}, 57 U. \textit{MIAMI L. REV.} 685, 716 (2003) ("Equal rights are only imaginable in their absence. A group imagines equal rights only from a situation of oppression . . . ") [hereinafter \textit{Interpretation}].
  \item \textsuperscript{259} \textit{Id.} at 716-17.
  \item \textsuperscript{260} "What are slaves dreaming of when they ask for rights?" Professor Farley asks. \textit{Id.} at 693.
  \item \textsuperscript{261} \textit{Frances Olson, Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience}, 18 \textit{GA. L. REV.} 929, 951 (1984).
  \item \textsuperscript{262} \textit{Thirteen Stories}, supra note 11, at 586.
\end{itemize}
not interpret themselves. The amendment promised (and continues to promise) blacks "equal protection" and "due process" under the law. However, the amendment doctrinally fails to deliver. This systemic failure is precisely wherein power lies.

In his analysis of Supreme Court jurisprudence on race discrimination, Professor Alan David Freeman argues that inherently illusory promises legitimize the doctrine of equality:

The doctrine cannot legitimize unless it is convincing, but it cannot be convincing in the context of antidiscrimination law unless it holds out a promise of liberation. Simultaneously, the doctrine must refrain from delivering on the promise if it is to serve its function of merely legitimizing. And finally, the doctrine must occasionally offer at least illusions of reconciliation and resolution, lest it collapse in obvious self-contradiction.

And so, the law "dress[es] up as justice." Equal protection jurisprudence strives to convince the oppressed that the law is efficacious. Blacks are asked to believe (the myth) that the law offers justice and promotes a common good. The myth veils

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263. Interpretation, supra note 258, at 689 ("A rule cannot determine the circumstances of its own application ... .").
264. Section one of the Fourteenth Amendment reads, in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. Const. amend. XIV, § 1.
265. See Thirteen Stories, supra note 11, at 586 ("Civil rights will not create the raceless society. ... To qualify as the special favorite of the laws, one must present one's self as a history of group oppression. ... Equality, under liberalism, means only a series of bans against particular acts of discrimination."); Freeman, supra note 19, at 1058-65 (discussing the limitations of the Equal Protection Clause). For an analysis of how the Fourth Amendment fails to protect blacks, see generally Carbado, supra note 59.
266. See Interpretation, supra note 258, at 717 ("The status quo reveals the compulsion to repeat the very inequalities that equal rights are seemingly designed to eliminate. The compulsive repetition of the same problems—the same hierarchies, the same inequalities—is the way the system reveals itself."); Thirteen Stories, supra note 11, at 587 ("The entire system of equal rights is designed to fail. ... Equal rights ideology fails to save the subaltern classes from oppression because it assumes that oppression does not take place.").
267. Freeman, supra note 19, at 1052. See also Carbado, supra note 59, at 997 (analyzing Chief Justice Rehnquist's investment in legitimizing Fourth Amendment doctrine).
269. See Lilies of the Field, supra note 31, at 1037.
270. For a recent assertion of this claim see Robert John Araujo, S.J., A Judicial Response to Terrorism: The Status of Military Commissions Under Domestic and Inter-
reality—"equality" is really a determination made by (most likely) a white male judge about how little equality is required to sustain the myth. Therefore, the standard for what is "equal" becomes that judge's individual perspective, not what is equal in any objective sense.

According to one commentator, "the power of the law to enforce its own premises as the truth of the system erases the significance of its philosophical interlocutors, rendering their protest impotent." In other words, if the law has efficacy, and therefore offers protection from racial discrimination, then the fact that blacks are unemployed, underemployed, earn less than whites, or are not accepted at elite schools is the result of black inferiority.

Illusory promises repress memories of discrimination and capture the discriminated in a web of deception. The fallacy that the

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national Law, 11 Tul. J. Int'l & Comp. L. 117, 119 (2003) ("The rule of law simultaneously takes into consideration the protection of the individual and the promotion of the common good.").

271. Thirteen Stories, supra note 11, at 587 ("[T]he actors who turn the wheel of the liberal equality machine do not like their subaltern castes.").

272. Professor Freeman argues convincingly that equal protection jurisprudence, as it relates to people of color, unerringly adopts the perpetrator's perspective rather than the victim's. Freeman, supra note 19, at 1052. The perpetrator perspective is a powerful legitimation tool. If blacks find themselves, as Professor Farley would say, still in the back of the bus when it comes to education, employment, housing etc., and the law says you have remedies, then your position back there is legitimate. As an embodiment of the perpetrator's perspective, the law proceeds with a definition of discrimination contrary to the one blacks tend to embrace.

273. Cornell, supra note 268, at 1055 (analyzing the observations of Stanley Fish) (emphasis added).

274. See Cashing In On Crime, supra note 218 ("[B]y including African-Americans in the official unemployment figures, the unemployment rate for them increases to almost 40 percent . . . .").


277. Sara Rimer & Karen W. Arenson, Top Colleges Take More Blacks, but Which Ones?, N.Y. Times, June 24, 2004, at 1 ("Blacks . . . are still underrepresented at Harvard and other selective colleges . . . .").

278. See Interpretation, supra note 258, at 717 ("After equal rights, the oppressors remain oppressors and the oppressed remain oppressed. The only thing lost is consciousness of oppression."). See also Thirteen Stories, supra note 11, at 588 ("The ideology of equal rights is a way of masking the desperate nature of one's situation. The
law goes out of its way to protect blacks from discrimination enables whites to place a thick veil over history.\textsuperscript{279}

Saidiya Hartman considered this deception in her study of Reconstruction: "[T]he equality of rights to be extended to freedmen depended upon the transformation of former slaves into responsible and reasonable men."\textsuperscript{280} By making equal rights contingent upon former slaves achieving "responsible man" status, the law encouraged blacks to "bring [themselves] as quickly as possible into step with the white world."\textsuperscript{281} It was only by adopting the white way of being that blacks could compel an acknowledgment of their humanity,\textsuperscript{282} a predicament made clear by Congressman Ignatius Donnelly's appeal to the 39th Congress:

If he is, as it is claimed, an inferior being and unable to compete with the white man on terms of equality, surely you will not add to the injustice of nature by casting him beneath the feet of the white man . . . . If he is, as you say, not fit to vote, give him a chance; let him make himself an independent laborer \textit{like yourself}; let him own his homestead; and let his intelligence, darkened by centuries of neglect, be illuminated by all the glorious lights of education. If after all of this he proves himself an unworthy savage and brutal wretch, condemn him, but not til then.\textsuperscript{283}

By pretending to protect equal opportunity the law systematically disclaims responsibility for inequality.\textsuperscript{284} The fact that blacks appear incapable of taking advantage of special treatment and preferences\textsuperscript{285} must mean they really are wretched and unworthy.\textsuperscript{286}

\vspace{1em}

\textsuperscript{279} See Lipsitz, supra note 26, at 17-18 ("Because they are ignorant of even the recent history of the possessive investment in whiteness—generated by slavery and segregation, immigrant exclusion and Native American policy, conquest and colonialism, but augmented by liberal and conservative social policies as well—Americans produce largely cultural explanations for structural social problems.").

\textsuperscript{280} Hartman, supra note 14, at 175.

\textsuperscript{281} Fanon, supra note 38, at 98 (discussing colonialism).

\textsuperscript{282} Id.

\textsuperscript{283} Hartman, supra note 14, at 177 (citation omitted) (emphasis added). See also Fanon, supra note 38, at 98-99.

\textsuperscript{284} Thirteen Stories, supra 11, at 587 ("'Equal rights' . . . is the persistent and enduring fantasy that oppression does not exist.").

\textsuperscript{285} See Steiner & Argothy, supra note 17, at 461 (quoting a white police officer) ("[T]imes have changed; there's equality. We're actually past equality. We're actually into favoritism based on sex and race . . . .") (citation omitted). But see Kimberle Crenshaw et al., Introduction to Critical Race Theory: The Key Writings That Formed the Movement, at xiii, xxix (Kimberle Crenshaw et al. eds., 1995). According to some scholars,
Once inequitable circumstances are shown to be the black man’s doing, the law renders impotent any discrimination complaint.287

For this reason, Professor Farley concludes that “[r]ules are indeterminate,” and as a result, “a rule requiring equality is as available for a reading that will produce inequality as is any other rule.”288 Combined with color- or race-blind methods of judicial review, where the Court effectively makes race irrelevant,289 the doctrine of equality effectively disguises the master/slave relationship that persists between whites and blacks.290

According to Professor Farley, the future of antidiscrimination/equal protection jurisprudence was mapped out in Justice Harlan’s Plessy v. Ferguson dissent.291 For Harlan, formal racial equality was no barrier to white supremacy. The Supreme Court’s reasoning in McCleskey v. Kemp292 supports Professor Farley’s contention that, “[e]qual rights—interpreted and implemented by those whose whole lives were, are, and will be woven into the grand tapestry of white-over-black—mean[ ] nothing more, nothing less, and nothing other than white-over-black.”293

[T]he putatively neutral baseline from which affirmative action is said to represent a deviation is in fact a mechanism for perpetuating the distribution of rights, privileges, and opportunity established under a regime of uncontested white supremacy. . . . [T]he aim of affirmative action is to create enough exceptions to white privilege to make the mythology of equal opportunity seem at least plausible.

Id.

286. See S/M, supra note 17, at 70.
287. Cornell, supra note 268, at 1055.
288. See Interpretation, supra note 258, at 688.

290. The doctrine of equality denies the persistence of inequality. Professor Hartman might argue that such denial reaffirms a “relationship of paternalistic dependency and reciprocity.” See HARTMAN, supra note 14, at 52.
291. See supra note 257 and accompanying text.
293. Lilies of the Field, supra note 31, at 1037.
In *McCleskey*, the law violently masqueraded as justice through colorblind judicial review.\(^\text{294}\) The defendant in *McCleskey*, a black man convicted of armed robbery and the murder of a white police officer, argued that his death penalty sentence should be overturned because capital punishment was disproportionately applied to black defendants, and in particular, to those black defendants whose victims were white.\(^\text{295}\)

In support of the appeal, McCleskey presented the Baldus study, an unprecedented, comprehensive analysis of black crime performed by three academics who discovered profound racial disparities in Georgia's use of the death penalty.\(^\text{296}\) The professors subjected their data to rigorous testing, accounting for "230 variables that could have explained the disparities on nonracial grounds."\(^\text{297}\) The study examined over 2,000 murder cases in Georgia during the 1970s, and concluded that if the black defendant's victim was white, there was a seventy percent chance that the prosecutor would seek the death penalty and a twenty-two percent chance it would be granted.\(^\text{298}\) However, if the black defendant's victim was black, the probability that the prosecution would seek the death penalty went down to fifteen percent, and the likelihood it would be assessed went down to one percent.\(^\text{299}\)

The Court, even after finding the study presented "statistically valid"\(^\text{300}\) conclusions, held that McCleskey failed to demonstrate that his death sentence constituted "purposeful discrimination" on
the part of the Georgia jury.\textsuperscript{301} The requirement to show "pur-
purposeful discrimination" in \textit{McCleskey}, as well as other discrimina-
tion cases, reflects an inability, or unwillingness, on the Court's part
to recognize the emergence of a less overt, but no less potent form
of racism.\textsuperscript{302}

In his dissent, Justice Brennan criticized the Court's callous-
ness in a way reminiscent of the "false victory"\textsuperscript{303} of Justice
Harlan's famous dissent:

\begin{quote}
It is tempting to pretend that minorities on death row share a fate
in no way connected to our own, that our treatment of them
sounds no echoes beyond the chambers in which they die. Such
an illusion is ultimately corrosive, for the reverberations of injus-
tice are not so easily confined.\textsuperscript{304}
\end{quote}

Justice Brennan's critique is indicative of a racially biased
Court that desires to "free [itself] from the burden of [black] his-
tory,"\textsuperscript{305} but is unwilling to "repudiate" the constitutional mecha-
nisms that perpetuate the burden.\textsuperscript{306} While the dissent found
disturbing the majority's opinion that "[t]he Baldus study cannot
'prove that race . . . was a factor in McCleskey's particular case,'"\textsuperscript{307}
Justice Brennan saw nothing wrong with the required standard of
proof.\textsuperscript{308} By ignoring the structural flaw in the doctrine of equality,
Brennan's dissent, like Harlan's, served the cause of white
supremacy.

\begin{quote}
does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia.") (emphasis added).
\end{quote}
301. The \textit{McCleskey} Court did not want to recognize that the system is compi-
cated by discriminatory factors:

In its broadest form, McCleskey's claim of discrimination extends to every
actor in the Georgia capital sentencing process, from the prosecutor who
sought the death penalty and the jury that imposed the sentence, to the State
itself that enacted the capital punishment statute and allows it to remain in
effect despite its allegedly discriminatory application. We agree with the
Court of Appeals, and every other court that has considered such a challenge,
that this claim must fail.

\textit{Id.} at 292.

302. \textit{See} Kennedy, \textit{supra} note 294, at 1424 ("Racial subordination . . . can be
maintained without discrete, episodic, affirmative acts of purposeful discrimination. In-
deed it can be more securely entrenched by habitual patterns of action and inaction that
infect harms upon blacks without any intentional design whatsoever.").

303. \textit{See} \textit{Lilies of the Field}, \textit{supra} note 31, at 1036.
305. \textit{Id.} (Brennan, J., dissenting).
McCleskey could never satisfy the burden of proving purposeful discrimination because, in modern society, racist jurors are rarely conspicuous about, if even conscious of, their ties to the Confederacy. By the same token, blacks capable of demonstrating the racially disparate impact of legislation can only mount Constitutional challenges so long as their conduct does not threaten the status quo. Equal protection jurisprudence tracks the color-line. For the McCleskey Court to invalidate Georgia's discriminatory sentencing practices would have required a complete overhaul of a criminal justice system that benefits white defendants and white victims—something the Court has steadfastly refused to do.

Professor Farley writes that “[t]oday's neosegregation rulings, because they purport to mandate equality but do not, are ways of proving blacks inferior.” For Farley, this is the way that inferiority becomes a fact of blackness: “'You have equal rights,' our

309. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 323 (1987). According to Professor Lawrence,

[T]he theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. . . . Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level. Id.

310. Until recently, of course, this was not always the case. See, e.g., Taylor Branch, Parting the Waters: America in the King Years 1954-63, at 391 (1988). On February 1, 1961 lawyers representing four African American defendants pointed out that the plaintiff, Montgomery mayor, Earl James, and “five members of the jury were wearing beards in preparation for centennial celebrations of the Civil War,” and “objected that these conspicuous Confederate symbols created an atmosphere prejudicial to the defendants.” Id. The judge, “who had been chosen to administer the oath of office to a Jefferson Davis stand-in at a ceremony marking the Confederacy's hundredth birthday, overruled the objection.” Id.

311. Washington v. Davis, 426 U.S. 229, 248 (1976) (fearing an alternative finding “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white”). See also Kennedy, supra note 294, at 1414 (“[T]he Justices have tailored declarations of rights to fit their perceptions of acceptable remedies.”).

312. See generally Black Body, supra note 14; Freeman, supra note 19.

313. Lilies of the Field, supra note 31, at 1037.
masters snarl, 'why are you still at the bottom?'"314 It is impossible to explain why one is "still at the bottom" when one internalizes the oft-told lie that we live in a world without discrimination.315

A legal system that can disclaim responsibility for the mess it creates is a powerful one. The American criminal justice system is one such system, and its power lies in its ability to conceal the mechanisms that cause black men to internalize the criminal role constructed especially for them.

CONCLUSION

_The Problem of the twentieth century is the problem of the color-line_.316—W.E.B. DuBois

Too many of us are in jail, my friend; too many of us are starving, too many of us can find no door open.317—James Baldwin

The legacy of slavery is all around us. U.S. history has involved an unrelenting effort to suppress black political, economic, and social power. American prisons, especially private prisons, reinforce this legacy of white supremacy. Prison industry ownership is almost exclusively white. The guardians of the criminal justice system are disproportionately white.318 Prisons are filled with black men, nearly one million, and the Department of Justice blithely predicts it will process thirty percent of all black men at some point in their lifetime. The Department knows this because the law has been remarkably consistent in determining who enters, exits, and remains in prison.

The mass production of black prisoners is the result of a legal system that serves and protects whiteness. The criminal justice system takes its cues from white fantasies. These fantasies induce the levels of crime that the system requires to sustain itself,319 and its

314. Id.
315. Id.
316. DUBOIS, supra note 54, at 23.
317. JAMES BALDWIN, BALDWIN COLLECTED ESSAYS 769 (Literary Classics 1998).
318. In 2000, 69% of corrections employees were white, 21% were black, and 8% were Hispanic. JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONS FACILITIES, 2000, at 14, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf (last modified Oct. 15, 2003). Further, approximately 63% of corrections employees are corrections officers. Id. at 13.
319. See Cashing In On Crime, supra note 218. ("Our criminal justice is designed to fail to reduce crime, because, although citizens would be greatly benefited from less crime (just as citizens would be greatly benefited from fewer health problems), the
control is so complete it can project blame onto the very people that it victimizes.

Statistics legitimate white fantasies of blacks. Statistics show that about half of the United States' two million prisoners are black. The "reasonable (white) man" would conclude that blacks, therefore, are disproportionately responsible for crime in this country. However, the power of the statistics lies in the way they obscure the fact that: black incarceration numbers reflect the selective enforcement of laws, particularly drug laws, and; black criminality is a manifestation of the internalized oppression first imposed upon blacks during slavery.

The criminal justice system has cultivated an environment ripe for investing in black crime. The law has demonstrated its ability to produce a consistent supply of black bodies to fill prisons, and corporations have demonstrated their ability to warehouse this "superfluous population." The joint venture has effectively reintroduced the policy of enslaving black men for profit. The emergence of corporations whose services absorb the government's (over)production of black crime is no historical accident. Meeting in the marketplace just as their predecessors did during slavery, these commodity producers will continue to exploit black bondage so long as it serves the bottom line.

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