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THE HIDDEN COST OF INCARCERATION: Women of Color Pay the Price of Legislation That Allows For Exploitive Private Profits

Ayesha Waraich

TABLE OF CONTENTS

INTRODUCTION	90
I. THE IMPORTANCE OF NARRATION IN LEGAL WRITING.....	92
II. THE RISE IN THE PRISON POPULATION	94
A. <i>War on Drugs</i>	95
B. <i>Mandatory Minimums Become the Weaponry for the War on Drugs</i>	97
C. <i>Three Strikes Law</i>	99
III. EXPLOITATION BY PRIVATE COMPANIES.....	100
A. <i>Call Me, Maybe?</i>	101
B. <i>Commissary</i>	106
C. <i>A Guide to Putting Money on the Books</i>	109
IV. WHO REALLY PAYS?	110
A. <i>Women of Color Suffer the Spillover Consequences of Incarceration</i>	112
V. POLICY PROPOSITIONS: INTENDING TO END THE EXPLOITATION.....	114
A. <i>Telephone Shifts</i>	114
1. Rates Based on Household Income.....	114
2. Contractual Regulations & Advocate Oversight.....	116
B. <i>Changing the Money on the Books Process</i>	117
1. Following the Phone Regulation: Fee Caps for Commissary	118
2. Higher Prison Wages.....	118
CONCLUSION	119

INTRODUCTION

Imagine two individuals, products of similar environments, spending their adult lives in two completely different environments: one in law school and the other in prison. Because of the stark difference in their realities, the connection between the two individuals may seem attenuated. However, it is not. It is representative of the one between brother and myself. He endured the consequences of addiction, mandatory sentencing, and the Three Strikes law, while I endured the collateral consequences of this sentencing. Although our paths have diverged, and we live in starkly different environments, I continue to face those collateral consequences.

During his last court date, where he was sentenced to well over a decade in prison, I had bittersweet sentiments. I felt heartbroken and helpless. I watched my brother, one of the many Black and Brown men who filled the courtroom, in an orange jumpsuit shackled at his wrists and feet, being ushered out of court. Out of sight, but not out of mind. I felt like I had lost my childhood best friend. On the other hand, however, I let out a sigh of relief. The burden and cost of coming to every court date, consistently, was exhausting. Though, what I did not know that day was that the burden and costs actually never end.

As my brother serves his prison sentence, I serve a financial one. I pay to accept telephone calls from my brother that are so expensive I sometimes have to decide whether I can even pick up the phone. Visitation is also pricey. On top of gas and hotels travel expenses, the food I buy during my visits is sold in vending machines and is priced well over what it normally sells outside of prison. My costs also include commissary and quarterly packages with necessary items that the prison does not provide him.

Having an incarcerated family member is, noticeably, emotionally draining and heavy on the heart. It should not be heavy on the pocket as well. But the unfortunate reality is that many families face these same circumstances, making the cost of incarceration spill out of prison walls and into the lives of the family members of the incarcerated individual.¹

This Article discusses the hidden costs of incarceration that most legislators, scholars, journalists, and taxpayers overlook. A recent study shows that 45 percent of Americans have or have had an immediate family member incarcerated,² demonstrat-

1. See Saneta deVuono-powell, et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CENTER, 7 (2015), <http://whopaysreport.org/who-pays-full-report> [<https://perma.cc/YL7P-7EZ7>].

2. See Peter K. Enns, et al., *What Percentage of Americans Have*

ing that many Americans are affected by mass incarceration. The costs of incarceration of their family member's imprisonment fall on these members specifically and their communities generally. These expenses are typically unknown by people without first-hand experience with incarceration, whether they have been or are incarcerated, or have a family member who has been or is incarcerated. I will use my first-hand experience to explore the costs—what they are, why they exist, and who pays them.

Further, this Article draws a link between the War on Drugs—which was designed to impact and did impact mostly people of color—to the identity of the people who pay the costs. The Article also connects further links the War on Drugs, mandatory minimum sentencing, and the Three Strikes law and how these three features of our criminal justice system work together to be the largest contributors to the systemic incarceration of people of color, particularly men.³ In fact, the supposed connection between minorities, drugs, and crimes became the highlight for President Reagan's War on Drugs, with a clear undertone of racial regime.⁴ Near-hysteria around the War on Drugs prompted Congress to pass mandatory minimum sentencing, which subjected Brown and Black men to long prison terms and created an unprecedented rise in America's prison population.⁵ The ripple effects of this racial rhetoric have continued to impact people of color at rates disproportionate to their white counterparts,⁶ as the realities of incarceration and the nature of the costs have severe consequences for many communities of color.

And although communities of color experience these consequences, it is rarely discussed how families and largely women of color have become the bearer of the collateral consequences of the legislation and policies that led to increased incarceration. Families have been stripped of fathers, sons, brothers, and husbands.⁷ At the

Ever Had a Family Member Incarcerated?: Evidence From The Family History of Incarceration Survey, 5 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/2378023119829332> [<https://perma.cc/PL67-BW2K>].

3. See MICHELLE ALEXANDER, *THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 56 (2012).

4. See *Race and the War on Drugs*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/sites/default/files/field_document/ACF4F34.pdf (last visited Dec. 2, 2019) [<https://perma.cc/ND7S-9ALD>].

5. *Id.*

6. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1988), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [<https://perma.cc/924L-L5LW>].

7. See deVuono-powell, et al., *supra* note 1, at 27.

same time, the rise in the prison population has consequently made prisons into a lucrative industry.⁸ This exploitation occurs because families, and mainly women of color, with incarcerated loved ones are burdened with a disproportional amount of the financial cost of incarceration.⁹ Although there are many expenses associated with a loved one's incarceration, this Article will focus on the costs of phone calls and commissary.

Part I explains the importance of narrative in legal writing. Specifically, my narrative helps personalize, contextualize, and humanize the topic of this article, as my subjective experience with the costs of incarceration will be intertwined with the objective analysis in relevant parts. Part II describes how the War on Drugs, along with the mandatory minimum and the Three Strikes laws led to the imprisonment of predominantly people of color. Part III details the hidden costs of incarceration, explaining the fees, costs, and private companies that make money from punishment. Part IV links the targets of the War on Drugs to the identity of who pays the costs: largely women of color. Part V proposes changes to prison phone call and commissary system in a way that ends the exploitation by private companies, creates prisoners who have better life skills—here, money management—for when they are released, and takes the burden away from families and women to pay for these exhaustive costs.

I. THE IMPORTANCE OF NARRATION IN LEGAL WRITING

“So you're the little woman who wrote the book that made this great war.”

—Abraham Lincoln to Harriet Beecher Stowe
(*Uncle Tom's Cabin*)

Personal narratives are rooted in the human experience and will therefore always captivate and impact readers more than writing arranged around an assortment of facts.¹⁰ Narratives are essential in effectively communicating different perspectives and are used in many modes of art. For example, the popular podcast *Ear Hustle* amplifies the voices of individuals incarcerated at San Quentin Prison and enjoys major success with its wide audience.¹¹

8. Davis, *supra* note 6.

9. See deVuono-powell, et al., *supra* note 1, at 9.

10. See Ashley Lamb-Sinclair, *When Narrative Matters More Than Fact*, THE ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/education/archive/2017/01/when-narrative-matters-more-than-fact/512273> [<https://perma.cc/U8ME-7LP9>].

11. See Sarah Larson, “*Ear Hustle*”: *The Podcast Made Inside San Quentin*, THE NEW YORKER (Aug. 16, 2017), <https://www.newyorker.com/culture/>

One of Ear Hustle's co-creators explains that prisons are invisible places to most people and in telling stories that people on the outside would not normally hear, he hopes that the podcast's stories "make human the people that are in here."¹² Ear Hustle's widespread success proves not only that narrative is important, but that the narrative of the prison experience is clearly wanted.¹³

The value of narrative in the arts raises the question of its potential value in legal writing. While some critics question whether storytelling and legal analysis should coexist, others recognize the importance of it.¹⁴ Storytelling is important in legal writing and should be frequently utilized because it can create policy change. Storytelling is "a way of opening up political space, destabilizing entrenched power relationships, and giving voice to voices that are usually drowned out, suppressed or simply ignored. By enabling stories to proliferate, we aim to undermine assumptions and preconceptions and 'change the narrative' about stigmatized or marginalized groups. Personal stories can also be used to open up policy space."¹⁵ If the legal community continues to encourage writers to frame their arguments only in terms of statistics, facts, and legal analysis, an assumed experience about a community or individual will emerge, and we will never uncover the full truth. Thus, in order to bring about the change we desire to see, legal writing should celebrate both objective and subjective views and amplify the voices of individuals that are directly affected by legislation and policies.

Legal writing, in its current form, leaves no room for personal stories. From the moment I entered law school, it was obvious to me that the objective standard is valued more than the subjective standard. While thinking objectively has its value, it strips away individuality and context. When I began the statistical research for this Article, I pushed my own complex familiarity with the prison system out of the picture. But then I had an epiphany: how could I write about prisons, incarceration, and the impact of those

podcast-dept/ear-hustle-the-podcast-made-inside-san-quentin [https://perma.cc/6ELD-9R9Y].

12. Ari Shapiro, *Behind 'Ear Hustle,' The Podcast Made in Prison*, NATIONAL PUBLIC RADIO (Apr. 18, 2018, 5:06 PM), <https://www.npr.org/2018/04/18/603562521/behind-ear-hustle-the-podcast-made-in-prison> [https://perma.cc/NW3K-LK88].

13. Larson, *supra* note 11.

14. See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 261 (1994).

15. See Brett Davidson, *The Role of Narrative in Influencing Policy*, ON THINK TANKS (July 20, 2016), <https://onthinktanks.org/articles/the-role-of-narrative-change-in-influencing-policy> [https://perma.cc/42DQ-UUDD].

on women of color without even mentioning that I myself am a statistic? I am a woman of color whose brother is currently incarcerated and has been for much of my adult life. Telling my story is especially essential because “abstract analysis and formal empirical research are less appropriate than stories for communicating the understandings of women of color.”¹⁶

Much of this Article’s research and writing reflects my personal experience. In an effort to humanize numbers and facts, attack the stigma of incarceration and the families and women affects, and inspire others in the legal field to share their stories, parts of my story appear alongside statistics and objective analysis. It is important to note that the experience of every family and woman differs as they—sometimes silently—carry the burden of an incarcerated family member. I share many similarities with what women endure through a family member’s incarceration, but recognize my experience is unique: I am a college-educated law student with privileges that some women and families do not have.

II. THE RISE IN THE PRISON POPULATION

The United States comprises only five percent of the world’s population but accounts for 25 percent of the world’s prisoner population.¹⁷ With over two million adults locked in such cages, it is the largest prison population in the world.¹⁸ How did we get here?

Numerous factors have led to a startling increase in the prison population. This Part discusses the following aspects: the War on Drugs, mandatory minimum sentencing, and the Three Strikes law—along with media, politics, reelection, profit, and, crucially, race in a “tough on crime” era—and how all these elements worked together to increase the prison population.¹⁹

16. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 810 (1993).

17. See Michelle Ye Hee Lee, *Does the United States Really Have 5 percent of the World’s Population and One Quarter of the World’s Prisoners?*, THE WASHINGTON POST (Apr. 30, 2015, 8:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/> [<https://perma.cc/5RC2-67CF>].

18. *Id.*

19. Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983> [<https://perma.cc/47MW-5V5M>].

A. *War on Drugs*

The War on Drugs was instrumental, and perhaps even the catalyst, for the huge rise in the prison population. In 1971, President Richard Nixon named drug abuse “public enemy number one” and explained that to defeat this enemy, it would be “necessary to wage a new, all-out offensive.”²⁰ True to his word, Nixon created the Drug Enforcement Agency²¹ in 1973. A huge rise in the prison population followed. In 1974, just three years after Nixon declared the War on Drugs and just one year after the creation of the Drug Enforcement Agency, there became a dramatic rise in the prison population that continued to grow for years to come.²²

In 1982, President Ronald Reagan reignited the War on Drugs and deepened its trenches far more than had the Nixon administration.²³ Budgets for federal law enforcement agencies dramatically increased, while funding for agencies responsible for drug rehabilitation, treatment, prevention, and education decreased considerably.²⁴ Despite the fact that less than two percent of the American public believed drugs were a pressing issue, Reagan intensified the War.²⁵ To gain public support and legitimize the War, the Reagan administration in 1985 successfully created a craze by announcing that “crack [had] hit the streets.”²⁶ In August of 1986, *Time* featured crack as the subject of the magazine’s issue of the year.²⁷ The War on Drugs gained momentum and in October of 1986, Reagan signed the Anti-Drug Abuse Act of 1986.²⁸ This legislation differentiated between crack and cocaine, demanding mandatory minimum

20. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America’s Drug Problem*, RICHARD NIXON FOUNDATION (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404> [<https://perma.cc/A3GV-FA5P>].

21. *The DEA Years*, DRUG ENFORCEMENT ADMINISTRATION <https://www.dea.gov/sites/default/files/2018-07/1970-1975%20p%2030-39.pdf> [<https://perma.cc/B8FR-XVAC>].

22. U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, PRISONERS 1925–81 1 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf> [<https://perma.cc/E97A-8X74>].

23. *Watch: Ronald Reagan and his ‘War on Drugs,’* TIMELINE (June 26, 2017), <https://timeline.com/ronald-nancy-reagan-war-on-drugs-crack-baby-just-say-no-cia-munism-racial-injustice-fcfeadb3548d> [<https://perma.cc/79NR-PD7B>].

24. ALEXANDER, *supra* note 3.

25. *Id.*

26. *Id.*

27. *Id.*

28. U.S. DEP’T OF JUST., CRIMINAL DIVISION, HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986 (1987), <https://www.ncjrs.gov/pdffiles1/Photocopy/157817NCJRS.pdf> [<https://perma.cc/M7L8-HQSA>].

sentencing for distribution of both drugs but establishing a far harsher sentence for distributing crack.²⁹

Many scholars argue that the War on Drugs generally, but even more specifically, the Anti-Drug Abuse Act and mandating different sentencing for crack versus cocaine, were racially motivated. In fact, crack was predominately associated with lower-income and lower-educated minorities — namely, African Americans — while powder cocaine was linked to whites.³⁰ Crack was less expensive and therefore accessible to poor Americans, many of whom were African American, at this time, whereas cocaine was pricier and tended to be used by affluent whites.³¹ The focus on these harsh sentences and the nitpicking between crack and powder cocaine resulted in the majority of individuals that were arrested, and often imprisoned, for these drug offenses to be Brown and Black men.³² This disparity in policing statistics was despite the fact that rates of drug use by whites and Blacks were relatively the same.³³

To put the War on Drugs into perspective, in current terms, there are over half a million individuals currently incarcerated for a drug offense.³⁴ In other words, one in five incarcerated persons is locked up for a drug violation.³⁵ Even if the War on Drugs itself was not racially motivated, its results and repercussions were mainly felt by communities of color,³⁶ as the prison population of men of color increased significantly after Reagan's declaration.³⁷

29. *Id.*

30. ALEXANDER, *supra* note 3.

31. Deborah Vagins & Jesselyn McCurdy, *Cracks in the System: 20 years of the Unjust Federal Crack Cocaine Law*, AMERICAN CIVIL LIBERTIES UNION (Oct. 2016), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/4K9J-SW7Q>].

32. *Watch: Ronald Reagan and his 'War on Drugs,' supra* note 23.

33. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (June 14, 2016), <https://www.sentencing-project.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<https://perma.cc/XJR4-TGL2>].

34. *The Drug War, Mass Incarceration and Race*, DRUG POLICY ALLIANCE 1 (Jan. 2018), http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf [<https://perma.cc/N7ZM-5CAP>].

35. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/G62C-E6LN>].

36. *The Drug War, Mass Incarceration and Race, supra* note 34.

37. *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> (last visited April 25, 2021) [<https://perma.cc/RM87-ALJL>].

Lawyer, activist, and author Michelle Alexander explained this impact of the War on Drugs on specifically minority communities in a realistic, poignant, and humanizing way when she wrote:

Most Americans violate drug laws in their lifetime. Yet only some of us will be arrested, charged, [and] convicted of a crime. Who becomes a social pariah and excommunicated from civil society and who trots off to college bears scant to the morality of crimes committed? Who is more blameworthy: the young black kid who hustles on the street corner, selling weed to help his momma pay rent? Or the college kid who deals drugs out of his dorm room so that he'll have cash to finance spring break?³⁸

Alexander's quote concisely sums up the War on Drugs in a concise way: Black and Brown bodies have endured the brunt of the War, getting charged and convicted for drug-related crimes at higher rates than their white counterparts.

B. *Mandatory Minimums Become the Weaponry for the War on Drugs*

Mandatory minimum sentencing laws were being used to sentence individuals for drug offenses, weaving together the War and Drugs, legislation, and punishment. To further the War's agenda, in the 1980s, Congress and many state legislatures passed laws requiring judges to give definite sentences for a variety of crimes,³⁹ mostly drug offenses.⁴⁰ Thus, judges no longer had the freedom to weigh factors—such as an individual's life circumstances, prior offenses, or the context of the crime. Instead, they had to give the mandatory minimum sentence that was prefixed for the crime committed.⁴¹

Under these laws, violations involving five grams of crack or five hundred grams of cocaine both mandated a minimum incarceration term of five years.⁴² Further, violations involving fifty grams of crack or five kilograms of cocaine mandated a sentence of ten years to the violator.⁴³ There is no actual medical reason for this blatantly displaced ratio of 100–1 between crack and cocaine.⁴⁴ Nevertheless,

38. ALEXANDER, *supra* note 3 at 216.

39. *Mandatory sentencing was once America's law-and-order panacea. Here's why it's not working.*, FAMILIES AGAINST MANDATORY MINIMUMS 1, <https://www.prisonpolicy.org/scans/famm/Primer.pdf> [<https://perma.cc/Y3JX-F8BB>].

40. *Id.*

41. *Id.*

42. *Mandatory Minimums and Sentencing Reform*, CRIMINAL JUSTICE POLICY FOUNDATION, <https://www.cjpf.org/mandatory-minimums> [<https://perma.cc/YP2R-NXKH>].

43. *Id.*

44. *ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986*

as mentioned before, the so-called difference between urban crack and suburban cocaine caused a huge disparity in the prison system, with men of color predominately affected by this sentencing scheme.⁴⁵

A *New York Times* article written in 1995, close to a decade after mandatory sentencing laws were passed, illustrates the racial disparity of mandatory minimum sentencing in regard to crack versus cocaine sentences. According to the article, statistics during this time found that half of crack users were white, but the sale and use of crack were largely focused in areas that were poor, urban, and minority communities.⁴⁶ This is further supported by the article's sentencing statistics, which found that 90 percent of individuals convicted of federal crack offenses in 1994 were Black, while only 3.5 percent were white.⁴⁷ On the other hand, a significantly larger amount of whites were convicted of powdered cocaine charges in 1994, specifically 25.9 percent,⁴⁸ thereby corroborating the narrative that the stricter sentences for crack offenses were aimed at minority communities.

During the early 1990s, a few years after the mandatory sentencing legislation had passed its ramifications were being felt, even lawyers and legislators acknowledged the laws had an unequal impact on Black men.⁴⁹ Laura Murphy, a director of the Washington D.C. chapter of the American Civil Liberties Union in the 1990s, stated:

How can you go to an inner-city family and tell them their son is given 20 years, while someone in the suburbs who's using powdered cocaine in greater quantities can get off with 90 days' probation? When people understand the truth about the way these laws are imposed, the fact they've had no deterrent, and the race-based nature of these prosecutions, then I think a sleeping giant is going to roar.⁵⁰

Murphy's quote foreshadowed the realization that Congress finally had: the mandatory minimum sentencing and ratio for crack

Deepened Racial Inequity in Sentencing, AMERICAN CIVIL LIBERTIES UNION (Oct. 26, 2006), <https://www.aclu.org/press-releases/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity> [<https://perma.cc/BWA4-DVLR>].

45. *Id.*

46. Charisse Jones, *Crack and Punishment: Is Race the Issue?*, THE NEW YORK TIMES (Oct. 28, 1995), <https://www.nytimes.com/1995/10/28/us/crack-and-punishment-is-race-the-issue.html> [<https://perma.cc/8XYD-GB2B>].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

versus cocaine were draconian. In 2010, with bipartisan support, Congress passed the Fair Sentencing Act that reduced the disparity of crack versus cocaine offenses from 100:1 to 18:1.⁵¹

C. *Three Strikes Law*

The Three Strikes legislation worked with the War on Drugs to lock away individuals, typically Brown and Black men, who may have had a prior drug conviction alongside their current offense. The law was first introduced in the Violent Crime Control and Law Enforcement Act, now known as the 1994 Crime Law.⁵² This law was a chance for Democrats, and recently elected President Bill Clinton, to be tougher on crime than his predecessors, former presidents Nixon and Reagan.⁵³ By passing the 1994 Crime Law and the Three Strikes law, Democrats could align themselves as doing more to prevent crime than Republicans, in a time when Americans were very concerned with crime. This legislation was, essentially, a political strategy.⁵⁴

When first passed, the Three Strikes law gave any offender who had two previous or serious violent felonies a life sentence.⁵⁵ Although this law was meant to keep violent offenders locked away from mainstream society, many third offenses were low-level felonies, like shoplifting, pilfering a small amount of change from a parked car, or passing a bad check.⁵⁶ Even then, this federal law encouraged states to pass similar laws and build more prisons with congressional funds.⁵⁷ Currently, over half of the states in the

51. U.S. DEP'T OF JUST., THE FAIR SENTENCING ACT OF 2010 1 (Aug. 5, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf> [<https://perma.cc/R92U-FG2G>].

52. Lauren-Brooke Eisen & Inimai Chettiar, *The Complex History of the Controversial 1994 Crime Bill*, BRENNAN CENTER (Apr. 14, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/complex-history-controversial-1994-crime-bill> [<https://perma.cc/MD9X-56YA>].

53. German Lopez, *The Controversial 1994 Crime Bill Law That Joe Biden Helped Write, Explained*, Vox (Sept. 29, 2020, 10:25 AM), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> [<https://perma.cc/FR5T-ZZHZ>].

54. *Id.*

55. *Three Strikes Basics*, THREE STRIKES PROJECT: STAN. L. SCH., <https://law.stanford.edu/stanford-justice-advocacy-project/three-strikes-basics> (last visited Dec. 2, 2019) [<https://perma.cc/3JXN-CPWK>].

56. Brent Staples, Opinion, *California Horror Stories and the 3-Strikes Law*, N.Y. TIMES (Nov. 24, 2012), <https://www.nytimes.com/2012/11/25/opinion/sunday/california-horror-stories-and-the-3-strikes-law.html> [<https://perma.cc/R83U-7ZDE>].

57. Lopez, *supra* note 53.

United States have a version of the Three Strikes law,⁵⁸ and more than half of inmates sentenced under the law are serving sentences for nonviolent crimes.⁵⁹

Further, the law disproportionately affects minority communities, as over 45 percent of prisoners serving life sentences under the Three Strikes law are African American.⁶⁰ This imbalance of minority communities being negatively impacted by the Three Strikes law can be linked to the War on Drugs.⁶¹ Many states consider drug offenses as “prior strikes,” and because more Black men are convicted and sentenced due to the difference in crack and cocaine sentencing, more African American offenders are subjected to life sentences under the Three Strikes law.⁶² The Three Strikes law, along with the War on Drugs and mandatory minimum sentencing laws, were all key contributors to mass incarceration, leading to more prison sentences, more prison cells, and more Black and Brown bodies locked away for longer terms.⁶³

III. EXPLOITATION BY PRIVATE COMPANIES

“Going to prison is a lot like dying, only you live on as a ghost, a ghost that regularly haunts your family and friends by phone, letters, cards or email.”⁶⁴

—Fernando Rivas

Companies that most citizens would think are far removed from the prison system have worked their way into making profit from punishment.⁶⁵ Primarily concerned with their bottom line and profit, private, for-profit companies, empowered by prison's desperate environment, create contracts that give commissions to state prisons for allowing the private companies to monopolize a service within that prison.⁶⁶ Currently, there are close to 4,000 private

58. Alexis Kelly, *Three Strikes Law and Habitual Offenders*, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/resources/three-strikes-law.htm> (last visited Dec. 4, 2019) [<https://perma.cc/L9B3-LXJ9>].

59. *Three Strikes Basics*, *supra* note 55.

60. *Id.*

61. *10 Reasons to Oppose “3 Strikes, You’re Out,”* ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> (last visited Dec. 4, 2019) [<https://perma.cc/ZAJ5-CTFB>].

62. *Id.*

63. Lopez, *supra* note 53.

64. Fernando Rivas, *Being a Prisoner is Like Being a Ghost*, MARSHALL PROJECT (Oct. 24, 2019, 10:00 PM), <https://www.themarshallproject.org/2019/10/24/being-a-prisoner-is-like-being-a-ghost> [<https://perma.cc/WTA5-TP64>].

65. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE* (Seven Stories Press 2003) [<https://perma.cc/F6N4-3QK5>].

66. *The Prison Industrial Complex: Mapping Private Sector Players*,

corporations that profit from incarceration, and these include companies that provide services like meals, telephone calls, healthcare, and transportation.⁶⁷ These companies are directly profiting from the so-called corrections business,⁶⁸ and some of these private companies do not only exploit inmates inside the prison, but they also exploit prisoners' support system outside the prison. With 6.5 million adults who have an immediate family member currently incarcerated,⁶⁹ prison companies understand the lucrative nature of the prison industry. In fact, prisoners' support networks have spent over \$2.9 million on just telephone calls and commissary accounts.⁷⁰

Before continuing with this discussion, I would like to note that although there are close to 4,000 private companies infiltrating the public prison system, in this Part I will specifically be discussing exploitation through phone calls and the commissary. This is because, while writing this Article, I instantly gravitated towards writing about these two particular topics. This decision was almost subconscious, as prison phone calls and commissary are the two categories that have heavily impacted my experience with my brother's incarceration.

A. *Call Me, Maybe?*

Phone calls are essential to maintaining a relationship with an incarcerated family member. In fact, continuing contact with family during one's incarceration is widely accepted as crucial for reducing recidivism, as family contact is significant in aiding meaningful reentry.⁷¹ Numerous studies have consistently shown that keeping in close contact with family while incarcerated leads to a lower chance of reoffending and has overall better post-release outcomes for the newly-released individual.⁷²

WORTH RISES (Apr. 2019), <https://static1.squarespace.com/static/58e127cb-1b10e31ed45b20f4/t/5cc7c27b9e3a8d00018649c5/1556595324791/The+Prison+Industrial+Complex+++Mapping+Private+Sector+Players+++2019.pdf> [https://perma.cc/7CL9-DWXB].

67. *Id.*

68. DAVIS, *supra* note 65, at 88.

69. *Half of Americans Have Family Members Who Have Been Incarcerated*, EQUAL JUST. INITIATIVE (Dec. 11, 2018), <https://ej.org/news/half-of-americans-have-family-members-who-have-been-incarcerated>. [https://perma.cc/FA2Q-ZUGY]

70. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLY INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [https://perma.cc/C7XN-5RUC].

71. *Id.*

72. Alex Friedmann, *Lowering Recidivism through Family Communication*, PRISON LEGAL NEWS (Apr. 15, 2014), <https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication> [https://

How does an individual who is locked away in a prison continue to have meaningful contact with their family members? It can be through letters, visitation, or phone calls.⁷³ However, the reality is that many incarcerated individuals have high levels of illiteracy or poor written communication skills, making it almost impossible to have sincere conversations through letters.⁷⁴ Visitation can also be extremely problematic since as most male inmates are about one hundred miles away from their family members.⁷⁵ And, even if the distance is not an issue, many family members are subjected to prison rules and regulations—like intrusive searches, long waits, and inconsistent dress regulations—making in-person visitation less appealing.⁷⁶

All this is true for me. My brother lives over 500 hundred miles away from me, so visitations on a regular basis are not realistic. In fact, visitation even a few times a year is burdensome, considering life becomes busy, prisons have lockdowns—during which visitation is suspended—and also for the simple fact that visitation is expensive. Moreover, the wait times for visitation are extremely long as well. I have to arrive at the prison extra early to ensure my spot for visitation in case the visitation is overflowing with people, and there are not enough accommodations.

Though letters are another option as they are personal, handwritten, and I can read them as many times as I wish, they are still different from being able to hear my brother's voice. Letters also take some time to deliver, so the conversation does not flow as naturally as a phone call would.

As a result of the difficulties surrounding visitation and limitations of letters, phone calls are truly the only lifeline to a halfway decent relationship with my brother. Limited to only 15 minutes, it is the only time I get to hear my brother's voice—his laugh, his humor (although I am funnier), his compassion, his love, and his support.

Again, my situation is quite normal, as telephone calls are the frontrunner of communication between prisoners and their families. As one incarcerated individual states, "When inmates can't afford to maintain contact with the outside world, they are less equipped

perma.cc/4S47-Y2WG].

73. *Id.*

74. *Id.*

75. Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, URB. INST., <https://www.urban.org/sites/default/files/publication/50461/310882-Families-Left-Behind.PDF> (last updated June 2005) [<https://perma.cc/62UN-E86C>].

76. *Id.*

to transition smoothly into civilian life.”⁷⁷ Further, a study showed that about 40 percent of fathers say they have weekly contact with their children while incarcerated, which shows how consistently families keep in contact.⁷⁸ Consequently, private phone companies, collectively known as inmate calling services (ICS) have come to understand the value of prison phone calls and, thus, have created a way to profit from familial communication.⁷⁹

Families must pay both rates and fees that are associated with prison phone calls in order to communicate with their incarcerated loved ones. Rates are what one pays per minute; this includes any higher charge that can accumulate for the first minute of the call.⁸⁰ Fees, on the other hand, are the other fees one might pay for “services” related to the call, such as having to open an account, fund an account, close an account, receive a refund or a paper bill, etc.⁸¹

Prison phone contracts between private companies and state-run prisons are based on a commission model, where the private companies pay the prison a kickback, or a steady percentage of commission, for allowing it to be the only phone company within the prison.⁸² This essentially creates a monopoly for the phone industry inside the prison and allows these private phone companies to charge egregious rates because there is no other phone service provider within the prison and, thus, no competition.⁸³ Further, the kickbacks owed to the prison increase the costs of prison phone calls because while commission to the prison needs to be paid, these companies need to profit as well.⁸⁴ ICS know the importance of phone calls and that the incarcerated individual’s support networks will regularly pay the price to keep in contact with their loved one, both of which can be shown by how many family members will continue to call their loved ones despite these companies’ ridiculous

77. Daniel Wagner, *Meet the Prison Bankers Who Profit From the Inmates*, TIME (Sept. 30, 2014, 6:00 AM), <https://time.com/3446372/criminal-justice-prisoners-profit> [<https://perma.cc/5THB-QNCY>].

78. Travis et al., *supra* note 75.

79. PRISON PHONE JUST., <https://www.prisonphonejustice.org/about> (last updated Mar. 18, 2019) [<https://perma.cc/SH9J-3K7Q>].

80. Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL’Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [<https://perma.cc/9T5Z-6NWF>].

81. *Id.*

82. *See Rates and Kickbacks*, PRISON PHONE JUSTICE, <https://www.prisonphonejustice.org> [<https://perma.cc/FA65-327N>].

83. Wagner & Jones, *supra* note 80.

84. *See Rates and Kickbacks*, *supra* note 82.

prices for phone calls.⁸⁵ As a result, the vast majority of these costs are paid for not by prisoners, but by their family members.⁸⁶

To address these high rates, the Federal Communications Commission (FCC) has started to regulate interstate phone calls and has implemented rate caps for prison telephone calls.⁸⁷ Prior to these rate caps, phone calls could cost as much as \$17 per 15 minutes.⁸⁸

In contrast, the new rates cap the limit to about 21 cents per minute for prepaid calls and 25 cents a minute for collect calls.⁸⁹ However, to compensate for the money lost because of the FCC rate caps, companies can now earn money through fees.⁹⁰ Specifically, charging high fees allows phone providers to abide by the FCC rate cap regulation while also creating new revenue and, thus, profit.⁹¹

In 2015, the FCC capped fees as well, but some phone providers still found ways to dodge these regulations and continue to charge unconscionable fees.⁹² For example, Securus, a company that provides phone and video communication for inmates and their families, pushes families to pay for calls individually instead of creating a pre-paid account.⁹³ Paying for a single call along with the fees associated with that call creates a higher profit than paying a one-time fee for prepaid funds.⁹⁴ Thus, although some fees are capped by the FCC, private phone companies still find a way to create revenue that goes straight into their pockets.

85. Elizabeth Maros & Bonita Tenneriello, *The Telephone is a Lifeline for Prison Families. And Calls are Outrageously Expensive*, COGNOSCENTI (Jan. 27, 2020) <https://www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos> [<https://perma.cc/779B-WNR6>] While this article does not explicitly state that ICS knows that families, and particularly women, will pay for prison or jail phone calls, it can be inferred because they *do* end up paying for phone calls, which is shown by the example in this article where a woman explains even though the calls are expensive, she still pays.

86. *Id.*

87. *See Rates and Kickbacks*, *supra* note 82.

88. *See* Sam Gustin, *Prison Phone Calls Will No Longer Cost a Fortune*, TIME (Feb. 12, 2014, 7:48 AM), <https://time.com/6672/prison-phone-rates> [<https://perma.cc/LVH4-YK9B>].

89. *Telephone Service for Incarcerated Individuals*, FED. COMM'N COMM'N, <https://www.fcc.gov/consumers/guides/inmate-telephone-service> [<https://perma.cc/M6C4-3ESA>].

90. Wagner & Jones, *supra* note 80.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

As the public has slowly come to understand the “inherent conflict of interest when facilities award monopoly contracts and then reap a percentage of the revenue,”⁹⁵ some state legislatures have started to ban the percentage-based commissions.⁹⁶ Specifically, there are a handful of states that do not allow prisons to take commissions from private phone companies, such as California, New York, Colorado, and six additional states as well.⁹⁷ However, these state legislatures only prohibit private phone companies from paying and bargaining with *commissions*, thereby creating a loophole through which companies can give kickbacks to state prisons in other forms.⁹⁸ Some of these kickbacks include paying the prisons a “signing bonus” to contract with their company, providing phone-related technology to the prison, like call recording equipment, or paying excessive “rent” to the prison for hosting the phone company’s equipment within the prison.⁹⁹ This loophole essentially allows private phone companies to continue to create monopolies contracts within prisons and, therefore, maintain their steady profits, while also allowing for prisons to benefit from these contracts.¹⁰⁰ Thus, although some states have banned commission-based contracts, for the family members who pay for these calls, nothing has changed: phone calls are still expensive.¹⁰¹

To put prison phone calls into a more realistic perspective, I will use my experience with the company Global Tel*Link (GTL). Their rates per minute are \$0.082 and a fifteen-minute phone call costs \$1.23.¹⁰² The prices may seem inexpensive and \$1.23 for a fifteen-minute phone call may seem reasonable, but the prices add up. For example, I talk to my brother close to four times a week, if and when possible. That adds up to \$19.68 for the month. This again, might not seem too expensive; however, when this cost

95. Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POL’Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions> [<https://perma.cc/M6XZ-PJL3>].

96. *See Id.*

97. Other states that do not allow prisons to take commissions from private phone companies are Colorado, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, and South Carolina. *See Rates and Kickbacks*, *supra* note 82.

98. *See Wagner & Jones, supra* note 95.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See Notice to Family and Friends: California Department of Corrections and Rehabilitation*, GLOBAL TEL*LINK (July 1, 2019), https://www.gtl.net/wp-content/uploads/2019/06/GTL-CDRC_Rate%20Sheet_Eng_July-2019.pdf [<https://perma.cc/RJ8R-9HUQ>].

is determined by the year, I spend more than \$200 a year on *just* phone calls. If I calculate how much I have spent, and will spend, purely on phone calls for my brother's entire incarceration, it would be well over \$2,500. Fees are not even included in this cost.

Nevertheless, these phone calls are essential for me to remain in contact with my brother because he is over 500 miles away from where I live. Phone calls are the only way I can catch my brother up with what is going on in my life and vice versa; they help maintain normalcy, support, and love in our sibling relationship. When I have good news, I want to be able to share and celebrate with him. When I have a bad week, I want to be able to confide in him. Sometimes, I simply just want to hear his voice. Moreover, phone calls are the only way to understand, value, and support each other's growth. As years and years pass and my brother is still incarcerated, phone calls are the primary way my brother and I connect about our lives: major life changes, successes, losses, and everything in between. Life has a way of continuously moving forward, with no regard to the circumstances of where my brother and I are, how often we get to see each other, or how often we talk. Without phone calls, we would be stuck in different time zones, always trying to catch up with one another through past recollections, and never be able to talk about things as they happen to us. Thus, phone calls are not only essential to maintaining contact with an incarcerated loved one, but they are also one of the few personal and humanizing parts of prison.

B. *Commissary*

Another essential factor to survive in prison is commissary, and private companies know this. Prisons provide inmates with the most basic necessities to survive: clothing, meals, and a handful of very basic personal care items.¹⁰³ However, to have any other personal items outside of these necessities provided by the prison, inmates must purchase those themselves.¹⁰⁴ They do this by buying items through commissary.¹⁰⁵

Commissary is essentially a store set up within the correctional institution, so much so prisoners call it "going to the store."¹⁰⁶ However, commissary items and prices are provided and controlled

103. See *FAQ: The Prison Commissary*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-prison-commissary> [<https://perma.cc/HEJ8-59XZ>].

104. *Id.*

105. *Id.*

106. ERIKA CAMPLIN, PRISON FOOD IN AMERICA 71 (Rowan & Littlefield 2017).

not by state prisons, but by a handful of private companies, such as Keefe Supply Company or Trinity Services Group.¹⁰⁷ Commissary items vary by institution, but typically include clothing, snacks, food, coffee, medicine, shampoo, soap, toothbrushes as well as envelopes, stamps, and writing paper.¹⁰⁸ Items such as medicine, extra clothing, and hygiene products are things that an individual in the free world would not be able to live without, yet these items are considered a luxury in prison, being sold in commissary rather than provided to inmates by the prison. The need for these items is essentially inescapable, especially in cold states, where winter clothes are not provided by prisons.¹⁰⁹

Commissary day, a day when inmates buy the items they want or need from the commissary, varies by institution and can be held once every two weeks,¹¹⁰ or once a week.¹¹¹ Inmates are not allowed to have any physical money, so they pay for commissary items through their individual trust fund account.¹¹² To illustrate, an inmate's commissary fund is like a bank account in the prison:¹¹³ inmates can buy whatever the commissary has to offer based on how much "money is on their books."¹¹⁴ Just like a regular bank account, funds are deducted to reflect the purchases the inmate has made.¹¹⁵

One of the ways in which prisoners provide funds in their commissary accounts is through meager wages they earn by working in the prison.¹¹⁶ These wages go directly into their funds and tend to be spent for commissary.¹¹⁷ This way of payment and purchase for commissary can be paralleled to company stores used by coal miners. In many instances, companies paid coal miners with compensation that was only useable at company stores.¹¹⁸ Because there was no competition with these company stores in coal mining

107. See Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/3WMH-QSC9>].

108. See *Sending Money to an Inmate*, PRISONPRO, <http://www.prisonpro.com/content/sending-money-inmate> [<https://perma.cc/HD3A-ZRTS>].

109. Wagner, *supra* note 77.

110. See *FAQ: The Prison Commissary*, *supra* note 103.

111. See *Sending Money to an Inmate*, *supra* note 108.

112. See *FAQ: The Prison Commissary*, *supra* note 103.

113. See *Sending Money to an Inmate*, *supra* note 108.

114. *Inmate Commissary*, UNION COUNTY SHERIFF'S OFF., https://union-countysheriff.us/?page_id=644 [<https://perma.cc/ZP2T-SJDP>].

115. See *Sending Money to an Inmate*, *supra* note 108.

116. *Id.*

117. *Id.*

118. See Va. Commonwealth Univ., *Company Towns: 1880s to 1935*, SOCIAL WELFARE HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/programs/housing/company-towns-1890s-to-1935> [<https://perma.cc/K8BA-QPTJ>].

towns, the costs of items were inflated.¹¹⁹ Similarly, private companies who monopolize the commissary market in prisons can charge whatever price they wish because there is little to no competition in that prison.¹²⁰

The average daily wage for prisoners for a non-industry job is close to eighty-six cents.¹²¹ When looking at a commissary price list, very few items are less than eighty-six cents.¹²² An inmate's monthly income based on this daily wage would be a little over \$25. Again, when looking at a commissary price list, \$25 would not even be close to a sufficient amount for an inmate to survive.¹²³ This is especially true when the inmate needs over-the-counter medicine or some other item to meet their aging needs: Prilosec tablets can cost more than \$16,¹²⁴ while orthotic arch support costs over \$21.¹²⁵ A recent study of commissary spending showed that in the states of Illinois and Massachusetts, incarcerated people spent over \$1,000 per person annually at commissary.¹²⁶ Yet, an average inmate's annual income is a little over \$300.

These high costs show that because prison wages are extremely low, prisoners must rely on family members to add money into their accounts so they can purchase items from commissary.¹²⁷ Private companies who provide state prisons with their commissary items, such as Keefe Supply Company or Trinity Services Group are not oblivious to prisoner wages, meaning they intentionally exploit the inmates' families.¹²⁸ In fact, these private commissary companies are tremendously profitable because their products move directly from the warehouse to the customer, the inmate, and the companies do not have any additional costs related to maintaining a traditional retail space.¹²⁹ This proves private commissary

119. *Id.*

120. *See* Raher, *supra* note 107.

121. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/N93Y-KS9M>].

122. *See* FED. BUREAU OF PRISONS, FEDERAL BUREAU OF PRISONS TRUFACS COMMISSARY SHOPPING LIST (2011), https://www.bop.gov/locations/institutions/eng/ENG_CommList.pdf [<https://perma.cc/5Q3R-EXCF>].

123. *Id.*

124. *See* FED. BUREAU OF PRISONS, DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS MCC, NEW YORK: JULY, 2015 COMMISSARY PRICE LIST (2015), https://www.bop.gov/locations/institutions/nym/NYM_CommList.pdf [<https://perma.cc/ZA6R-845M>].

125. *See* Fed. Bureau of Prisons, *supra* note 122.

126. *See* Raher, *supra* note 107.

127. *Id.*

128. *Id.*

129. Camplin, *supra* note 106.

companies could lower their prices to reflect menial prison wages, but they know families will cover any extra costs.¹³⁰

Such facts undoubtedly indicate that family members are covering commissary costs. If every paid inmate was *only* using their wages to purchase from commissary, these private prison companies would barely make any profit. In other words, commissary companies have crafted a steady and secure business in the punishment industry: prisoners always need items not provided by the prison, and family members will always pay for their loved ones.

C. *A Guide to Putting Money on the Books*

Not only are family members covering the cost of commissary for their incarcerated loved ones, and, thus, being exploited by commissary companies, but families are also being further exploited by the ways in which they must transfer funds into the commissary account.

JPay, a private company that provides various services to prisons, has essentially monopolized the prison money transfer industry.¹³¹ In the last decade, it has silently swept away money orders, the inexpensive method to send money to inmates, and replaced it with predominantly online money transfers.¹³² Today, the company provides money transfers for almost two million offenders in more than half the states.¹³³ In fact, for almost half of the families in the United States, JPay is the only way to send money to their incarcerated loved ones.¹³⁴ Knowing this information and its market position, JPay profits through the egregious fees it charges for *every* money transfer *every* time the transfer is made.¹³⁵ The fees vary in price, depending on how much money one is transferring to the inmate; they may vary from institution to institution, though most fees in various prisons are the same through JPay.¹³⁶

To illustrate, money transfers between both thirty and seventy-five dollars as well as between two hundred and three hundred have a fee of \$7.95, while a money transfer over seventy-five dollars and under two hundred dollars has a fee of \$9.95.¹³⁷ In order to live comfortably, an inmate needs between \$120 to \$200 in their

130. See Raher, *supra* note 107.

131. Wagner, *supra* note 77.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. CSP-Sacramento Rates, JPay, <https://www.jpayers.com/Facility-Details/California-Department-of-Corrections-Rehabilitation/CSP-Sacramento.aspx> (last visited Nov. 18, 2019) [<https://perma.cc/6LM3-586Y>].

commissary account per month,¹³⁸ which suggests that JPay has intentionally and maliciously set the fee for the potentially most common amount in money transfers with the highest fee.

I use JPay to transfer money into my brother's fund. Every month, I put about \$150 that goes into his commissary fund. However, I pay a total of \$159.95 because of the \$9.95 fee JPay charges. This means I pay almost \$120 every year on *just* JPay fees. When looking only at fees based on an annual analysis and then further multiplying those by the number of years an individual is incarcerated, the \$9.95 can be monstrous for me and a huge profit for JPay. For instance, I will pay over \$1,500 on only fees during the span of my brother's incarceration. This does not even include the amount of money I put into his commissary account for him to use, which is further to the benefit of private commissary companies. If I multiply the total I pay monthly for commissary, \$159.95, I would spend nearly \$25,000 during my brother's prison term.

Regardless of the ridiculous expense of commissary, I still transfer money into my brother's commissary fund once a month because commissary is essential for survival. Prisons get cold and the state does not provide thermals or extra clothing. Moreover, prison cells are limited in space and my brother shares a cell, so items like bins or containers are essential to keep personal items private. Commissary is also the most humanizing feature of prison. In an environment where decisions are constantly made for an individual, commissary provides freedom of choice. It further allows for my brother to buy items that remind him of home, like the coffee my parents drink or cereal that we grew up eating.

IV. WHO REALLY PAYS?

While many men of color have been sentenced to long-term prison terms, what prosecutors, judges, and legislators failed to recognize is that the families of these individuals have to serve the sentence alongside them. Families bear the collateral consequence of these prison sentences; they must pay the literal price of maintaining contact with and providing for their incarcerated loved one.¹³⁹ One family member described the complicated relationship with prison companies in simple terms: "Whatever it is, you pay.

138. Christopher Zoukis, *How Much Money Should I Send My Incarcerated Loved One? An Interview with Prison Expert Christopher Zoukis*, ZOUKIS CONSULTING GROUP (Oct. 7, 2013), <https://www.prisonerresource.com/interview/how-much-money-should-i-send-my-incarcerated-loved-one-an-interview-with-prison-expert-christopher-zoukis> [<https://perma.cc/52KZ-ZKE6>].

139. See deVuno-powell, et al., *supra* note 1, 12.

When the call comes in, you take the call. It is time to visit, you visit. They want something, you buy it. They need something, you pay for it. The costs are astronomical.”¹⁴⁰

Often, families often must choose between supporting and maintaining contact with their loved one who is in prison or meeting the basic needs of their family members on the outside.¹⁴¹ Yet, these families have not committed any crime and are innocent of any wrongdoing.¹⁴² Predictably, these same family members who are innocent of any crime, are primarily responsible for the costs of the incarcerated individual, and they tend to be women.¹⁴³ What is often overlooked, however, is that it is largely women of color who bear the heaviest burden of incarceration, as they are the group that predominately supports their incarcerated loved ones.¹⁴⁴

I can attest to this statistic: I am a woman of color who primarily bears the burden of my brother’s incarceration. Using the word burden in regard to my brother’s incarceration is heavy, and I feel the guilt associated with using this word. However, the word burden is the most accurate expression when describing my relationship with paying for phone calls and commissary during his incarceration. I pay for everything. I pay for phone calls, to simply *talk* to my brother. Not to see him, not to hug him, just to have a 15-minute recorded conversation with him. If I choose not to pay for phone calls, then I can’t talk to my brother. Similarly, I pay for his commissary. How do I not give my brother money monthly for basic necessities? It is impossible to survive in prison without commissary money. Obviously then, there is no real choice.

The reality is that financial costs weave into the other burdens I carry regarding my brother’s incarceration. I don’t pay *only* financially. I pay in other ways not mentioned in this Article: through my mental health, through my worries about my brother and his well-being and safety, through the stigma I experience, and through the secrets I carry about my brother’s incarceration.

140. *Id.*

141. *Id.* at 9, 11–12.

142. *Id.*

143. *Id.*

144. Clayton, G., Farr, B., Mandlin., Richardson E., *Because She’s Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Just. Grp. (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf.

A. *Women of Color Suffer the Spillover Consequences of Incarceration*

These [women of color] are only partially functioning, grieving, in debt, struggling to make ends meet, and, throughout it all, are largely silent and unacknowledged.¹⁴⁵

Largely, it is women of color who suffer the severe consequences of a loved one's incarceration. "For every man who is incarcerated, there are women . . . who suffer financial [and other] consequences."¹⁴⁶ Currently, there are over two million individuals in prison, and two-thirds of those individuals are African American and Hispanic.¹⁴⁷ In fact, a 2014 Prison Policy reported demonstrated that Hispanics make 16 percent of the United States' population while making 19 percent of the prison population; Black individuals make 13 percent of the population, yet they make 40 percent of the prison population.¹⁴⁸ White individuals, on the other hand, make up the majority of the country's population, 64 percent, while they only make up 39 percent of the prison population.¹⁴⁹ In eleven states, at least one in twenty adult African American males are in prison, while, in some states, that statistic is as high as one in fourteen.¹⁵⁰ Further, studies show one in four women have an incarcerated family member, and black women are far more likely to have an incarcerated loved one than white women.¹⁵¹ These startlingly statistics allude to the notion that women with incarcerated loved ones are disproportionately Black and Brown women.¹⁵²

After their loved one is incarcerated, these women are "left to make sense of their loss, pick up pieces of their lives, support their loved ones, often having to provide basic necessities to loved ones that are not offered by the prisons that confine them."¹⁵³ They now must not only keep their household afloat, but must also

145. *Id.*

146. Bancroft, C., Faigeles, B., Grinstead, O., Zack, B., The financial cost of maintaining relationships with incarcerated African American men: A survey of women prison visitors, *J. OF AFR. AM. MEN* (June 2001).

147. Leah Sakala, *Breaking Down Mass Incarceration in 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLY INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/9L22-6E8N>].

148. *Id.*

149. *Id.*

150. Nellis, *supra* note 33.

151. Hedwig, L., Hicken, M., McCormick, T., and Wildeman, C., *Racial Inequalities in Connectedness in Imprisoned Individuals in the United States*, *Du Bois Rev.*

152. *Id.*

153. *Id.*

provide financial, moral, and emotional support to the incarcerated individual.¹⁵⁴ Women of color spend close to one-third of their income *simply* to maintain contact with the incarcerated individual, which, at many times, leads them into debt.¹⁵⁵ In fact, a recent study done by San Francisco's Financial Justice Project, a program within the city's treasurer's office, found that eighty percent of phone calls made from within San Francisco jails are paid for primarily by women of color.¹⁵⁶

Further, a study conducted in the 1990s illustrated that women of color spent close to \$300 a month on their incarcerated loved ones when adding the price of visitation, telephones, commissary, and other costs.¹⁵⁷ In today's terms, that would be about \$450 a month.¹⁵⁸ This number is shocking, especially when many women of color who bear these costs work full-time, but are still disproportionately low-income.¹⁵⁹

If these women were not low-income to begin with, they tend to eventually fall within that bracket because they have to absorb the financial costs of incarceration, while simultaneously losing the financial support from their incarcerated loved ones.¹⁶⁰ This is because many women lose their household's primary income when the male in their family is incarcerated.¹⁶¹ Consequently, women, whose loved one was the primary breadwinner, experience homelessness or housing insecurity at distressingly high rates.¹⁶² And they receive little support because they often do not share the fact that their loved one's incarceration, even with those closest to them.¹⁶³

Since women must bear the costs of taking care of their loved ones in prison, as well as their loved ones on the outside, many of them are forced to push put their own life plans on hold in order to keep up with the financial burden. While these plans may have

154. deVuono-powell, et al., *supra* note 1.

155. Bancroft, Faigeles, Grinstead, and Zack *supra* note 146.

156. Dominic Fracassa, *SF to allow free calls for inmates, no markups on products sold in jail*, S.F. CHRON. (June 12, 2019 4:41 PM), <https://www.sf-chronicle.com/bayarea/article/SF-to-allow-free-calls-for-inmates-no-markups-on-13974972.php> [<https://perma.cc/FZ7R-QMLV>].

157. Clayton, Farr, Mandlin, and Richardson, *supra* note 144.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Clayton, G., Farr, B., Mandlin., Richardson E., *Because She 's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Just. Grp. (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf

163. *Id.*

led to long-term stability, to keep up with the costs of supporting their incarcerated loved ones, women are compelled to work longer hours, change jobs, miss out on better job opportunities, and forgo college education to keep up with the costs of supporting their incarcerated loved one.¹⁶⁴

Like many women of color, I became my brother's primary financial and emotional support, while still trying to piece my life together. I had to deal with the aftermath of my own emotions and the sense of loss following my brother's incarceration, while simultaneously trying to take care of him too. I had to be supportive, loving, and positive because I knew his reality, a prison cell, embodied none of these characteristics. However, it was a struggle. As with many women of color, I tend not to share my brother's incarceration with many people in my life. In fact, many people do not even know my brother exists. The unfortunate reality is that shame is attached to incarceration; thus, making it hard for the masses of women affected by incarceration to share their experiences.

V. POLICY PROPOSITIONS: INTENDING TO END THE EXPLOITATION

Public prisons are public only by name. These days, you pay for everything in prison.¹⁶⁵

- Professor Hadar Aviram

Recent studies show how “mass” mass incarceration truly is: one in two American adults has either currently has an immediate family member behind bars, or has previously had one.¹⁶⁶ With so many Americans affected by the prison system, and thus, these expenses, it is imperative to remove the costs off the backs of family members and women of color.

A. *Telephone Shifts*

1. Rates Based on Household Income

The FCC has capped the rates and fees ICS can charge for telephone calls made from within prisons,¹⁶⁷ and although this is a feasible start, it is not enough for some families. FCC commissioner Mignon Clyburn, who led the prison phone reform, stated the new

164. *Id.*

165. Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration: Prison costs taxpayers \$80 billion a year*, THE MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [https://perma.cc/G4P2-CN95].

166. *Id.*

167. *Telephone Service for Incarcerated Individuals*, *supra* note 89.

rate caps would guarantee the cost of inmate calls to be “just, reasonable, and fair.”¹⁶⁸

However, the terms “just, reasonable, and fair” do not even apply objectively, as rates of family incarceration disproportionately affect not only communities of color but low-income communities as well.¹⁶⁹ The number of people who have an incarcerated immediate family member increases as family income decreases.¹⁷⁰ Adults with household incomes less than \$25,000 are 61 percent more likely to have a family member who is incarcerated than adults with household incomes more than \$100,000.¹⁷¹ Consequently, even with the capped rates and fees, prison phone calls are still not just, reasonable, or fair to the majority of the population who must spend money on the calls. If 61 percent of the population paying for these phone calls has an income under \$25,000, it is unsurprising that one in three families with incarcerated loved ones go into debt simply to pay for phone calls.¹⁷²

Thus, as a start, the government should regulate the costs of prison phone calls relative to an individual’s household income. Some phone calls should be free, while others can still be charged. Each inmate should provide a primary with whom they communicate the most, provided the inmate has one. That primary contact, if he or she wishes to receive calls from the inmate, should have to provide their household income, assets, and other determining factors to determine whether he or she qualifies for free phone calls. This system would essentially work like other governmental systems, such as qualifying for a public defender or food stamps. Primary contacts, who have shown the ability to afford the phone calls, should pay for them at the set prison rate. However, primary contacts who cannot afford the phone calls, even with the capped rates and fees, should receive them for free. Further, prisons may have the freedom to regulate the free phone calls, such as allowing inmates to have only a certain amount of free phone calls per week.

Funding the free phone calls could possibly come from the reallocation of state funds. For example, San Francisco has reallocated its city’s funding, making phone calls made from San Francisco

168. Sam Gustin, *The FCC is Voting to Cap Ridiculous Phone Rates in Prison*, VICE (Oct. 1, 2015 at 6:14 am) https://www.vice.com/en_us/article/nze8eb/the-fcc-is-voting-to-cap-ridiculous-phone-rates-in-prison [<https://perma.cc/YN9N-SBSL>].

169. Equal Just. Initiative, *supra* note 69.

170. *Id.*

171. *Id.*

172. *Id.*

jails completely free.¹⁷³ The ideal plan would have prison calls completely free as well, as it can be done. However, this sliding-scale payment system can be the first step in that longer journey.

2. Contractual Regulations & Advocate Oversight

Unconscionable prison phone rates and consumer fees can all be traced to a single moment in time: when companies started to offer “kickback,” or their revenues, solely to win an exclusive contract with a prison.¹⁷⁴ At various points, private telephone companies were giving away almost all of their revenue to prisons, making them charge ridiculously high fees to recover their profit.¹⁷⁵

However, since the FCC has regulated prison phone fees, these companies have become more creative. For example, JPay contracted with the New York Department of Corrections to give “free” tablets to 52,000 inmates.¹⁷⁶ If these free tablets sound skeptical, it is because they are. These tablets are a part of a “bundled contract,” which is essentially a contract that allows JPay to provide not only the free tablets to the prison, but also allows them to create revenue from new services with these tablets.¹⁷⁷ These services include selling “stamps” for \$0.35 to email their loved one; refunding an inmate’s money to the inmate on a pre-paid debit card, instead of a check, that is filled with fees; offering video chats at \$9 for thirty minutes, as well as charging above-market prices for purchasing media on the tablets.¹⁷⁸ It is projected that this bundled contract and so-called “free” tablets will create \$9 million in revenue for JPay.¹⁷⁹ This shows that private prison companies are creating inventive contracts to keep their profit steady in response to the FCC’s cap on prison rates and fees.

The Prison Policy Initiative recommends various methods prison officials and legislators can use to make phone contracts fairer, which include: (1) the contract should not include other correctional services, i.e. bundled contracts; (2) the contract should not include “free” products, like tablets, which are then profited from in various ways; and (3) the contract specifically lists all telephone fees, rates, and charges, as it is not uncommon for facilities

173. Fracassa, *supra* note 156.

174. *See* Wagner & Jones, *supra* note 95.

175. *Id.*

176. Wand Bertram & Peter Wagner, *How to Spot the Hidden Costs in “No Cost” Tablet Contract*, PRISON POLICY INITIATIVE (July 24, 2018). <https://www.prisonpolicy.org/blog/2018/07/24/no-cost-contract> [<https://perma.cc/W3DV-QKV7>].

177. *Id.*

178. *Id.*

179. *Id.*

to sign contracts without actually knowing these extra charges family members bear.¹⁸⁰ Specifically disallowing bundled contracts and kickback-based contracts would stop private prison companies from creating new ways to make an unconscionable profit on the backs of women of color. These new profit revenues, such as the tablets, are essentially the same outrageous phone rates and fees before the FCC caps, simply in another form.

To combat the kickback issue in general, one solution is to for the federal government to incentivize all states, as some states have already done, to ban kickback contracting. These private prison phone companies who give most of their revenue as kickbacks to the prison are then pushed against the wall to make a profit for themselves, thus incentivizing them to find new ways to exploit the prisoner's support network. Further, in general, states should order prison officials contracting with phone companies to have an advocate to speak on behalf of the prisoner's support network, because they are the individuals who are directly affected by these contracts and their costs. The advocates can be individuals from organizations that work with family members of the incarcerated or even directly impacted family members. This gives the individuals who bear the consequences of these contracts a voice, allows for their narrative to be heard, and ensures they are represented when these contracts are made. This would, in turn, hopefully create fairer and less exploitive contracts. It would also push prison officials to not just look for a cost that seems low but look for the lowest total cost to the consumer, the inmate's support network, when fees and rates are both calculated.

B. *Changing the Money on the Books Process*

What is perhaps a philosophical question is whether our country should even be incarcerating individuals at the rate it has and currently is, especially since states cannot provide many essential goods to inmates. This makes dictating how commissary companies work tricky as companies provide inmates with essential necessities, but the cost is shifted from the state to provide these necessities to the inmate's support networks.¹⁸¹ Although there is no perfect answer, the government can start with capping commissary deposit fees and paying prisoner's a higher wage.

180. See Wagner & Jones, *supra* note 95.

181. See Raher, *supra* note 107.

1. Following the Phone Regulation: Fee Caps for Commissary

To begin reforming the financial burden on inmate's support networks, the government should cap commissary fees as it has done with telephone fees. Specifically, companies charge egregious fees to deposit money into an inmate's account every time it is deposited. For example, JPay is used to deposit money and in almost every state, charging fees up to \$15 to send money to an inmate.¹⁸² Because depositing money into an inmate's commissary account is subject to these fees, the government should cap the fees, and ensure they are uniform in every state and every commissary company.

2. Higher Prison Wages

Although many inmates in prisons work, their wages are meager. In some states, inmates do not get paid at all.¹⁸³ Instead, companies should be allowed to use prison labor only if inmates are paid fair wages. For example, prisons could implement the Prison Industry Enhancement Certification Program, which allows private companies to use prison labor, while paying inmates local wages.¹⁸⁴ It also reduces prison costs, since a percentage of the inmate's income is used to cover room and board, another percentage is for Social Security and Medicare, and some is given back to victims of crime.¹⁸⁵

Importantly, if states paid prisoners more than the few cents an hour, then inmates could potentially afford commissary prices. However, these wages do not have to be as competitive as the free world, considering most inmates do not pay identical costs associated with living in the free world, such as rent. For example, even if prisoners were paid \$3 an hour and worked only fifteen hours a week, their monthly income would be \$180. This is an income that would allow them to make their own commissary purchases and take the burden off their loved ones, who are predominately low-income women of color.

182. Availability & Pricing, JPay, <https://www.jpays.com/pavail.aspx> [<https://perma.cc/M4K9-SNCU>].

183. Daniel Moritz-Rabson, 'Prison Slavery: Inmates Are Paid Cents While Manufacturing Products Sold to Government', NEWSWEEK (Aug. 28, 2018), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729> [<https://perma.cc/26LE-5RQ8>].

184. U.S. BUREAU OF JUST. PRISON INDUS. ENHANCEMENT CERTIFICATION PROGRAM, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf (last visited on Jan. 16, 2020).

185. *Id.*

Although there are surely critics who do not agree with raising prisoner wages, especially increasing them to local wages, the reality is that at least 95 percent of people incarcerated will be released back to their communities at some point.¹⁸⁶ Paying inmates livable wages allows them to not only pay for their own commissary expenses and compete with commissary prices, but also allows them to learn how to make, manage, budget, and save their own money. These skills are necessary for the free world and for incarcerated men who are able to lighten the burden for the family and women who were taking care of them financially while they were in prison.

CONCLUSION

Prison legislation and policies have had the unintended consequences of punishing women of color for years, who although are not in a literal prison, are in a financial prison. It is now time to be intentional in how we push for change in battling private companies who profit from punishment at the hands of predominately low-income women of color. These women are essentially sentenced to the same prison term as their incarcerated loved ones, as they must pay the exploitive costs associated with incarceration. Although much damage has already been done, there is room for growth. Policymakers, legislators, and the public must not only see these women as exploited consumers and understand that the financial burden of incarceration puts them into a cyclical cycle of poverty, but also see them as humans, and listen and learn from their stories and narratives to implement policy change.

As for myself, I wish I could say the costs have lessened and the financial burden has gotten easier. However, it is the complete opposite. The more consistently I talk to my brother, the more our relationship grows. The costs of these consistent phone calls, then, are obviously expensive. Through our 15-minute phone conversations, we navigate understanding and learning about each other as self-aware adults, rather than the individuals we were when his incarceration occurred. We are both learning about each other, while simultaneously learning about ourselves. Commissary costs never lessen either, as commissary is not only essential, but one of the few humanizing pieces of prison. Thus, as long as my brother is incarcerated, I will continue to cover phone and commissary expenses.

186. Reentry Trends in the U.S., Bureau of Justice Statistics <https://www.bjs.gov/content/reentry/reentry.cfm#:~:text=At%20least%2095%25%20of%20all,be%20released%20to%20parole%20supervision.> (last revised Apr. 25, 2021) [<https://perma.cc/AF38-7TJS>].

My narrative of my brother's incarceration is just one in many millions, but I acknowledge that I am privileged enough to write about my experience, especially to a legal audience. Although I somewhat differ in privilege from the many women of color I have written about, I feel connected to them as well. We suffer from stigma. We suffer from financial costs. We suffer from emotional burdens. But we are also hopeful: for prison reform, for changes in legislation, for a reduction in incarceration, and for the day our incarcerated loved ones come home.