Coy McKinney
An Anarchist Theory of Criminal Justice
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> some—often even uglier—variant of the very thing one first challenged) but from one or another strategy of slipping away from its grasp, from flight, desertion, the founding of new communities.[68]

Critical for creating this new society is a belief that it is possible and that we have the power to do it.

It is time to reaffirm what is already ours and reclaim our individual sovereignty. It is time for our self ownership to be reaffirmed and lived out in life. It is a metaphysical fact that we own our bodies and minds. All other ownerships can be challenged and are transitory at best, but self ownership is undeniable and permanent as long as we are living beings. Therefore it is ultimately, indeed must be our decision as to how we will conduct our lives the only law that we must accept is to do no harm to others and to recognize and respect the personal sovereignty of the other as they must ours. Recognition and respect of every person's individual sovereignty is the only way in which systems of mutual cooperation can be successfully developed and maintained. And indeed is the only law required for peaceful coexistence with the greater society. But it is not a law of compulsion like most laws, but is rather the natural state of things such as the laws of physics.[69]

[68] Graeber, *supra* note 40, at 60–1.

[69] Consent Withdrawn, We Must Marginalize The State And Capitalism, (last visited Apr. 27, 2012).

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> restorative justice go against this paradigm. Its practitioners have a much less cynical view of humanity, but nonetheless it's quite possible that RJ (restorative justice) won't reach its full potential without a radical re-evaluation of societal values.[67]

Thus, in order for restorative justice to operate in the anarchist fashion it is intended to, and be successful, there needs to be an evolution in the way we live our lives, and the way we view one another.

Conclusion

In conclusion, the racist, classist, hierarchical interests represented in the formation of the Constitution have created a legal system, and subsequently, a criminal justice system, that has consistently failed to administer true justice. Thus, a new approach must be taken, which will require us to stop relying on the current criminal justice system, and its oppressive laws to solve our interpersonal issues. The criminal justice system will continue to work the way it has, as long as we continue to consent and participate in it. If we collectively take a stand and withdraw our consent from the system, and instead redirect how we deal with conflict to a restorative approach, the criminal justice system will become irrelevant. In explaining "revolutionary exodus," David Graeber writes:

> The theory of exodus proposes that the most effective way of opposing capitalism and the liberal state is not through direct confrontation but by means of what Paolo Virno has called "engaged withdrawal," mass defection by those wishing to create new forms of community. One need only glance at the historical record to confirm that most successful forms of popular resistance have taken precisely this form. They have not involved challenging power head on (this usually leads to being slaughtered, or if not, turning into

[67] Johnson, *supra* note 59.

Thus, the restorative justice process function of compassionately helping individuals learn from their mistakes.

Restorative justice practices are gaining traction and being applied throughout the country in a variety of contexts, but its success and continued use is dependent upon a continuing shift in societal values, and the strengthening of communal ties.[66] In some instances, forms of restorative justice are being used in conjunction with the criminal justice system for misdemeanor crimes. Defendants are given the choice of pleading guilty and going through a process in which they admit guilt, and discuss what caused them to commit the crime, and are then required to perform community service. While this is a step in the right direction, the process still operates under the power of the state. Additionally, it creates a problematic incentive for defendants to plead guilty to crimes just to escape accountability. Accountability is important in ensuring justice through the restorative method, however, without the force of the state to ensure this, the question becomes, how can society hold people accountable for their actions? Matthew Johnson believes:

> . . . that accountability comes naturally with community and interdependent relationships. We tend to not view ourselves as connected in Western culture; we see ourselves primarily as individuals. In this context, accountability is not as important as escaping blame or harm. However, if I value my relationship with you more than my own willingness to avoid pain/consequences, I will tell you that I broke your favorite possession, etc., because I would want the same done for me, and we are interconnected. Also, accountability comes much easier when there is no expectation of punishment. If I knew you weren't going to sue me, hit me, or shun me for admitting my wrongdoing, I would have much more of an incentive to tell the truth and be accountable. The current criminal justice system, along with the capitalist economic system, assumes that we act within our own self-interests, and this is just the way of things. Therefore, we incentive behavior that maximizes self-interest. Yet we turn around and criticize people for being selfish, etc. The principles of

[66] Umbreit, *supra* note 60, at 261.

This paper is a critique of how the state, the legal system, and the criminal justice system function in American society, and calls for an anarchist approach to how society should be organized that will remove the oppressive frameworks we currently live under.

To support my arguments, I will first provide an overview of how the criminal justice system works. From there I will offer an analysis on why the criminal justice system is flawed, and the racially discriminatory effect it has had on society. I will then discuss why the disproportionate number of minorities found in prison and impoverished in this country is directly tied to the contemporary ruling interests that were preserved by the U.S. Constitution. Showing that the system is inherently discriminatory, I propose an alternative method for viewing society through anarchism. I will spend time debunking myths regarding anarchism and explaining why it is a viable ideology. In the end, I will propose a restorative justice approach to criminal justice that requires neither the state nor the legal system.

Overview of criminal justice system

In theory, the function of the legal system, and the state is to provide a structure that creates an environment for society that protects individual and collective freedom. The intention of the legal system then, is to provide an objective set of rules for governing conduct and maintaining order in society. In order to cover all potential conflicts, the law is divided into two forms: (1) civil law, which are rules and regulations that decide transactions and grievances between individuals; and (2) criminal law, which are rules concerned with actions deemed dangerous or harmful to society as a whole, and are prosecuted by the state.

Relevant to this paper, the criminal justice system is the method by which society deals with individuals who violate criminal laws. It is the means for society to "enforce the standards of conduct necessary to protect individuals and the community."[1] This system is composed

[1] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 7, (1967).

of three parts: (1) police enforcement of the law; (2) adjudication of potential violations; and (3) punishment/rehabilitation for criminal acts.

The state authorizes police officers to enforce the law and maintain order. This permission allows the police to arrest individuals, and use deadly force when the circumstances permit. Since police officers are allowed to use their discretion in determining when there has been a violation of the law, and when to use deadly force, they are trained to be capable of assessing the situations they find themselves in, and acting accordingly.

As a check on the power given to police officers, state prosecutors are responsible for determining whether the charges have substance, and if the individual's case should go to trial. In the words of Michelle Alexander, the prosecutor has the most power of any other criminal justice official, and is the person that "holds the key to the jailhouse door."[2] This adds a special responsibility for prosecutors, according to Chief Judge, Isaac Christiancy:

The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that though unfair means may happen to result in doing justice to the prisoner in the particular case yet justice so attained is unjust and dangerous to the whole community.[3]

If a prosecutor determines there is enough evidence for trial, the individual will be charged with committing a crime.

At trial, the adversarial system is used. This means the prosecutor will present evidence, in addition to arguments, explaining why the defendant is guilty of the alleged crime(s), and the defendant's attorney, who is either appointed by the state or chosen independently, will do the same, except explaining why the defendant is not guilty. All this is presented before a judge, and sometimes a jury, who are regarded as objective third parties, and are responsible for determining the guilt of the defendant.

[2] Michelle Alexander, *The New Jim Crow*, 86, (2010).
[3] *Hurd v. People*, 25 Mich. 405 (Mich. 1872).

by misunderstandings and needs not being met for individuals. This method prevents individuals that have caused harm from being vilified, which encourages others to participate, and also reveals any inadequacies within the individual's community.

The second pillar is that restorative justice "emphasizes offender accountability and responsibility."[63] This means, rather than sending offenders to jail, they confront the people that have been harmed by their actions, and take responsibility for rectifying the situation. Offenders are permitted to tell their side of the story, but must also listen to how and why their actions led to the harm. Then together, the individuals work towards an agreeable solution. All this fits within the third pillar of engagement, which suggests that the primary parties affected by crime be given significant roles in the justice process.[64] An example of how the process works is as follows:

> We [an organization that coordinates restorative justice conferences] would get a referral, call each principal actor in the conflict, interview them carefully and empathetically . . . making sure they are aware of the process as well as their own feelings . . . and get their consent to participate in the process. We would then repeat the process with everyone else involved and schedule a time that worked for everyone and an appropriate, neutral location. If it were a Victim-Offender Dialogue, it would likely take place at the correctional institution. The preparation process, where a trained facilitator would talk to each person individually, is generally the most important part and will determine the success of the conference. At the end of the conference, dialogue, etc., the facilitator(s) would help the participants generate a consensus agreement, that might include restitution, an apology, community service, etc., and follow up with participants after an established amount of time to ensure that they were satisfied with the agreement and that it was being followed as agreed.[65]

[63] Zehr, *supra* note 61, at 23.
[64] Zehr, *supra* note 61, at 24.
[65] Johnson, *supra* note 59.

and believes justice can only be determined by the involved parties through dialogue. A justice system based on these principles exists, and is called restorative justice.

Restorative justice is a form of conflict resolution, used by different indigenous groups throughout the world, to settle disputes between individuals. According to a restorative justice co-director of facilitation, Matthew Johnson, "[r]eliance on the state to achieve justice or security goes against the idea that people are fully equipped to deal with their own conflicts — an idea that is at the core of restorative justice principles."[59] In contrast to the current criminal justice system, where the state is viewed as the primary victim in criminal acts, and victims, offenders, and the community are given passive roles, restorative justice views crime as being directed against individual people.[60]) This means conflicts and disputes are settled entirely by members of the community. The framework restorative justice uses, allows it to be applied in any circumstance in which a conflict is deemed to exist. At its core, it is a form of community justice that recognizes the interconnectedness of communal living, and that harm and conflicts are symptoms of communal inadequacies. Therefore, if everyone's needs are being met, then consequently the causes for conflict are prevented.

Howard Zehr, a leading advocate and visionary for restorative justice, says that it has three primary pillars: harms and needs, obligations, and engagement.[61] In regards to harm, Zehr writes, "[w]hile our first concern must be the harm experienced by victims, the focus on harm implies that we also need to be concerned about the harm experienced by offenders and communities."[62] The restorative approach tries to uncover the causes of conflicts in a manner that respects the perspectives of the people involved. Behind this is the belief that conflicts are created

59 Email interview with Matthew Johnson, Co-Director of Facilitation, Conflict Resolution Center of Montgomery County (Apr. 26, 2012).

60 Mark S. Umbreit and Betty Vos and Robert B. Coates and Elizabeth Lightfoot, Restorative Justice In the twenty-first century: A social movement full of opportunities and pitfalls, 89 *Marq. L. Rev.* 251, 255 (2005). (This article provides a comprehensive breakdown of the variety of restorative justice models and their impact.

61 Howard Zehr, *Little Book of Restorative Justice*, 22 (2002).

62 *Id.* at 23.

If an individual is convicted of a crime, they enter into the custody of the correctional authorities. An example of the stated role correctional authorities and prisons play in the criminal justice system is exemplified by the Federal Bureau of Prisons, which "protects society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens."[4] Prisoners can receive medical, educational, religious, and career assistance to achieve the stated edification goals. Prisoners can be released before fulfilling their required time in prison by being placed on parole, which means they are released back into society with certain restrictions on their freedom. Ultimately, the objective of the correctional authorities and prisons is to protect society from criminals, while also providing rehabilitation to them so that they leave prison better than when they entered.

In its entirety, the criminal justice system is structured to deliver justice in a fair manner that upholds the ideals America holds for itself.

The problem — the illusion

Despite the stated intent of the criminal justice system, there are clear, systemic problems with how it functions that not only call its existence into question, but also the legal system that produced it as well. At the core of the problem is the fact that "justice" is determined by the state, and not the individuals involved. Worsening this is the fact that the origin of the state was built on discriminatory ideals. This has resulted in a criminal justice system that does not serve the people, but works to maintain oppressive and discriminatory, governmental authority.

The victims and alleged offenders have little, to no, say in the determination of justice throughout the criminal process. The state replaces the actual victim as the injured party for trial, and seeks justice based on its own standards. Defendants are advised to remain silent, and to

4 Federal Bureau of Prisons, (last visited Apr. 26, 2012).

allow their attorney to do most of the speaking for them. In describing this phenomenon, Alexandra Natapoff, writes:

> The United States's criminal justice system is shaped by a fundamental absence: Criminal defendants rarely speak. From the first Miranda warnings through trial until sentencing, defendants are constantly encouraged to be quiet and to let their lawyers do the talking. And most do. Over ninety-five percent never go to trial, only half of those who do testify, and some defendants do not even speak at their own sentencings. As a result, in millions of criminal cases often involving hours of verbal negotiations and dozens of pages of transcripts, the typical defendant may say almost nothing to anyone but his or her own attorney.[5] [. . .]
>
> Defendant silence also has systemic implications for the integrity of the justice process. In our democracy, individual speech has historically been seen as an antidote to governmental overreaching. Criminal defendant speech is perhaps the quintessential example of the individual defending his or her life and liberty against the state. Yet silent defendants rarely express themselves directly to the government official deciding their fate, be it judge or prosecutor, and are often punished more harshly when they do. The justice system assumes that conversations between counsel and clients, and counsel's own speech on behalf of clients, fulfill the personal needs of defendants as well as systemic requirements that defendants be "heard." Yet most defense counsel are overworked, appointed counsel with insufficient time to spend communicating with their clients or fully exploring their clients' personal stories.[6]

Together, the practice of "representation" does not form an honest quest for justice, since it silences the only individuals that are truly capable of determining it.

[5] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. Rev. 1449 (2005).

[6] Natapoff, *supra* note 5, at 1451.

> yourself too much figuring out what they think is going on, and therefore, generally speaking, you don't. Hence the sure-fire way to simplify social arrangements, to ignore the incredibly complex play of perspectives, passions, insights, desires, and mutual understandings that human life is really made of, is to make a rule and threaten to attack anyone who breaks it. This is why violence has always been the favored recourse of the stupid: it is the one form of stupidity to which it is almost impossible to come up with an intelligent response. It is also of course the basis of the state.[58]

Consequently, the manner in which we allow the state to enforce compliance to the law is comparable to the rhetoric the American government uses to demonize "terrorist" groups and the countries labeled as their supporters. If terrorism is something we collectively admonish, our next step is to be honest in our introspection, and overcome the glaring contradiction that surrounds us.

Despite the state's monopoly on the use of legitimate force, it still only exists because we acknowledge it to. To live in a truly cooperative and free society, we must be willing to let go of our reliance on the external state and legal system, and begin to engage each other on a local basis, and take full responsibility for the structure of our communities and neighborhoods.

A new way forward — a restorative approach to justice

The current legal system's fundamental purpose is to resolve conflict. However, the power to determine resolutions is given to individuals that do not have an interest in the matter, and prevent the individuals involved to determine their own form of justice. Additionally, obedience to this system is enforced under duress. Rather than using force to achieve compliance, the anarchist approach to resolving conflict is voluntary,

[58] Graeber, *supra* note 40, at 72–3.

The anarchist belief equates "law" with ethics, and reasons that since we learn ethics from our families, friends, and other members of our community, our current governmental legal system is not required.

The permanence of a state authority comes under further questioning when its actual existence is probed. Graeber writes:

> In fact, the world is under no obligation to live up to our expectations, and insofar as "reality" refers to anything, it refers to precisely that which can never be entirely encompassed by our imaginative constructions. Totalities, in particular, are always creatures of the imagination. Nations, societies, ideologies, closed systems . . . none of these really exist. [. . .]
>
> This is not an appeal for a flat-out rejection of such imaginary totalities . . . It is an appeal to always bear in mind that they are just that: tools of thought.[56]

Thus, part of the state's existence and legitimacy is due to the mental recognition we assign to it. If everyone were to shift their thinking to a worldview in which the state was undesired, and instead, looked to live without its authority, the state's power and existence would be critically undermined.

The primary reason we acknowledge the authority of the state is its ability to use force as a means of enforcing compliance. This means anyone who breaks the law can have their liberty taken from them, or be killed by state officials. Sociologist Max Weber, describes the state as, " a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."[57] On the issue of force and violence, Graeber writes:

> . . . violence, particularly structural violence, where all the power is on one side, creates ignorance. If you have the power to hit people over the head whenever you want, you don't have to trouble

55 Kropotkin, *supra* note 52.

56 Graeber, *supra* note 40, at 43–5.

57 Max Weber, Politics As A Vocation, (last visited Apr. 27, 2012).

Although America's legal system has determined that justice is most effectively administered through the adversarial system, the reality of the process shows that this is a contrived conclusion. The adversarial system relies on prosecutors to "do justice," and for defense attorneys to be "zealous advocates" for their clients, relying on both sides to present their strongest arguments, so that a third-party trier of fact can make the best decision.[7] This system relies on justice being equated with victory, which encourages both sides to be as uncooperative as possible with each other.

In living up to their roles as zealous advocates for their clients, and encouraged by the adversarial system, defense attorneys can employ a number of tactics to win cases, that do not help the trier of fact make an informed decision. In his essay outlining the problems with these tactics, labeled "aggressive defense," William H. Simon, provides a few troublesome examples:

> Defense lawyers sometimes have opportunities to draw out and delay cases, for instance, by deliberately arranging their schedules to require repeated continuances. This can have the advantage of exhausting prosecution witnesses and eroding their memories.
>
> Defense lawyers are sometimes asked to present perjured testimony by defendants. They sometimes find they can benefit their clients by impeaching the testimony of prosecution witnesses they know to be truthful. And they sometimes can gain advantage by arguing to the jury that the evidence supports factual inferences they know to be untrue. [. . .]
>
> Lawyers occasionally find it advantageous to disclose or threaten to disclose information that they know does not contribute to informed determination on the merits because such disclosure injures the prosecution or witnesses.[8]

7 Model Rules of Prof'l Conduct R. 3.8(a) (2008); *Id.* at Preamble, Scope, Terminology (2008).

8 William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703, 1704–5 (1993).

While these tactics are permissible, each exemplifies how the adversarial system promotes the goals of the individual defendant over that of overall justice.

Prosecutors are also encouraged by the adversarial system to give precedence to winning rather than obtaining actual justice. As a representative of the state, prosecutors must be conscious of how the public perceives their decisions. To ensure this, almost everywhere in America, (except Alaska, Connecticut, New Jersey, and the District of Columbia) the job of chief prosecutor is determined by an election.[9] To secure election, or reelection, prosecutors often campaign on how "tough" they are on crime, something that is usually demonstrated by the number of convictions a prosecutor has made. This equates convictions with justice, which consequently, creates an imbalance in the pursuit of justice, as it implies justice lies on the side of the prosecutor, by default, and not the defendant. In arguing that judges should not be elected, Justice John Paul Stevens said, "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases."[10] The same argument can be made for prosecutors as well. Thus, in order to show proficiency, prosecutors are often encouraged to convict individuals. However, the argument that convictions equal justice is a fallacy. If this were true, the rate of recidivism would be decreasing, yet it is increasing. According to a 2006 report released by the bipartisan Commission on Safety and Abuse in America's Prisons, within three years of their release, 67% of former prisoners are rearrested and 52% are re-incarcerated.[11]

Assisting the "convictions = justice" belief are economic incentives that permit individuals and corporations to profit from the number of prisoners a jail has. This is commonly referred to as the "private prison-

[9] Ric Simmons, Election of Local Prosecutors, Ohio State University, Moritz School of Law, (last visited Apr. 27, 2012).

[10] John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 St. John's J. Legal Comment. 21, 30–31 (1996) (discussing need to improve quality of judges and espousing belief that judges should not be elected).

[11] Commission On Safety and Abuse in America's Prisons, *Confronting Confinement*, 106, (2006).

> are continually led to demand from it what can proceed only from themselves, from their own education and their own morality." In existing States a fresh law is looked upon as a remedy for evil. Instead of themselves [the populace] altering what is bad, people begin by demanding a law to alter it.[53]

Allowing officials of the state to fill positions of power and determine policy for the community is problematic for the following reason:

> The notion of "policy" presumes a state or governing apparatus which imposes its will on others. "Policy" is the negation of politics; policy is by definition something concocted by some form of elite, which presumes it knows better than others how their affairs are to be conducted. By participating in policy debates the very best one can achieve is to limit the damage, since the very premise is inimical to the idea of people managing their own affairs.[54]

As a result, communities that concede their power to the state, reduce their independence and freedom to determine the type of society they want to live in.

The relinquishing of community power to a state government is unnecessary because there is no reason to believe the state can perform better than the community could. Anarchists believe we are capable of practicing a natural form of justice amongst ourselves, based on our conscience and innate ability to reason with one another, without trusting the process to a hierarchical ruling class of professionals. Kropotkin explains the manipulative justification for law by saying:

> Its origin is the desire of the ruling class to give permanence to customs imposed by themselves for their own advantage. Its character is the skilful commingling of customs useful to society, customs which have no need of law to insure respect, with other customs useful only to rulers, injurious to the mass of the people, and maintained only by the fear of punishment.[55]

[53] *Id.*

[54] Graeber, *supra* note 40, at 9.

Thus, anarchism does not advocate violence or mayhem, but rather calls for the liberation of everyone by removing oppressive social structures and practices from within our communities.

The vision anarchism has for society directly challenges a number of the core assumptions and principles held by mainstream America. For one, anarchists believe the current legal system and the authorization it provides for governmental and state power is both harmful and unnecessary.

In theory, the government is supposed to be of, for, and by the people, but the reality of its function has only ensured the existence of a ruling class, whose power and interests are perpetually preserved by the system of governance. David Graeber describes the state as having a dual character, where it is viewed as an institutionalized form of extortion by communities that seek to retain some degree of autonomy, while also appearing as a "utopian project in the written record."[51] Despite its idealistic aura, Peter Kropotkin writes that, ". . . Anarchists have often enough pointed out in their perpetual criticism of the various forms of government, that the mission of all governments, monarchical, constitutional, or republican, is to protect and maintain by force the privileges of the classes in possession . . ."[52] Essentially, the power a community naturally has to rule itself, is given to a higher authority, the state, to govern on the community's behalf. This opens the community to the abuses of power that result from hierarchical relationships. Additionally, the community's reliance on the state to govern its affairs diminishes the community's own power, making it, and its members, subservient to the state. This reliance on the state and the legal system creates an indirect way of resolving conflict. Rather than individuals settling disputes amongst themselves, they rely on impersonal laws to find a solution. To this point, Kropotkin writes:

> [Quoting French jurist Dalloy] ". . . legislation is expected to do everything, and each fresh law being a fresh miscalculation, men

50 David Wieck, Anarchist Justice, (last visited Apr. 27, 2012).

51 Graeber, *supra* note 40 at 65.

52 Peter Kropotkin, Law And Authority, (last visited Apr. 27, 2012).

industrial complex." Between 1999 and 2010, the use of private prisons increased by 40% at the state level, and by 784% in the federal prison system.[12] This rise correlates with an increase in revenues as well: Corrections Corporation of America and the GEO Group, the two largest private prison companies, made over $2.9 billion combined in 2010.[13] Explaining how these profits have been spent, the Justice Policy Institute states, "[a]s revenues of private prison companies have grown over the past decade, the companies have had more resources with which to build political power, and they have used this power to promote policies that lead to higher rates of incarceration."[14] Thus, a cycle exists where private prison facilities influence the criminal justice system through political and economic means, encouraging the flawed belief that convictions equal justice.

The confluence of economic and political motives for obtaining more convictions has had tremendously negative effects on society, and has helped usher in a period of "mass incarceration." According to the International Centre for Prison Studies, the United States has the highest incarceration rate per 100,000 people of the national population, than any other country in the world.[15] A New York Times article described the situation succinctly, "[t]he United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners."[16]

Furthermore, this period of mass incarceration has illuminated the racist character of America's legal system. According to the Bureau of Justice Statistics, as of December 31, 2010, state and federal correctional authorities had jurisdiction over 1,612,395 prisoners, while a total of 7.1 million people were under the supervision of adult correctional authorities.[17] Of the 1.6 million prisoners, 588,000 identified as Black, and

12 Cody Mason, *Too Good To Be True: Private Prisons In America*, 1, (2012).

13 Justice Policy Institute, *Gaming The System: How The Political Strategies of Private Prisons Promote Ineffective Incarceration Policies*, 12 (2011).

14 *Id.* at 2.

15 International Centre For Prison Studies, Entire world – Prison Population Rates per 100,000 of the National Population, (last visited Apr. 27, 2012).

16 Adam Liptak, U.S. Prison Population Dwarfs That of Other Nations, (last visited Apr. 27, 2012).

345,900 identified as Hispanic, representing 36% and 21%, respectively, of the prison population.[18] This is alarming since, according to the 2010 U.S. Census, Blacks make up 12.6% of the American population, and Hispanics constitute another 16.3% of the population.[19] Making the imbalance clearer, the estimated number of inmates held in custody in local, state, or federal prisons per 100,000 U.S. citizens, for Blacks, Hispanics, and Whites, respectively, is the following: 4,607; 1,908; and 769.[20] This means Blacks are nearly 6 times as likely as Whites to be in prison. Paul Butler writes:

> Imagine a country in which more than half of the young male citizens [referring to Blacks] are under the supervision of the criminal justice system, either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age thirty. Imagine a country in which there are more young men in prison than in college.[21]

The racial disparity is also present in death penalty cases. According to the Equal Justice Initiative, "[m]ore than half of the over 3300 people on death row nationwide are people of color; nearly 42% are African American. Prominent researchers have demonstrated that a defendant is more likely to get the death penalty if the victim is white than if the victim is black."[22] And according to Amnesty International, a 1990 report by the non-partisan U.S. General Accounting Office found, "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty."[23] As a result, the effect of criminal laws,

17 Bureau of Justice Statistics, Prisoners In 2010, (last visted Apr. 27, 2012); Bureau of Justice Statistics, Correctional Populations In The United States, 2010, (last visited Apr. 27, 2012).

18 Bureau of Justice Statistics, *supra* note 17 (first cite), at Appendix, Table 12.

19 Karen R. Humes, Nicholas A. Jones, Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, Table I (2011).

20 Bureau of Justice Statistics, *supra* note 17 (second cite), at Appendix Table 3.

21 Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 690–1 (1995).

22 Equal Justice Initiative, Racial Bias, (last visited Apr. 27, 2012).

23 Amnesty International, Death Penalty and Race, (last visited Apr. 27, 2012).

practices of the criminal justice system. Although Butler calls for the undermining of the legal system, he ensures that readers do not confuse his ideas as "encouraging anarchy" by explicitly stating so ("I am not encouraging anarchy."[48]). A logical assumption of Butler's reasoning is that anarchy would be more problematic than reform.

Anarchism's absence from mainstream America's discussions should not reflect poorly on the ideals it promotes. In the opinion of anarchist author, John Zerzan, anarchism is about, "eradicating all forms of domination. This includes not only such obvious forms as the nation-state, . . . and the corporation, . . . but also such internalized forms as patriarchy, racism, and homophobia."[49] "Domination" occurs in relationships where there is an unequal distribution of power, allowing the dominator(s) to exert their will over others. Being subject to domination causes mental and physical oppression, both of which obstruct human growth. For this reason, hierarchy is viewed negatively by anarchists, and instead, horizontal structures, dependent upon collaboration are encouraged. According to Anarchist writer, David Wieck, anarchism represents:

> . . . a kind of intransigent effort to conceive of and to seek means to realize a human liberation from every power structure, every form of domination and hierarchy. Correlative with this negation is the positive faith that through the breakdown of mutually supportive institutions of power, possibilities can arise for noncoercive social cooperation, social unity, specifically a social unity in which individuality is fully realizable and in which freedom is defined not by rights and liberties but by the functioning of society as a network of voluntary cooperation. [. . .]
>
> We are premising a society in which people have stopped living in fear of one another, in which gross violence, hatred, and contempt for life have become uncommon, in which alienation of person from person seldom reaches the malignant extremes to which we are accustomed.[50]

48 Butler, *supra* note 21, at 20

49 Everythingology, Enemy of The State: An Interview With John Zerzan & Derrick Jensen, (last visited Apr. 27, 2012).

Everywhere in the world, it seems, archaeological digs are reshaping our view of the distant past. Not only are these findings revealing that civilizations were older than once thought, but they are showing that man was smarter and more progressive.[44]

Based on this, Graber asks that we engage in a "thought experiment":

> What if, as a recent title put it, 'we have never been modern'? What if there never was any fundamental break, and therefore, we are not living in a fundamentally different moral, social, or political universe than the Piaroa or Tiv or rural Malagasy? [. . .]
>
> Let us imagine, then, that the West, however defined, was nothing special, and further, that there has been no one fundamental break in human history. No one can deny there have been massive quantitative changes: the amount of energy consumed, the speed at which humans can travel, the number of books produced and read, all these numbers have been rising exponentially . . . The West might have introduced some new possibilities, but it hasn't canceled any of the old ones out.[45]

Without a basis for disregarding the social organization of "primitive" societies, anarchism remains a relevant sociopolitical doctrine.

While anarchism's critics may concede that it is conceivable, they may still argue it is not the best way of structuring society. This position is exemplified by the thoughts of French Revolution thinker, Jacques-Pierre Brissot. Brissot, in denouncing his political rivals, the Enragés, accused them of advocating anarchy, warning that without the rule of law and government, there could be no way of delivering justice within society.[46] This sentiment is exemplified modernly in Paul Butler's bold essay, "Racially Based Jury Nullification: Black Power In The Criminal Justice System."[47] In Butler's essay, he calls for Blacks to exercise jury nullification in particular circumstances as a way of protesting the unfair

44 *Id.* at 295.
45 Graeber, *supra* note 40, at 46–51.
46 Brittanica, *supra* note 38.
47 Butler, *supra* note 21, at 677.

their enforcement and prosecution, has disproportionately placed more Blacks and Hispanics in jail than in the nation's history.

Causes for the discriminatory effects of the criminal justice system

The disproportionate number of racial minorities involved in America's criminal justice system is not by chance, but intent, as it is a consequence of the racist and classist interests the U.S. constitution was designed to protect. Starting in the mid-15th century, after the violent acquisition of land belonging to long-established indigenous communities, Americans and Europeans engaged in the cruel transportation of over 11 million Africans for over 450 years.[24] The African slave trade helped build America into one of the most powerful countries in the world, but also created a patriarchal society that reified racial discrimination by the creation of racial identities. These racial identities were used by the rich, White elites to create artificial divisions amongst the masses to pit them against each other, and not their rulers. The Populist leader from Georgia, Tom Watson, in calling for racial unity, said:

> You are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars both.[25]

The rich, white men that had obtained economic and political power throughout the colonies utilized the opportunity the Constitutional Convention provided to ensure their power was maintained with the formation of the new country. Writing about the findings of fellow historian Charles A. Beard, Howard Zinn writes:

24 British Broadcasting Corporation, Quick guide: The Slave Trade, (last visited Apr. 27, 2012).
25 Howard Zinn, *A People's History of the United States: 1492-Present*, 291 (2003).

Beard applied this general idea [that the rich must either control the government directly, or control the laws by which the government operates] to the Constitution, by studying the economic backgrounds and political ideas of the fifty-five men who gathered in Philadelphia in 1787 to draw up the Constitution. He found that a majority of them were lawyers by profession, that most of them were men of wealth, in land, slaves, manufacturing, or shipping, that half of them had money loaned out at interest, and that 40 of the 55 held government bonds, according to the records of the Treasury Department.

Thus Beard found that most of the makers of the Constitution had some direct economic interest in establishing a strong federal government: the manufacturing needed protective tariffs; the moneylenders wanted to stop the use of paper money to pay off debts, the land speculators wanted protection as they invaded Indian lands; slaveowners needed federal security against slave revolts and runaways; bondholders wanted a government able to raise money by nationwide taxation, to pay off those bonds.

Four groups, Beard noted, were not represented in the Constitutional Convention: slaves, indentured servants, women, men without property.[26]

Summarizing the constitution then, Zinn writes:

> The Constitution, then, illustrates the complexity of the American system: that it serves the interests of a wealthy elite, but also does enough for small property owners, for middle-income mechanics and farmers, to build a broad base of support. The slightly prosperous people who make up this base of support are buffers against the blacks, the Indians, the very poor whites. They enable the elite to keep control with a minimum of coercion, a maximum of law–all made palatable by the fanfare of patriotism and unity.[27]

[26] *Id.* at 90–1.
[27] Zinn, *supra* note 25, at 99.

Another argument used to discredit anarchism is its perceived impracticality and lack of application outside of "non-primitive" societies. Generally, "primitive" societies are distinguished from modern societies because of an absence of an institutionalized government-like authority. Due to this distinction, "primitive" societies are considered irrelevant to discussions surrounding present-day social issues.

Anarchist anthropologist, David Graeber, provides an alternative lens to view this dichotomy through his book, *Fragments of An Anarchist Anthropology.*[40] Graeber writes that the popular American understanding of how human society has developed is that it has followed a linear path, beginning primitive and becoming more advanced and complex over time. Graeber explains that the anthropological record does not support this conclusion, using three egalitarian cultures, the Piaroa, Tiv, and Malagasy, as examples.[41] Graeber writes:

> . . . we [anthropologists] have been trying for decades now to convince the public that there's no such thing as a 'primitive,' that 'simple societies' are not really all that simple, that no one ever existed in timeless isolation, that it makes no sense to speak of some social systems as more or less evolved.[42]

Author Walter Cruttenden also takes time to dispel this myth, writing:

> The leap was made: If Darwin had evidence that physical organisms adapt to fit their environment (evolve), then society, even over short periods, must evolve in the same linear fashion. In other words, if evolution existed in physical development, it must also play a role in societal and cultural development within humanity. This was very appealing to the intellectuals of post-Renaissance Europe as it justified a superior attitude toward less complex societies.[43]

[40] David Graeber, *Fragments of An Anarchist Anthropology*, (2004).
[41] Graeber, *supra* note 40, at 65.
[42] *Id.* at 41.
[43] Walter Cruttenden, *Lost Star of Myth And Time*, 9 (2006).

employment between Blacks and Whites has continued to expand, further demonstrating the bias inherent in the construction of American society.[37] Thus, a new approach to how we live and interact with each other is desperately needed. One where our interconnectedness is valued, and where society nurtures everyone's existence. This requires a culture that focuses on anti-oppressive structures, and has the goal of collectively liberating all people. Luckily, such a vision exists, and it is called anarchism.

Introduction to anarchism

The word "anarchism," derived from the Greek root "anarchos," means "without authority," and according to the Encyclopedia Brittanica, its central ideals are freedom, equality, and mutual aid.[38] Despite this, in modern popular society, anarchism is surrounded by stigma and taboo, and invokes images of social chaos, in which terrorism is the prevailing means of establishing law and order, making anarchism seem both impractical and undesirable. However, through the fog of misperception and obscurity, lies a sociopolitical doctrine that challenges some of our deeply held assumptions on what the relationship between the individual and society can be, and calls us to work towards creating a truly free and cooperative society.

Behind some of the constructions of anarchism as a violent ideology are events that transpired between the years of 1890 and 1901. During this time period, individuals that identified as anarchists killed several ruling figures, including U.S. President William McKinley, King Umberto I of Italy, and Sadi Carnot, the President of France.[39] These are certainly extreme acts, but it is unfair, and too simple to ascribe these actions to all anarchists without an investigation into the circumstances surrounding each event, or consideration for the diversity of thought and tactics within anarchism itself. Such an investigation is beyond the scope of this paper, but suffice it to say, the use of violence, as a means to justify the ends anarchism seeks, is not a universally accepted tactic.

[37] See Ajamu Dillahunt *et al.*, United for a Fair Economy, State of the Dream 2010 DRAINED Joblessness and Foreclosed in Communities of Color; The Schott State Report on Black Males & Education. (last visited Apr. 27, 2012).

[38] Encyclopedia Brittanica, Anarchism, (last visited Apr. 27, 2012).

[39] Brittanica, *supra* note-38.

Those with power and influence, who had benefited from the use of slaves as a means of achieving economic and political power, helped ingrain slavery into their respective legal systems and cultures. Thus, representatives, especially from Southern states, had a strong interest in preserving slavery, and would not have agreed to join the union without a constitutional protection for it. This protection is exhibited by the original sections of the Constitution located at: Article 1, Section 2, Clause 3 (recognizing the "three-fifths compromise"); Article 1, Section 9, Clause 1 (permitting the continuance of the slave trade until 1808); and Article 4, Section 2, Clause 3 (protection for the Fugitive Slave Act).

While legislation to abolish the slave trade became law in 1808, some state governments enacted Black Codes, or laws to regulate the institution of slavery and to place further restrictions on the liberty of Blacks. The Supreme Court did nothing to abolish slavery, or the racist laws, in fact, it thwarted an attempt by some Northern states to limit slavery, through the Missouri Compromise, by nationalizing the practice with its decision in *Dred Scott v. Sanford.*[28] The issue of slavery ultimately contributed to the outbreak of the Civil War, and the eventual passage of the 13th, 14th, and 15th Amendments in 1865, 1868, and 1870, respectively (prohibiting slavery except as punishment for committing a crime, guaranteeing equal protection for all citizens, and prohibiting the denial of the right to vote based on race, respectively). However, the intent in maintaining a racially divided society persisted, as state governments implemented "Jim Crow" laws that segregated Blacks to a separate, and second-class citizenship. The Supreme Court again did nothing to repeal these laws until its decision in *Brown v. Board of Education of Topeka* over 80 years later in 1954.[29] The Civil Rights Movement followed in the 1960s and 1970s and helped remove many of the overt forms of racial discrimination the legal system and federal government had maintained, but regardless of these changes, legally sanctioned racial discrimination has endured. Now, it operates in covert and institutionalized ways that can be shown through the impact of governmental policy. The government's "War on Drugs" has become the most recent, post-Civil Rights

[28] *Scott v. Sandford*, 60 U.S. 393 (U.S. 1857).

[29] *Brown v. Bd. of Educ.*, 347 U.S. 483 (U.S. 1954).

Movement policy to continue the racial discrimination and exploitation of minorities in America. While the term "War on Drugs" was initially used by President Richard Nixon, it was under the Presidency of Ronald Reagan when it became heavily enforced. The purported purpose of the "war" was to reduce the illegal drug trade, by implementing policies that discouraged the production, distribution, and consumption of illegal drugs. This included imposing restrictive penalties on an individual's liberties for committing drug-related crimes (i.e., losing the right to vote, denial of public benefits), and harsher sentencing guidelines (i.e., "three strikes laws," mandatory minimums).

Although the appearance of the effort appears racially neutral, its enforcement has had a clear racial bias. Terming the initiative the "New Jim Crow," Michelle Alexander explains that, "[a]s of 2004, more African American men were disenfranchised (due to felon disenfranchisement laws) than in 1870, the year the Fifteenth Amendment was ratified . . ."[30] Illustrating the racial bias of this, Alexander continues:

> This war has been waged almost exclusively in poor communities of color, even though studies consistently show that people of all colors use and sell illegal drugs at remarkably similar rates. In fact, some studies indicate that white youth are significantly more likely to engage in illegal drug dealing than black youth. Any notion that drug use among African Americans is more severe or dangerous is belied by the data. White youth, for example, have about three times the number of drug-related visits to the emergency room as their African American counterparts.[31]

Another indicator of the racial bias within the initiative can be shown through the difference in sentencing guidelines. In 1986, the U.S. Congress passed laws that created a 100:1 sentencing disparity for the possession or trafficking of crack, in comparison to the penalties for trafficking powder cocaine, which exhibits discrimination since Blacks are more

30 Michelle Alexander, The Age of Obama As A Racial Nightmare, (last visited Apr. 27, 2012).

31 Alexander, *supra* note 30.

likely to use crack than powder cocaine, a substance that is predominantly used by Whites.[32] Compounding this further are the revelations journalist Gary Webb uncovered on how the Nicaraguan rebel group, the Contras, who were known for drug trafficking, were assisted by the U.S. government in distributing crack cocaine in Los Angeles, California to fund weapons purchases.[33] Thus, the undisguised racist laws and policies that targeted Blacks after the formation of the Constitution have continued, just in a less overt fashion.

The history of the plight of other minorities under oppressive laws and governmental policies should not go unmentioned. Latinos have been targeted through anti-immigrant laws, termed "Juan Crow," that have had similar, but different effects on Latinos as Jim Crow did on Blacks.[34] Native Americans are also disproportionately represented in the criminal justice system since they are incarcerated at a rate 38% higher than the national per capita rate.[35] Muslims, especially after the September 11th events, have been subjected to racial profiling and surveillance by local and federal authorities, similar to how the Japanese, and Asians generally, were persecuted before and during World War II. Furthermore, the government's practice of discriminating against groups based on racial identities is exemplified by its use of data obtained by the U.S. Census and the policies it has created.[36]

Encapsulating the history of America's legal system with the impact it has had on society, the conclusion can be drawn that it has successfully achieved the objectives its creators intended: a patriarchal, plutocracy ruled by Whites. The gap in equality on wealth, health, education, and

32 Jim Abrams, Congress Passes Bill To Reduce Disparity In Crack, Powder Cocaine Sentencing, (last visited Apr. 27, 2012).

33 See Gary Webb, *Dark Alliance: The CIA, the Contras, and the Crack Cocaine Explosion*, Seven Stories Press; 2nd edition (1999).

34 Karla Mari McKanders, Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws, 26, *Harv. J. on Racial & Ethnic Just.*, 163 (2010).

35 U.S. Commission On Civil Rights, *A Quiet Crisis, Federal Funding And Unmet Needs In Indian Country*, 68 (2003).

36 See Therese Beaudreault, The Race Categories On The U.S. Census: Representations of False Consciousness, (last visited May 6, 2012).