

# PRIVATE PRISONS AND THE NEW MARKETPLACE FOR CRIME

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## I. INTRODUCTION

A felony prison sentence in the United States carries with it devastating outcomes.<sup>1</sup> A sentenced inmate loses his liberty and freedom during the period he is locked up and is often “sentenced” to brutalization, solitary confinement, dehumanization, sometimes rape, and an overwhelming scarcity of options once released from prison.<sup>2</sup> Imprisonment in the United

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1. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 10 (Greg Ruggiero ed., 2003) (highlighting a devastating outcome of prison sentences); Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY, Nov. 2000, at 1–5, <https://www.ncjrs.gov/pdffiles1/nij/184253.pdf> (discussing the collateral consequences of imprisonment, including, for example, social disorganization, family disputes, work and economic well-being, and political alienation); BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (Fed. Judicial Ctr. ed., 1994), [http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf) (discussing the rounding impact of mandatory minimum sentencing); Reza Ali Mohseni, *The Sociological Analysis of Prison: Costs and Consequences*, 4 J.L. & CONFLICT RESOL. 13 (2012) (evaluating prison policy from a pathological point of view); Kevin Johnson, *Prison Populations Hinder Budget Cuts*, USA TODAY (Oct. 10, 2011, 9:45 PM), [http://usatoday30.usatoday.com/NEWS/usaedition/2011-10-21-Lifers\\_ST\\_U.htm](http://usatoday30.usatoday.com/NEWS/usaedition/2011-10-21-Lifers_ST_U.htm) (noting an inmate serving life costs states over \$30,000 per year).

2. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 141 (The New Press, 2012); Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33 (Jeremy Travis & Michelle Waul eds., 2003) (examining the devastating psychological effects of imprisonment); James M. Binnall, *Respecting Beasts: The Dehumanizing Quality of the Modern Prison and an Unusual Model for Penal Reform*, 17 J.L. & POL’Y 161, 171–77

States has devolved into a place where horrific conditions, inhumane treatment, and degradation have become the norm.<sup>3</sup> When a felon gains release from prison, he or she faces obstacles and impediments that often lead a prisoner right back into the clutches of the prison system. Upon release, formerly incarcerated persons face discrimination and roadblocks that are nearly insurmountable for most ex-felons.<sup>4</sup>

Not only has prison become an unholy experience for United States prisoners, but as the prison regime in this country has devolved into the system that exists today, this nation has also become the world's greatest incarcerator, imprisoning more of its citizens than any other nation in the world.<sup>5</sup> Despite its fairly small population compared to that of other nations, United States citizens are imprisoned at rates that far exceed any other country.<sup>6</sup> In fact, "[t]he United States has less than [five percent] of the world's population. But it has almost a quarter of the world's

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(2008) (discussing how prisoners lose their value as human beings as inmates); Craig Haney, "Infamous Punishment": *The Psychological Effects of Isolation*, 8 NAT'L PRISON PROJECT J. 3 (1993); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 566-67 (1997) (evaluating how solitary confinement commits a felon to the "psychologically destructive effects of prolonged extreme idleness and social deprivation"); Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 223 (2008) (underscoring the dehumanizing practice of giving birth as a pregnant prisoner); Sherwood Ross, *America's Dehumanizing Prisons*, GLOBAL RES. (Mar. 22, 2009), <http://www.globalresearch.ca/america-s-dehumanizing-prisons/12851> (showing the inhumane conditions that exist in prisons).

3. See ALEXANDER, *supra* note 2, at 181.

4. See *id.* at 141.

5. andré douglas pond cummings, "All Eyes on Me": *America's War on Drugs and the Prison Industrial Complex*, 15 IOWA J. GENDER RACE & JUST. 417, 419 (2012).

6. ALEXANDER, *supra* note 2, at 7 (stating that "[a]lthough crime rates in the United States have not been markedly higher than those of other Western countries, the rate of incarceration has soared in the United States while it has remained stable or declined in other countries"); see ROY WALMSLEY, INST. FOR CRIMINAL POLICY RES., WORLD PRISON POPULATION LIST (Inst. for Criminal Policy Res. ed., 11th ed. 2016), [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf) (emphasizing that the United States, with more than 2.2 million prisoners, ranks first in the world above China's more than 1.65 million sentenced prisoners); SENTENCING PROJECT, FACTS ABOUT PRISONS AND PEOPLE IN PRISON (2014), [http://sentencingproject.org/doc/publications/inc\\_Facts%20About%20Prisons.pdf](http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf) (showing that the United States, in 2011, with 716 inmates per 100,000 people, has the highest incarceration rate in the world). Surprisingly, China, Russia, and Iran, despite highly repressive governments, imprison their citizens at rates that are significantly less than the United States. ALEXANDER, *supra* note 2, at 6. Other Western countries imprison at rates dramatically lower than the United States. *Id.*

prisoners.”<sup>7</sup> Because of this massive incarceration movement that has gripped the United States for the past three decades, one might very well speculate that either the United States is overwhelmed with criminals *or* that United States streets are safe and secure because millions of miscreants are locked up behind bars. Yet, neither speculation is true.

Hundreds of thousands of young men of color are currently incarcerated in United States prisons for “no truly good law enforcement reason.”<sup>8</sup> Our nation’s streets are not safer, despite more than two million American citizens behind bars.<sup>9</sup> This is so because United States carceral policy has completely lost its way. For example, law enforcement departments have spent the past three decades narrowly focusing incredible resources, time, and policymaking on prosecuting a War on Drugs, which most now agree is an epic failure.<sup>10</sup> When President Richard Nixon declared a War on Drugs and President Ronald Reagan federalized and militarized this “war,”<sup>11</sup> law enforcement lurched into a regime where low level drug offenders were targeted in our

7. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1. The United States has 2.3 million criminals behind bars—more than any other nation. *Id.* “China, which is four times more populous than the United States, is a distant second, with 1.6 million people in prison.” *Id.*

8. Eric Holder, U.S. Att’y Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> (explaining that the vicious cycle of poverty, criminality, and incarceration traps too many Americans and that the 20th century criminal justice system is inadequate to handle our 21st century challenges).

9. See MARC MAUER, SENTENCING PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION (Sept. 1994), <http://www.prisonpolicy.org/scans/sp/abb.pdf>.

10. Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN (Dec. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs> (“Rather than continuing on the disastrous path of the war on drugs, we need to look at what works and what doesn’t in terms of real evidence and data.”); see Brian Clark Howard, *The War on Drugs is a “Miserable Failure”*, NAT’L GEOGRAPHIC (Jan. 22, 2013), <http://newswatch.nationalgeographic.com/2013/01/22/the-war-on-drugs-is-a-miserable-failure>; Dylan Mathews, *Kathleen Frydl on the Drug War*, WASH. POST: WONKBLOG (Apr. 30, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/30/kathleen-frydl-on-the-drug-war-her-e-we-have-total-and-complete-failure> (“[W]e’ve forgotten how to step back and ask ‘Is this even working?’ . . . But, in sum, the drug war has had no meaningful effect.”); Roque Planas, *Vicente Fox Sits Down with High Times Magazine to Blast Drug War*, HUFFINGTON POST (July 16, 2013, 5:16 PM), [http://www.huffingtonpost.com/2013/07/16/vicente-fox-high-times\\_n\\_3606689.html](http://www.huffingtonpost.com/2013/07/16/vicente-fox-high-times_n_3606689.html) (stating that “[t]he War on Drugs convoked by President Nixon 40 years ago has been a total failure”).

11. KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 56–58 (Sage Publ’ns ed., 2d ed. 2004).

nation's urban centers, while more serious and harmful crimes, such as white collar crime, fraud, and violent crime, became secondary concerns to local and federal law enforcement agencies.<sup>12</sup> Additionally, the War on Drugs was declared most forcefully in poor and urban communities, and waged upon the powerless and voiceless, while drug users and dealers in suburban areas, beach cities, and college campuses were left largely ignored and undeterred.<sup>13</sup>

After three decades, the War on Drugs has netted United States citizens the following: a multi-trillion dollar taxpayer-financed price tag;<sup>14</sup> prison overflow of low-level, non-violent drug offenders; drug kingpins and cartel leaders left largely undisturbed;<sup>15</sup> law enforcement across the nation with Pavlov's-dog like focus on stings and operations that target low-level offenders in communities of color;<sup>16</sup> blatant and economically devastating white collar crime and securities fraud dominating the landscape largely undisturbed;<sup>17</sup> a nation that turns a blind-eye to the soulless conditions to which we expose our "criminals" in

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12. ALEXANDER, *supra* note 2, at 48–49; BECKETT & SASSON, *supra* note 11, at 57–58. Beckett and Sasson write:

Once in office, Reagan instructed the new U.S. Attorney General, William French Smith, to establish a task force to recommend "ways in which the federal government can do more to combat violent crime." Because state and local governments are largely responsible for identifying and prosecuting conventional street crime, however, the administration's desire to involve the federal government in combating violent crime was problematic. Nevertheless, the Reagan administration began to pressure federal law enforcement agencies to set aside their focus on white-collar offenses and shift their attention to street crime instead. By October 1981, less than 1 year into the new administration, the Justice Department announced its intention to cut the number of specialists assigned to identify and prosecute white-collar criminals in half. The Reagan administration's crackdown on crime also explicitly excluded domestic violence on the grounds that it was "not the kind of street violence about which it was most concerned."

*Id.* (internal citation omitted).

13. ALEXANDER, *supra* note 2, at 60–61; dré cummings, *The Economics and Immorality of a Failed Drug War*, CORP. JUST. BLOG (Aug. 16, 2013, 3:00 PM), <http://corporatejusticeblog.blogspot.com/2013/08/more-on-holder-and-failed-drug-war.html>.

14. cummings, *supra* note 5, at 418.

15. *See id.*

16. cummings, *supra* note 13 (noting the systematic targeting of minority and urban communities).

17. BECKETT & SASSON, *supra* note 11, at 58.

prison;<sup>18</sup> and a private prison industry that profits handsomely on these distortions implicit in our country's discriminatory and deranged drug law enforcement system.<sup>19</sup> No country that promotes "equal justice under the law" should tolerate a carceral policy that has inequality in its DNA.

Specifically, shortly after the War on Drugs was declared, federalized, and militarized in the 1970s, a private for-profit company in Tennessee sprang up called the Corrections Corporations of America ("CCA").<sup>20</sup> The advent of this private prison corporation ushered in an era where the traditional government function of crime, punishment, and imprisonment became intertwined and enmeshed with corporate principles and goals like profit maximization for shareholders; executive compensation based on profits and share price; forward-looking statements forecasting larger prison populations; management's discussion and analysis focusing on a more robust prison state; and increased profits built solely on human misery and debasement.<sup>21</sup> Today, the prison industrial complex in the United States, of which CCA is a major player, has proliferated to the point that perverse incentives drive corporate managers at private prison companies.<sup>22</sup> Private prison company directors, managers, and their lobbyists currently work doggedly to increase profits by: (1) influencing carceral policy so that greater numbers of Americans face incarceration;<sup>23</sup> (2) exploiting those imprisoned through private prison labor contracts;<sup>24</sup> (3) lobbying government officials tirelessly to privatize entire state and federal prison systems;<sup>25</sup> (4)

18. See *id.* at 176–77 (describing the conditions of prisons across the United States).

19. See ALEXANDER, *supra* note 2, at 180–81; cummings, *supra* note 5, at 419–20.

20. See generally *The CCA Story: Our Company History*, CCA, <https://www.cca.com/our-history> (last visited Feb. 18, 2016).

21. See cummings, *supra* note 5, at 419–20.

22. See *id.* at 434–42 (discussing the various perverse incentives for private for-profit prisons).

23. *Id.* at 439–40.

24. See Patrice Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 ST. JOHN'S J. C.R. & ECON. DEV. 679, 682 (2015) [hereinafter *Emancipate the FLSA*]; Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589 (2012) [hereinafter *Hustle*] (discussing the exploitation of prisoners within the prison industrial complex).

25. Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFINGTON POST (Feb. 14, 2012, 9:37 AM), <http://www.huffingtonpost.com/2012/02/1>

reducing the quality of food and degree of safety for prisoners to cut costs at privately run facilities;<sup>26</sup> (5) drafting legislation and lobbying for passage of draconian sentencing policies including mandatory minimums, three-strikes, and illegal immigration legislation;<sup>27</sup> (6) bribing judges and government officials to fill private prison facilities with children on dubious charges;<sup>28</sup> (7) requiring governments that contract for their services to maintain capacity in the private prisons at ninety percent or risk breach of contract and higher per diem fees;<sup>29</sup> and (8) building new prison facilities despite no government contract or ready prisoners to fill them.<sup>30</sup>

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4/private-prisons-buying-state-prisons\_n\_1272143.html. CCA offered to purchase state-owned prison facilities from forty-eight cash-strapped states, so long as the state contractually agreed to keep the prisons occupied at ninety percent capacity. *Id.*

26. CORR. INST. INSPECTION COMM., INSPECTION AND EVALUATION OF THE LAKE ERIE CORRECTIONAL INSTITUTION 3–7, 13, 39 (2013), <http://big.assets.huffingtonpost.com/lakeeriereport.pdf>; John Burnett, *Miss. Prison Operator Out; Facility Called a ‘Cesspool’*, NPR (Apr. 30, 2012, 8:06 PM), <http://www.npr.org/2012/04/24/151276620/firm-leaves-miss-after-its-prison-is-called-cesspool>; see also Julie Carr Smyth, *Audits: Prison Vendor Charged for Unserved Meals*, YAHOO (July 15, 2013, 9:20 PM), <http://news.yahoo.com/audits-prison-vendor-charged-unserved-174049715.html>. *But see* Simon Hakim & Erwin A. Blackstone, *Cost Analysis of Public and Contract-Operated Prisons* (Ctr. for Competitive Gov’t, Working Paper Apr. 29, 2013), [https://www.researchgate.net/publication/257780985\\_Cost-Analysis-of-Public-and-Contractor-Operated-Prisons-FINAL3](https://www.researchgate.net/publication/257780985_Cost-Analysis-of-Public-and-Contractor-Operated-Prisons-FINAL3) (illustrating cost savings for states in private prison contracts and private prisons meeting the contract standards set forth by the states).

27. See *cummings*, *supra* note 5, at 438–39.

28. WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.8 MILLION KICKBACK SCHEME* (New Press, 2012); Stephanie Chen, *Pennsylvania Rocked by ‘Jailing Kids For Cash’ Scandal*, CNN (Feb. 23, 2009), [http://articles.cnn.com/2009-02-23/justice/pennsylvania.corrupt.judges\\_1\\_detention-judges-number-of-juvenile-offenders?\\_s=PM:CRIME](http://articles.cnn.com/2009-02-23/justice/pennsylvania.corrupt.judges_1_detention-judges-number-of-juvenile-offenders?_s=PM:CRIME).

As scandals from Wall Street to Washington roil the public trust, the justice system in Luzerne County, in the heart of Pennsylvania’s struggling coal country, has also fallen prey to corruption. The county has been rocked by a kickback scandal involving two elected judges who essentially jailed kids for cash. Many of the children had appeared before judges without a lawyer.

*Id.*

29. Kevin Johnson, *Private Purchasing of Prisons Locks in Occupancy Rates*, USA TODAY (Mar. 8, 2012, 12:37 PM), <http://www.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1> (finding “[a]t a time when states are struggling to reduce bloated prison populations and tight budgets, a private prison management company is offering to buy prisons in exchange for various considerations, including a controversial guarantee that the governments maintain a 90% occupancy rate for at least 20 years”).

30. Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT’L LAW. GUILD REV. 70, 74–75 (2009) (remarking that private prison companies, like the CCA, are

What seems undeniable now is the perverse and immoral incentives underlying the private prison industry translate into a demand for more prisons and prisoners. Simply stated, mass incarceration, often under inhumane conditions, is good business. The fact that United States prison conditions are so dehumanizing and ghastly, and so many prisoners are low-level, non-violent minor drug offenders, begs the question as to why we as a nation stand for private corporate profit in the realm of human imprisonment. The perverse incentives that frantically drive corporate executives are laid bare when an ever-increasing number of imprisoned Americans energizes corporate interests. One private prison analyst recently claimed that the consistent yearly increase in the prison population “from a business model perspective [is] clearly good news.”<sup>31</sup>

Private prison profiteers seek to increase privatization of the industry by promising more efficiently run prisons at lower costs, safer prisons, and better facilities and outcomes for prisoners.<sup>32</sup> Recent studies are now showing that these claims by private prison executives and lobbyists are simply not true.<sup>33</sup> Private prisons are increasingly shown to be less safe, less efficient, and less economical.<sup>34</sup> The contractual exchange of taxpayer

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“building prisons on spec, with no contract to build and no prisoners to house”); see Press Release, GEO Grp., The GEO Group Reports Second Quarter 2013 Results (2013), <http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle&ID=1845506&highlight=> (demonstrating GEO’s concerns for its idle prisons, stating, “GEO’s 2013 guidance does not assume the potential reactivation of approximately 6,000 current beds in inventory which GEO is actively marketing to local, state, and federal customers.”); Katie Stallcup, *Governor: Prison is the Start of Area’s Rebuilding*, NATCHEZ DEMOCRAT (Aug. 23, 2007, 11:31 PM), <http://www.natchezdemocrat.com/2007/08/23/governor-prison-is-the-start-of-areas-rebuilding> (explaining that CCA is confident in constructing a prison without a contract because, “[w]e don’t know exactly when or what, but we know the demand is out there”).

31. JeeYeon Park, *Lock Up Profits—in Prison Stocks: Analyst*, CNBC NEWS (Nov. 1, 2010, 6:02 PM), <http://www.cnbc.com/id/39949086>.

32. See, e.g., CHRISTOPHER HARTNEY & CAROLINE GLESMANN, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 2 (Nat’l Council on Crime & Delinquency ed., 2012), [http://nccdglobal.org/sites/default/files/publication\\_pdf/prison-bed-profiteers.pdf](http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf).

33. dré cummings, *Private Prison Industry Shenanigans in Florida*, CORP. JUST. BLOG (Oct. 26, 2012, 9:30 AM), <http://corporatejusticeblog.blogspot.com/2012/10/private-prison-industry-shenanigans-in.html>.

34. See CORR. INST. INSPECTION COMM., *supra* note 26, at 4–5; cummings, *supra* note 33; David M. Reutter, *Florida Provides Lesson in How Not to Privatize State Prisons*, PRISON LEGAL NEWS (Feb. 15, 2012), <https://www.prisonlegalnews.org/news/2012/feb/15/florida-provides-lesson-in-how-not-to-privatize-state-prisons>; *infra* Part III.

funds from governments and municipalities into the hands of the private prison system is simply a transfer of taxpayer monies into the personal accounts of private prison shareholders and executives who provide no real benefit in return, no manufactured product, and no efficient services. Rather, they provide taxpayer funded corporate welfare. The private prison system makes no sense morally, and it increasingly appears that the industry makes no sense economically.

This article seeks to describe the private prison model in Part II, highlighting the conclusion that private prison corporations offer no apparent good or service of value and exist rather as a means to transfer taxpayer capital into the hands of private shareholders and corporate executives. Next, in Part III, the article debunks the notion that private prisons warehouse the nation's criminals more efficiently and cost-effectively; instead highlighting emerging evidence that private prisons are less safe, more costly, and less efficient than government-run prisons. Thereafter, in Part IV, the article outlines and details the perverse incentives that motivate corporate executives as they pursue profit in an industry clearly intended to be run by governments, not by private interests. Finally, the article outlines a better way toward sane and safe carceral policy in the United States that includes eliminating privately run prison corporations completely.

The article concludes by arguing that private prisons should be eliminated. Until that day, the authors propose several forward thinking proscriptions. From an economic perspective, the privatization of prisons in our nation results in inefficient and immoral outcomes. Crime and punishment in the United States has lost its way, and we as a country have been lulled into accepting inhumane and inefficient treatment of those "criminals" that we decide to imprison, often for no truly sound law enforcement reason. These two realities, the fairly recent advent of the private prison corporation, and the increasing trend of inhumane and brutal treatment of millions of United States citizens in prison, ultimately leads to the destruction of human capital and to a dispiriting soullessness in how we, as a collective citizenry, regard criminals and prisoners that we cast into our nation's prisons.

## II. THE PRIVATE PRISON MODEL

Since the 1970s, the private prison corporation has been seeking government contracts to run our nation's prisons on behalf of the government.<sup>35</sup> As United States incarceration rates have skyrocketed since 1980, private prisons have reaped lucrative rewards while providing a steady drumbeat of private prison lobbyist voices urging the government to increase its incarceration rates.<sup>36</sup> In return for governments and municipalities turning the warehousing of prisoners over to private interests, companies like CCA and GEO Group promise that they will save government and taxpayer money by running the prisons with greater cost effectiveness and superior safety.<sup>37</sup> As we report below, recent studies demonstrate that the facts do not support this claim.<sup>38</sup> In addition, private prison companies are contracting with large multinational corporations to provide labor in exchange for lucrative contracts that do not inure to the benefit of those inmates that provide the labor—an exchange that looks and feels in many instances strikingly like modern-day involuntary servitude or slavery.<sup>39</sup> For example, the states of Georgia and Wisconsin do not pay their inmates at all for the labor they provide to private industry.<sup>40</sup> Why does a system that perpetuates slavery-like conditions and economically inefficient outcomes continue to be supported?

Although private prison corporations claim to save money for local governments by attempting to win prison contracts, the

35. See, e.g., Mulch, *supra* note 30, at 72–73.

36. Cummings, *supra* note 5, at 423, 437.

37. See HARTNEY & GLESMANN, *supra* note 32, at 2.

38. See *infra* Part III.

39. *Emancipate the FLSA*, *supra* note 24, at 679; *Hustle*, *supra* note 24, at 611; Rania Khalek, *21st Century Slaves: How Corporations Exploit Prison Labor*, ALTERNET (July 21, 2011), [http://www.alternet.org/story/151732/21stcentury\\_slaves%3A\\_how\\_corporations\\_exploit\\_prison\\_labor?page=0%2C0](http://www.alternet.org/story/151732/21stcentury_slaves%3A_how_corporations_exploit_prison_labor?page=0%2C0); *The U.S. War on Drugs: Political Economics of a New Slavery*, DRUG POL'Y ALLIANCE (Aug. 2001), [http://web.archive.org/web/2011041364123/http://www.drugpolicy.org/about/position/race\\_paper\\_econ.cfm](http://web.archive.org/web/2011041364123/http://www.drugpolicy.org/about/position/race_paper_econ.cfm).

40. Bill Torpy, *AJC Watchdog: Real Cost of Prison Labor; Inmates' "Free" Work has a Price*, ATLANTA J.-CONST., Oct. 20, 2011; see David M. Reutter, *Prison Slave Labor Replaces Freeworld Workers in Down Economy*, PRISON LEGAL NEWS (May 15, 2012), [https://www.prisoanlegalnews.org/24334\\_displayArticle.aspx](https://www.prisoanlegalnews.org/24334_displayArticle.aspx) (highlighting that rather than paying prisoners for labor, some counties in Wisconsin reduce the prisoners' period of incarceration, and Georgia prisoners provide free labor to the State in exchange for the opportunity to be hired several years after their release).

fundamental basis upon which private prison companies receive income is through contracts with municipal, state, and federal governments that promise payment of taxpayer funds to the private prison companies in exchange for warehousing the government's criminals in either privately-owned facilities or government-owned facilities.<sup>41</sup> This transfer of taxpayer funds to corporate coffers is based on a per diem rate where governments contractually owe private prisons a certain fee per bed or per prisoner.<sup>42</sup> Thus, the greater the number of prisoners, the greater the payout from taxpayers to corporate coffers.<sup>43</sup> Many private prison contracts require that municipalities maintain a ninety percent occupancy rate, so government leaders are pressured to maintain a nearly full prison in order to avoid breaching the contract with the private prison corporation.<sup>44</sup> Thus, the primary income potential for private prisons is taxpayer-funded contracts with governments—a naked transfer of taxpayer funds to private interests, presumably for better prison service.

To effectuate this transfer of funds from taxpayers to private prisons shareholders and executives, the private prison regime and its lobby have become a powerful force in both state and federal legislative bodies.<sup>45</sup> Further, a conflicted and likely corrupt relationship has grown between state and federal legislators—who are empowered to construct law and punishment practices in the United States—and the private prison corporation executives that employ all traditional power at their disposal to influence legislation creation. Nearly all for-profit corporations engage in activities to influence policymaking in their favor by paying lobbyists, providing campaign contributions, and

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41. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 458 (2005); see also HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 3 (In the Pub. Interest ed., 2013), <http://www.njjn.org/uploads/digital-library/Criminal-Lockup-Quota,-In-the-Public-Interest,-9.13.pdf> (explaining the role of lockup quotas in eliminating savings to taxpayers from private prisons).

42. Brad W. Lundahl et al., *Prison Privatization: A Meta-Analysis of Cost & Quality of Confinement Indicators*, 19 RES. ON SOC. WORK PRAC. 383, 384 (2009).

43. Cummings, *supra* note 5, at 440.

44. *Id.* at 446 n.148; Kevin Mathews, *For-Profit Prisons: Eight Statistics that Show the Problems*, TRUTH OUT (Dec. 27, 2013, 9:55 AM), <http://www.truth-out.org/news/item/20880-for-profit-prisons-eight-statistics-that-show-the-problems>.

45. See Cummings, *supra* note 5, at 437–39 (discussing the increased role of private prison lobbies in all levels of politics).

supporting election campaigns of those legislators friendly to their cause.<sup>46</sup> However, such efforts reflect a sinister vision concerning carceral policymaking when private corporate interests are employing lobbyists, drafting legislation, “purchasing” candidates, and electioneering for friendly legislators that support prison profits.<sup>47</sup>

Additionally, the incredible spike in incarcerated American citizens—more than 335%—over the past thirty years not only coincides with the War on Drugs but also with the advent of the private prison corporation.<sup>48</sup> This is not a coincidence. As described below, the private prison regime and its lobby have literally fanned the flames of the War on Drugs, convincing Congress to repeatedly adopt more draconian sentencing policies for even the most minor of drug offenses.<sup>49</sup>

Increasingly, United States citizens and policymakers are concluding that private prison corporations should have no role whatsoever in the traditional government function of criminal imprisonment.<sup>50</sup> The profit maximization incentives underlying

46. *Id.*; see andré douglas pond cummings, *Procuring “Justice”?: Citizens United, Caperton, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 97–99 (2010) (discussing the result of *Citizens United* on political campaign contributions from corporations).

47. *Cf. cummings, supra* note 5, at 421 (illustrating the sinister nature of private prisons which encourage incarceration rates to increase, often at the expense of minority populations in order to earn higher profits).

48. *Id.* at 418, 423.

49. NAT’L IMMIGRATION FORUM, *THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES* 7–9 (2013), <http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf> (describing how the private prison industry lobbies to receive mandated detention of illegal immigrants for many non-violent crimes); see PAUL ASHTON & AMANDA PETTERUTI, JUSTICE POLICY INST., *GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES* 21 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) (analyzing the role of lobbying in affecting incarceration and law enforcement policy); Laura Carlsen, *With Immigration Reform Looming, Private Prisons Lobby to Keep Migrants Behind Bars*, AMERICAS PROGRAM (Feb. 13, 2013), <http://www.cipamericas.org/archives/9022> (showing how the private prison industry is “swamping” congressional committees so that the corporations can lock up more and more “criminals”); Sadhbh Walshe, *How Lawmakers and Lobbyists Keep a Lock on the Private Prison Business*, GUARDIAN (Sept. 27, 2012, 9:55 AM), <http://www.theguardian.com/commentisfree/2012/sep/27/lawmakers-lobbyists-keep-lock-private-prison-business> (revealing how the CCA lobbies for harsh drug sentencing and is concerned that profits may fall with decriminalization of drug laws).

50. See Press Release, Human Rights Def. Ctr., Orgs. Urge U.S. Rep. Sheila Jackson Lee to Reintroduce Private Prison Info. Act (Dec. 19, 2012),

private prisons have proven too perverse and injurious to the basic civil rights of inmates.<sup>51</sup> The cost has been too high on both human capital and state and federal budgets. Collectively, the United States has suffered the consequences of this failed private prison exercise in the form of mass incarceration and near economic ruin for states across the country that are trying to keep pace with drug sentencing mandated by the War on Drugs as inspired by the private prison lobby.<sup>52</sup> In August 2013, Attorney General Eric Holder recognized as much when he declared a policy shift indicating that the Department of Justice would no longer prosecute low-level, non-violent drug offenders to the full extent mandated by law.<sup>53</sup> Unsurprisingly, this announcement was received poorly by local law enforcement, which has devised and implemented enforcement efforts for the last thirty years to prosecute the War on Drugs in communities that offer the least resistance (i.e., urban minority city centers instead of suburbs and college fraternities and sororities).<sup>54</sup> For this reason, Holder's announcement must have come as a grave disappointment to the private prison industry that has relied on the incarceration of millions of low-level, non-violent drug offenders to drive their profits and share price increases for so long. Perhaps anticipating a groundswell against the incredibly short-sighted incarceration of millions of low-level drug offenders, the private prison lobby in

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alliance.org/downloads/HRDC%20press%20release%20re%20PPIA%20letter%202012-1.pdf (urging government leaders to take legislative action to increase transparency of private prisons); *Legislature Rejects Private Prison Plan*, NEW ME. TIMES (Jan. 10, 2012), <http://www.newmainetimes.org/articles/2012/01/10/legislature-rejects-private-prison-plan> (discussing how Maine's Criminal Justice and Public Safety Committee voted unanimously against a bill creating private prisons).

51. See DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 23 (2011), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration?redirect=prisoners-rights/banking-bondage-private-prisons-and-mass-incarceration>.

52. See *id.* at 10, 20–21.

53. See Holder, *supra* note 8; dré cummings, *The Failed War on Drugs and Hip Hop*, HIP HOP L. BLOG (Aug. 17, 2013), <http://www.hiphoplw.blogspot.com/2013/08/the-failed-war-on-drugs-and-hip-hop.html>.

54. Mark Leland, *Former Law Enforcement Officers Admit "War on Drugs" Waste of Money*, FOX11 NEWS (Feb. 26, 2014), <http://fox11online.com/archive/former-law-officers-admit-war-on-drugs-waste-of-money> (“When we’re talking about the money spent on this war on drugs, it’s rather high,” said Brown County Sheriff John Gossage . . . “There’s an exorbitant amount of money being spent but I believe the stake holders in this community feel it’s very important that we do that.”); see generally ALEXANDER, *supra* note 2, at 97–103.

recent years turned its aggressive attention to incarcerating illegal immigrants as its next great profit stream.<sup>55</sup>

In sum, private prison companies earn profit in two primary ways: first, by receiving per diem payments from government and municipality contracts; and second, by receiving contract payments in exchange for the labor of prison inmates. In both instances, the private prison corporation is providing nothing of true value and no efficient service or product; it is just a transfer mechanism of taxpayer funds from government coffer to corporation coffer or a transfer of contracted labor payments from a private for-profit company into corporation-shareholder-executive accounts with very little to no economic transfer into laborer-prisoner accounts.

### III. PRIVATE PRISONS ARE PROFIT-DRIVEN ENTERPRISES THAT THREATEN BASIC CIVIL LIBERTIES

CCA, which is essentially the Enron of the private prison industry,<sup>56</sup> has long touted private prisons as an alternative to government-owned prisons. Indeed, CCA has set forth three reasons justifying the creation of private prisons for federal

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55. Chris Kirkham, *War on Undocumented Immigrants Threatens to Swell U.S. Prison Population*, HUFFINGTON POST (Aug. 23, 2013, 8:00 AM), [http://www.huffingtonpost.com/2013/08/23/undocumented-immigrants-prison\\_n\\_3792187.html](http://www.huffingtonpost.com/2013/08/23/undocumented-immigrants-prison_n_3792187.html).

Now, just as the federal government has pulled back the throttle on the drug war, it is embarking on an unprecedented campaign to criminally prosecute undocumented immigrants crossing the border. The result: A new wave of non-violent offenders are flooding the nation's prisons. "This is the crime du jour," said Judith Greene, director of the nonprofit Justice Strategies, which has focused on the private prison industry's growing reliance on incarcerating undocumented immigrants. "It's the drug war all over again. It's what's driving the market in federal prisons."

*Id.*

Although the public understands that the "tough on crime" approach has failed . . . the prison industrial complex has already recognized this rising tide and has latched on to immigration as the next feeder for their system. They've already started thinking about their next source of income and they are heavily lobbying for very tough immigration policies to be put in place . . .

LaToya Bohlaw, *Eric Holder's Proposal Could Shift the Focus of the Prison Industrial Complex*, BET (Aug. 20, 2013, 5:06 PM), <http://www.bet.com/news/national/2013/08/20/eric-holder-s-proposal-could-shift-the-focus-of-the-prison-industrial-complex.html>.

56. See Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 213 (2009).

inmates: (1) cost effectiveness—private prisons are less expensive to operate and will save the federal government millions of dollars;<sup>57</sup> (2) safety—private prisons effectively protect inmates' safety;<sup>58</sup> and (3) humane treatment—private prisons are modern facilities that provide humane treatment to inmates.<sup>59</sup>

Studies have shown that private prisons achieve none of these goals, and the reason is simple: private prisons operate under a fundamentally different regulatory structure that alters the choices—and motives—of its participants.<sup>60</sup> Unlike their federal counterparts, private prisons operate in a market economy where maximizing profits is vital to sustainability and thus a driving factor in corporate decision-making.<sup>61</sup> Under basic economic theory, when operational costs exceed current and future estimates, corporations must identify ways in which to reduce such costs and therefore increase profitability.<sup>62</sup> This is precisely what happened in the private prison context. Corporations such as CCA often underestimate the cost of operating private prisons in a manner that would *increase* safety *and* treat inmates more humanely.<sup>63</sup> As a result, operators of private prisons make the deliberate choice to cut costs. One scholar notes:

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57. See *Common Questions and Real Answers About Correctional Partnerships*, CORR. CORP. OF AM., <https://www.cca.com/Media/Default/documents/CCA-Resource-Center/Partnership-QA.pdf> (last visited Feb. 21, 2016) (“Correctional partnerships provide federal, state and local governments with the flexibility and savings that taxpayers deserve and expect. CCA partnership prisons save taxpayers precious tax dollars, allowing government to spend needed funds in other areas.”).

58. See *id.* at 4 (“Nothing is more important than the safety and security of America’s families and communities. That’s why safety and security are at the core of CCA’s mission.”).

59. See *id.* (“Treating inmates humanely isn’t just the right thing to do. It’s also the safe thing to do.”).

60. See, e.g., Matt Shroud, *Private Prisons Are Exempted From Federal Disclosure Laws; Advocates Say That Should Change*, FORBES (Feb. 7, 2013, 2:33 PM), <http://www.forbes.com/sites/mattstroud/2013/02/07/private-prisons-are-exempted-from-federal-disclosure-laws-advocates-say-that-should-change>.

61. *For-Profit Prisons*, AM. CIVIL LIBERTIES UNION OF TEX. (Jul. 30, 2013, 12:24 PM), <http://www.aclutx.org/strategic-campaigns/criminal-law-reform/for-profit-prisons>.

62. EDGAR O. EDWARDS & PHILIP W. BELL, *THE THEORY AND MEASUREMENT OF BUSINESS INCOME* 31–32 (Univ. of Cal. Press, 1961); see also Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and Its Evils? Prison Conditions, Neoliberalism, and Public Choice*, 42 FORDHAM URB. L.J. 411, 424 (2014).

63. See, e.g., *For-Profit Prisons*, *supra* note 61 (“State governments end up paying more because for-profit prison companies routinely underestimate the cost of oversight, healthcare, and background checks in their proposals.”).

The cost-cutting focus of private corporations translates to reduced staffing levels, reduced investment in training of prison guards, increased ratios of inmates to correctional officers, and lower wages for private correctional officers. Low pay, poor training, and high turnover may contribute to higher levels of violence in the private sector prisons. This may in turn encourage private prison employees to violate prisoners' rights—rights that would be better safeguarded if government employees in government-run facilities guarded the prisoners. This is the predicament of the privately housed federal prisoner.<sup>64</sup>

On one level, one cannot fault these corporations because there are only so many options for cost cutting in a prison, and they *all* involve areas directly or indirectly affecting inmate safety and treatment. This includes the quality and availability of health care, food, bathing, and recreational facilities; the experience (and quantity) of security personnel; and maintenance of the prison infrastructure.<sup>65</sup> This very fact, however, demonstrates why private prisons inherently cannot achieve their stated objectives and why their very existence as a profit-making industry threatens to compromise inmates' basic civil liberties.

Perhaps the most important reason that supports the elimination of private prisons is their propensity to create a marketplace for crime.<sup>66</sup> As CCA itself noted when discussing potential changes to various criminal laws, “any changes with

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64. Alison L. Waks, *Federal Incarceration by Contract in a Post-Minneci World: Legislation to Equalize the Constitutional Rights of Prisoners*, 46 U. MICH. J.L. REFORM 1065, 1072–73 (2013).

65. Peter H. Kyle, Note, *Contracting for Performance: Restructuring the Private Prison Market*, 54 WM. & MARY L. REV. 2087, 2096–97 (2013).

66. See, e.g., *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1872 (2002) (“Not only may private prison companies lobby for preferential treatment, they may also, as entities that directly profit from incarceration, influence substantive criminal legislation by supporting tough-on-crime candidates, scaring the public about crime, and advocating tougher sentencing.”); see also ASHTON & PETERUTI, *supra* note 49, at 2 (“While private prison companies may try to present themselves as just meeting existing ‘demand’ for prison beds and responding to current ‘market’ conditions, in fact they have worked hard over the past decade to create markets for their product.”).

respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.”<sup>67</sup> Put simply, much like an educational institution requires a sufficient number of students to operate with a surplus, private prisons need a sufficient number of inmates to realize a profit. This fact creates a “spillover” effect that exacerbates a number of already-existing problems in the criminal justice system.<sup>68</sup> For example, law enforcement officers, cognizant of the need to fill private prisons adequately, may exclusively target poor neighborhoods populated by underrepresented (and underserved) populations, profile individuals on the basis of race and ethnicity, and disregard due process and other constitutional rights.<sup>69</sup> One commentator explains:

The evidence shows that any short-term cost savings from private prisons may be hugely expensive in the long run. They pay poverty-level wages and create a dangerous environment for corrections officers and offenders. They increase crime by not preparing offenders for reentry into society. Private prisons are a bad deal for every stakeholder in the prison system.<sup>70</sup>

Furthermore, as described above, private prisons indirectly promote dangerous and racially-motivated investigatory practices and incentivize the extended incarceration of prisoners through lobbying legislators and advocating for harsh carceral legislation.<sup>71</sup> For these and other reasons, private prisons should be outlawed.

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67. Corr. Corp. of Am., Annual Report (Form 10-K) 19 (Feb. 25, 2011).

68. ALEXANDER, *supra* note 2, at 230; Aviram, *supra* note 62, at 423; Luca Anderson, Note, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 116 (2009).

69. Cf. Michael Brickner & Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, HUM. RTS., Summer 2011, at 13, 14 (discussing an instance in which a Pennsylvania Juvenile Court judge was convicted of racketeering for receiving payments from a private prison company in exchange for him sentencing juveniles to the company’s facility).

70. Matt Simmons, *Punishment & Profits: A Cost-Benefit Analysis of Private Prisons*, OKLA. POL’Y INST. (Aug. 7, 2013), <http://okpolicy.org/punishment-profits-a-cost-benefit-analysis-of-private-prisons>.

71. cummings, *supra* note 5, at 420–21.

*A. Private Prisons are Not Cost-Effective*

Numerous reports undercut the argument that private prisons are cost-effective. For example, the *New York Times* reports that “[d]espite a state law stipulating that private prisons must create ‘cost savings,’ the state’s own data indicate that inmates in private prisons can cost as much as \$1,600 more per year, while many cost about the same as they do in state-run prisons.”<sup>72</sup> Additionally, one study concluded that “cost savings from privatizing prisons are not guaranteed and appear minimal,”<sup>73</sup> and others suggest that “privately operated prisons can cost more to operate than state-run prisons—even though they often steer clear of the sickest, costliest inmates.”<sup>74</sup> For example, a study of the private prison system in Arizona concluded that “the state is actually losing money—\$3.5 million a year—by turning their inmates over to for-profit corporations.”<sup>75</sup>

Finally, the cost-effectiveness argument fails to account for the fact that private prisons typically only house *healthy* inmates.<sup>76</sup> When cost estimates are adjusted to account for this, the results are surprising:

Without adjusting for the increased medical costs imposed on state-run prisons, a 2010 Corrections Department study found that daily per inmate costs were cheaper in private prisons, at \$57.97 as opposed to \$60.66. However, when adjusting for medical costs, the results flipped with daily per inmate costs cheaper in state-run prisons at \$48.42 compared with \$53.02 in private prisons.<sup>77</sup>

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72. Richard A. Oppel, Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES (May 19, 2011), [http://www.nytimes.com/2011/05/19/us/19prisons.html?\\_r=0](http://www.nytimes.com/2011/05/19/us/19prisons.html?_r=0).

73. *Id.*

74. *Id.*

75. Aviva Shen, *Private Prisons Cost Arizona \$3.5 Million More Per Year Than State-Run Prisons*, THINK PROGRESS (Aug. 6, 2012, 2:40 PM), <http://thinkprogress.org/justice/2012/08/06/641971/private-prisons-cost-arizona-35-million-more-per-year-than-state-run-prisons>.

76. Jonathan Reid, *Fact Check: Are State-Run Prisons Cheaper than Private Prisons?*, AZCENTRAL (Oct. 21, 2014, 2:25 PM), <http://www.azcentral.com/story/news/politics/fact-check/2014/10/21/az-fact-check-state-prisons-cheaper-private-prisons/17680289>.

77. *Id.*

In fact, the United States Government Accountability Office acknowledged that “without comparable data, [the United States Bureau of Prisons] is not able to evaluate and justify whether confining inmates in private facilities is more cost-effective than other confinement alternatives such as building new BOP facilities.”<sup>78</sup>

As discussed below, even assuming *arguendo* that private prisons are more cost-effective than state- and federal-run prisons, this is achieved through inappropriate cost-cutting measures. As one commentator notes, “[m]uch of the presumed cost savings of private prisons are achieved through lower staffing costs: private prisons pay their employees less than public prisons.”<sup>79</sup> Cost cutting can threaten prisoner safety and lead to deplorable prison conditions.<sup>80</sup> For example, “[a] private prison in Idaho run by CCA (which operates three out of four active private prisons in Oklahoma) established a reputation as a ‘gladiator school’ because prison guards encouraged violence between inmates; one savage beating that took place while guards watched put the victim in a coma.”<sup>81</sup> These and other incidents led one commentator to argue, “[p]rivate prisons have been shown to have more incidents of misconduct than public prisons.”<sup>82</sup>

At bottom, therefore, cost-effectiveness alone means nothing without accounting for the quality of the prison environment, which evidence shows borders on abusive.<sup>83</sup>

While private prison organizations market their services on the premise of improved prison conditions at a lower cost, serious defects exist surrounding this method of incarceration. First, a lack of accountability and transparency can, and has, led to increased abuses in private facilities.

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78. Christie Thompson, *Everything You Ever Wanted to Know About Private Prisons*, MARSHALL PROJECT (Dec. 18, 2014, 12:26 PM), <https://www.themarshallproject.org/2014/12/18/everything-you-ever-wanted-to-know-about-private-prisons#.RPR56xFXo>.

79. Simmons, *supra* note 70.

80. *See id.*

81. *Id.*

82. *Id.*

83. *Developments in the Law: The Law of Prisons*, *supra* note 66, at 1875 (“Most studies do not analyze both cost and quality and thus are of limited value in assessing private prisons. Studies that do not look at both elements simultaneously cannot begin to analyze the costs and benefits of private prisons.”).

Second, many private prisons face allegations of mismanagement and dubious business conduct. Finally, private prison companies strongly lobby for harsher criminal laws, thereby ironically contributing to the prison overcrowding epidemic that states seek to remedy.<sup>84</sup>

What is worse, these cost-cutting measures are directly related to the desire to maximize profits: in the past twenty years, CCA has seen its profits increase by more than five hundred percent.<sup>85</sup> In other words, “[t]he supposed ‘cost savings’ of for-profit prisons can result in inadequate medical care, abuse, and other civil rights violations against the persons incarcerated in these facilities.”<sup>86</sup>

*B. Private Prisons are More Dangerous than State and Federal Prisons*

CCA’s cost-cutting and profit-maximizing practices often lead to inadequate staffing, which results in dangerous and, in some instances, uncontrollable prison environments. One scholar who studied CCA’s management of a private prison in Youngstown, Ohio, explains that within fourteen months of its operation, “the prison ‘experienced pivotal failures in its security and operational management’ . . . . Consequently, CCA prison guards were unable to control their prisoners.”<sup>87</sup> As a result, some prisoners were subjected to horrific treatment:

CCA managers employed brutal policies[,] . . . engaged in excessive use of force against prisoners, failed to maintain control over weapons, and failed to implement numerous security procedures. As a result, there were two homicides, numerous

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84. Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 *LOY. U. CHI. L.J.* 1153, 1194–95 (2013).

85. Mathews, *supra* note 44.

86. Brendan Fischer, *Violence, Abuse, and Death at For-Profit Prisons: A GEO Group Rap Sheet*, *CTR. FOR MEDIA & DEMOCRACY* (Sept. 26, 2013, 9:38 AM), <http://www.prwatch.org/news/2013/09/12255/violence-abuse-and-death-profit-prisons-geo-group-rap-sheet>.

87. Waks, *supra* note 64, at 1073 (quoting John K. Clark, *Inspection and Review of the Northeast Ohio Correctional Center*, U.S. DEPT. OF JUST. (Nov. 25, 1998), <http://www.justice.gov/ag/report-attorney-general-inspection-and-review-northeast-ohio-correctional-center>).

stabblings, extreme levels of violence, and six escapes within the first 14 months.<sup>88</sup>

Likewise, a study in Mississippi concluded that “privately-run prisons in the state had assault rates three to five times higher than the public facilities.”<sup>89</sup> In Oklahoma, it was reported that “[a] riot at the North Fork Correctional Facility in 2011 resulted in forty-six injuries, while a four hour long ‘disturbance’ at the Cimarron Correctional Facility this year only ended after corrections officers used bean bag rounds and pepper balls to subdue the rioters.”<sup>90</sup> One article discussing a private prison in Mississippi explained that “[b]eatings, rape, robbery and riots are commonplace, and inmates are denied access to medication and psychiatric care.”<sup>91</sup>

Notably, “inexperience of private prison employees is one reason for why this violence takes place,” which is caused in part by the high turnover rate at these prisons.<sup>92</sup> One study attributed violence at private prisons to “high employee turnover, inadequate training for officers, under-staffing, and miserable conditions experienced by the inmate population.”<sup>93</sup> The study compared the rate and severity of violence in private prisons with their government-run counterparts:

When comparing for-profit prisons with public, a nationwide study found that assaults on guards by inmates were [forty-nine] percent more frequent in private prisons than in government-run prisons. The same study revealed that assaults on fellow inmates were [sixty-five] percent more frequent in for-profit/private prisons. Another study concluded that, “Privately operated prisons appear to have systemic problems in maintaining secure facilities”

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88. Brief for The Legal Aid Soc’y of the City of N.Y. Supporting Respondent, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2011) (No. 00-860), 2001 WL 826705, at \*13.

89. Thompson, *supra* note 78.

90. Simmons, *supra* note 70.

91. Emily Le Coz, *Lawsuit Alleges “Barbaric” Conditions at Mississippi Prison*, REUTERS (May 30, 2013, 7:39 PM), <http://www.reuters.com/article/us-usa-mississippi-prison-idUSBRE94T17220130530>.

92. Simmons, *supra* note 70.

93. Fischer, *supra* note 86.

concluding that for-profit/private prisons have significantly more escapes, homicides, assaults, and drug abuse compared to government-run prisons.<sup>94</sup>

Thus, there can be little doubt that “there are structural problems with private prisons that increase the risk of bad and sometimes lethal outcomes.”<sup>95</sup>

### *C. Private Prisons Subject Inmates to Inhumane Conditions*

The living environments at many private prisons deprive many inmates of basic needs.<sup>96</sup> For example, “[o]ne way for for-profit prisons to minimize costs is by skimping on provisions, including food.”<sup>97</sup> In fact, a psychiatrist who investigated a private prison in Mississippi “found that the inmates were severely underfed and looked ‘almost emaciated.’”<sup>98</sup> In fact, “[d]uring their incarceration, prisoners dropped anywhere from [ten] to [sixty] pounds.”<sup>99</sup>

Sadly, numerous reports detail startling examples of deplorable prison conditions. At one Mississippi prison, “an otherwise healthy inmate had to have a testicle removed after prison officials repeatedly denied his request for medical help when it swelled to the size of a softball from cancer.”<sup>100</sup> Additionally, some prisoners live in “filthy quarters without working lights or toilets, forcing them to defecate on Styrofoam trays or into trash bags.”<sup>101</sup>

94. *Id.*

95. Allison Torres Burtka, *Problems with Prison*, AM. ASS’N FOR JUST., Dec. 2011, at 24, 29.

96. See Le Coz, *supra* note 91 (noting that a lawsuit alleged that inmates live in rat-infested filth and that their “human rights are violated daily”).

97. Mathews, *supra* note 44.

98. *Id.* (citing Holbrook Mohr, *Mississippi Prison Run by Utah Company Called “Barbaric”*, SALT LAKE TRIB. (May 30, 2013, 4:57 PM), <http://archive.sltrib.com/story.php?ref=/sltrib/new/56385710-78/lawsuit-prison-mississippi-prisoners.html.csp>).

99. *Id.*

100. Le Coz, *supra* note 91.

101. *Id.* One commentator summarized a recently-filed complaint against CCA that set forth in detail the grave conditions at East Mississippi Correctional Facility:

The complaint lists a litany of such horrors, but here are a few highlights: rampant rapes. Placing prisoners in solitary confinement for weeks, months or even years at a time, where the only way to get a guard's attention in an emergency is to set a fire. Rat infestations so

Furthermore, in a comprehensive report, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, the American Civil Liberties Union described the shocking conditions of confinement at one private prison:

At Reeves County Detention Center in late 2008 and early 2009, after a prisoner died from inadequate medical care, prisoners organized uprisings that got so out of control they ended with prisoners setting fire to the facility. Then, in the summer of 2013, prisoners started a petition to protest crowded conditions, bad food, and lack of medical care. When prison staff learned of the petition, they reportedly sought out the protest organizers, tear-gassed their dormitories, shot at them with rubber bullets, and then locked in isolation cells both the organizers and bystanders who objected to being tear-gassed.<sup>102</sup>

Similarly, a class-action lawsuit against Walnut Grove Youth Correctional Facility asserted, “children there are forced to live in barbaric and unconstitutional conditions and are subjected to excessive uses of force by prison staff.”<sup>103</sup>

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bad that vermin crawl over prisoners; sometimes, the rats are captured, put on leashes and sold as pets to the most severely mentally ill inmates. Many suicide attempts, some successful. The untreated mentally ill throw feces, scream, start fires, electrocute themselves and self-mutilate. Denying or delaying treatment for infections and even cancer. Stabbings, beatings and other acts of violence. Juveniles being housed with adults, including one 16-year-old who was sexually assaulted by his adult cell mate. Malnourishment and chronic hunger. Officers who deal with prisoners by using physical violence.

Jill Filipovic, *America's Private Prison System is a National Disgrace*, THE GUARDIAN (Dec. 31, 2015, 6:27 PM), <http://www.theguardian.com/commentisfree/2013/jun/13/aclu-lawsuit-east-mississippi-correctional-facility>.

102. AM. CIVIL LIBERTIES UNION, *WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM* 26 (2014), [https://www.aclu.org/sites/default/files/field\\_document/060614-aclu-car-reportonline.pdf](https://www.aclu.org/sites/default/files/field_document/060614-aclu-car-reportonline.pdf).

103. *Federal Lawsuit Reveals Inhumane Conditions at For-Profit Youth Prison*, SOUTHERN POVERTY L. CTR. (Nov. 16, 2010), <https://www.splcenter.org/news/2010/11/16/federal-lawsuit-reveals-inhumane-conditions-profit-youth-prison>.

These conditions are traceable to the demand upon private prisons to consistently operate at nearly maximum capacity.<sup>104</sup> As one commentator notes, “[s]tates sign agreements with private prisons to guarantee that they will fill a certain number of beds in jail at any given point,”<sup>105</sup> and “[t]he most common rate is [ninety percent], though some prisons are able to snag a [one hundred percent] promise from their local governments.”<sup>106</sup> Because of these contracts, “the state is obligated to keep prisons almost full at all times or pay for the beds anyway, so the incentive is to incarcerate more people and for longer in order to fill the quota.”<sup>107</sup>

While the above evidence demonstrates that private prison corporations’ mantra or promise of “more safe,” “more efficient,” and “more cost-effective” is bankrupt, if not fraudulent, the private prison regime continues to thrive in the United States. Private prisons thrive primarily on effective propaganda and relationships with lawmakers around the nation, including through lobbying efforts, campaign contributions, and the specious argument that private industry will always operate more efficiently than government facilities. As the above discussion demonstrates, in the case of the privatized prison corporation, this is simply not true. What is true is that perverse and immoral profit incentives motivate private prison leaders to act and establish policies that harm human beings and trample basic civil liberties.

#### IV. PERVERSE INCENTIVES THAT MOTIVATE PRIVATE PRISON POLICY

Perhaps the most perverse incentive in the private prison industry is that shareholder and executive profit are intimately tied to the number of prisoners that enter the private prison facility.<sup>108</sup> The evidence shows that when a profit motive depends

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104. Mathews, *supra* note 44 (noting that private prisons have an incentive to incarcerate more individuals because of their contracts with states to operate at near-capacity or pay for the beds otherwise).

105. *Id.*

106. *Id.*

107. *Id.*

108. cummings, *supra* note 5, at 436–38.

on incarcerating prisoners on a mass scale, citizens are subject to abuses of the most intolerable and undemocratic kind..

For example, private prison companies—while forcefully disclaiming such activity<sup>109</sup>—actively lobby for harsher prison sentences such as mandatory-minimums or three-strikes;<sup>110</sup> lobby for legislation that creates new crimes requiring incarceration, such as criminalization of illegal immigration or active detention of schoolchildren;<sup>111</sup> enter into contracts that mandate capacity

109. See Richard P. Seiter, Corr. Section, Acad. of Criminal Justice Sci., *Private Corrections: A Review of the Issues*, CORR. CORP. OF AM. (Mar. 2008), [www.cca.com/static/assets/Private\\_Corr\\_Review\\_of\\_Issues.pdf](http://www.cca.com/static/assets/Private_Corr_Review_of_Issues.pdf) (purporting to respond to issues and criticism levied against private corrections, including disclaiming any lobbying efforts for harsher prison sentences by CCA). According to CCA:

Myth: Private companies are actively engaged in legislation to promote longer and tougher sentences in order to keep beds filled and increase profits. Reality: The industry absolutely does not participate in or lobby for stricter sentencing. In fact, several companies in this industry provide services that serve as alternatives to sentencing, such as electronic monitoring, day reporting centers and probations services. Lobbying for longer sentences does not lead to increased business. Providing safe, secure facilities that offer meaningful programs and services for inmates does.

*Myths vs. Reality in Private Corrections: The Truth Behind the Criticism*, CORR. CORP. OF AM., [https://www.prisonlegalnews.org/media/publications/cca\\_myth\\_vs\\_reality\\_in\\_corrections\\_promotional\\_sheet.pdf](https://www.prisonlegalnews.org/media/publications/cca_myth_vs_reality_in_corrections_promotional_sheet.pdf) (last visited Feb. 26, 2016). But see Lee Fang, *Disclosure Shows Private Prison Company Mised on Immigration Lobbying*, THE NATION (June 4, 2013), <http://www.thenation.com/blog/174628/disclosure-shows-private-prison-company-mised-immigration-lobbying#> (“Earlier this year, one of the largest private prison corporations in the country sent out a statement to reporters claiming that it would not lobby in any way over the immigration reform debate. A new disclosure shows that the company, the Boca Raton-based Geo Group, has in fact paid an ‘elite team of federal lobbyists’ to influence the comprehensive immigration reform legislation making its way through Congress.”).

110. cummings, *supra* note 5, at 438–39.

111. See generally Nicole Flatow, *Mississippi County Jails Kids For School Dress Code Violations, Tardiness, DOJ Alleges*, THINK PROGRESS (Nov. 27, 2012, 9:00 AM), <http://thinkprogress.org/justice/2012/11/27/1239111/mississippi-county-jails-kids-for-school-dress-code-violations-tardiness-doj-alleges> (describing how the police are a “taxi-service” for shuttling students to jail for class misbehavior); César Cuauhtémoc García Hernández, *Largest Private Prison Company, CCA, Maintains Strong Immigration Business*, CRIMMIGRATION BLOG (Aug. 20, 2013, 9:00 AM), <http://crimmigration.com/2013/08/20/largest-private-prison-company-cca-maintains-strong-immigration-business.aspx>; Julianne Hing, *The Shocking Details of a Mississippi School-to-Prison Pipeline*, COLORLINES (Nov. 26, 2012, 9:34 AM), [http://colorlines.com/archives/2012/11/school\\_prison\\_pipeline\\_meridian.html](http://colorlines.com/archives/2012/11/school_prison_pipeline_meridian.html) (explaining how breaking a school dress code can lead to a trip to a detention center); *Locating the School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/racial-justice/school-prison-pipeline-fact-sheet-pdf> (last visited Feb. 22, 2016) (reflecting on the “school-to-prison pipeline” and the imposition of severe punishment for minor disciplinary infractions, which perpetuates a child’s involvement in the criminal justice system); Joaquin Sapien, *Time Out: Federal Complaint Alleges Rampant Abuse in Texas*

minimums in their prison facilities or a contract breach will result;<sup>112</sup> provide manufacturing and service labor to private industry at low or no cost by using inmates as workers and reaping massive profits on the backs of those prisoners;<sup>113</sup> and steadily decrease services and humane treatment of inmates to cut costs to increase shareholder profits and executive compensation.<sup>114</sup> These activities are common behavior for many corporations, which seek assertively to increase profits for shareholders.<sup>115</sup> But in the private prison context, such activities lead to civil and human rights violations.<sup>116</sup> In truth, the very existence of the private prison corporation flies in the face of the corporate social responsibility movement, as nearly every activity the private prison company advocates is arguably the antithesis of responsible corporate citizenship.<sup>117</sup>

Ultimately, private prisons' existence, if not simply to enrich shareholders and executives, is dependent on whether the private prison regime actually delivers a more cost-effective, efficient, and safer system of warehousing criminals.<sup>118</sup> This is the only avenue for which it makes sense to turn a traditional government function and taxpayer funds over to the private sector. Private prison lobbyists and executives base their pleas for government contracts on the fact that they can imprison more efficiently and more cost effectively.<sup>119</sup> If they cannot, the idea of

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*Truancy Program*, PROPUBLICA (June 12, 2013, 3:17 PM), <http://www.propublica.org/article/federal-complaint-alleges-rampant-abuse-in-texas-truancy-program> (highlighting that children can be led out in handcuffs for school tardiness).

112. Johnson, *supra* note 29.

113. cummings, *supra* note 5, at 422; *Hustle*, *supra* note 24, at 611.

114. See generally Reutter, *supra* note 34 (inferring from a study of private prisons in Florida, which showed that recidivism rates are equal to or higher than public prisons and the private prison system has not saved costs or been a solution to the ever-expanding prison system, that resources to private prisons are being diverted from prisoner needs to shareholders and executives).

115. cummings, *supra* note 5, at 435–36.

116. Le Coz, *supra* note 91 (discussing a private prison's oversight that led to "barbaric condition[s]," inhumane treatment, and human rights violations).

117. But see *Social Responsibility at CCA*, CCA, <http://www.cca.com/social-responsibility> (last visited Feb. 26, 2016) (describing CCA's dedication to being "a socially responsible organization and a strong corporate citizen").

118. But see Oppel, *supra* note 72 (noting that private prisons cost more to operate than state-run prisons, even though they avoid accepting sick, costly inmates).

119. See Simon Hakim & Erwin Blackstone, *Private Prisons Offer Big Savings for Maine Corrections Budget*, CENTRALMAINE.COM (May 23, 2013), <http://www.kjonline.com/opinion/MAINE-COMPASS-Private-prisons-offer-big-savings-for-Maine-corrections-budget.html>;

private prison company existence is nothing more than a naked transfer of taxpayer funds into the hands of corporate shareholders and executives. All indicators now point to the fact that the private prison regime does not deliver more cost-effective, efficient, and safer warehousing of criminals. Thus, there is no rational reason for the private prison corporation to continue. The time has come to end the private prison experiment, as it has been a failure.

## V. OUTLAWING THE PRIVATE PRISON MODEL

Democratic Presidential Candidate and United States Senator Bernie Sanders stated that “[s]tudy, after study, after study has shown private prisons are not cheaper, they are not safer, and they do not provide better outcomes for either the prisoners or the state.”<sup>120</sup> As such, Senator Sanders recently introduced legislation that would effectively ban private prisons.<sup>121</sup>

### A. *The Legislation*

The bill, titled the Justice is Not for Sale Act, seeks to prohibit federal and state governments from entering into contracts with private prisons within two years of enactment.<sup>122</sup> The Act also seeks the following: (1) reinstatement of federal parole guidelines for eligible prisoners to be released prior to completing their sentences;<sup>123</sup> (2) elimination of the requirement that Immigration and Customs Enforcement meet a 34,000 bed quota, which results in “the detention and abuse of undocumented immigrants to the financial benefit of prison corporations like GEO and CCA”;<sup>124</sup> and (3) regulation of video and telephone services in correctional facilities, which

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Simon Hakim & Erwin Blackstone, *Privately Run Prisons Offer Value to Ohio*, THE BLADE (July 21, 2013), <http://www.toledoblade.com/Opinion/2013/07/21/Privately-run-prison-s-offer-value-to-Ohio.html>.

120. See Carimah Townes, *Bernie Sanders Unveils Ambitious Plan to End Private Prisons*, THINKPROGRESS (Sep. 17, 2015, 12:55 PM), <http://thinkprogress.org/justice/2015/09/17/3702659/bernie-sanders-prison-bill>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

“overcharge inmates to the benefit of staff and corporate entities.”<sup>125</sup>

Senator Sanders’s proposal should be commended for drawing attention to the fact that private prisons achieve none of the objectives upon which their existence is based and that inmates suffer substantial and ongoing abuses in such prisons. Senator Sanders’s legislation underscores the need for systemic reforms to ensure that private prisons operate with greater transparency and accountability and to safeguard inmates from violent and inhumane prison environments. As a practical matter, however, given the current state of partisan rancor and the existing contracts between the federal government and private prisons,<sup>126</sup> it is unlikely that Congress will pass Senator Sanders’s proposal

#### *B. New Proposal for Eradicating Private Prisons*

Thus, we strongly believe that the private for-profit prison corporation model has failed and continues to fail, therefore our starting point is the same as Senator Sanders, which is that private prisons should be eliminated altogether. In fact, nascent and current private prison scholars have argued that the entire private prison construct is unconstitutional.<sup>127</sup> That said, because outright elimination is unlikely with the current Congress, several preliminary steps could be taken to begin the process of ending the perverse and immoral outcomes attendant to the private prison regime. To wit, Congress should consider several proposals to address the documented problems with private prisons, including: (1) ending the War on Drugs; (2) creating a federal agency to oversee the administration of private prisons; (3) affording private prisoners limited constitutional protections; and (4) creating a statutory cause of action against owners and employees of private prisons for conduct that violates constitutional rights.

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125. *Id.*

126. *See id.*

127. *See* Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, 13 HUMAN RIGHTS BRIEF 12 (2006); *see also* Ira P. Robbins, Symposium, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 325 (1986).

i. End the War on Drugs

Additionally, the discriminatory nature by which law enforcement has prosecuted the War on Drugs has led to devastated urban communities and incredible distrust between citizens of color and law enforcement.<sup>128</sup> A sickness has infected the United States for thirty years—namely a drug war flamed by private prison influence—and it appears now that the momentum for a sea change is mounting as the time has come to cure this fever.

The War on Drugs is an unadulterated failure that has, among other things, failed to eradicate drug use or treat drug addiction, led to overcrowding in federal prisons, and resulted in racially motivated investigatory practices. Indeed, despite spending a trillion dollars to reduce drug use,<sup>129</sup> studies show that “[a]bout [forty] percent of high school seniors admit to having taken some illegal drug in the last year—up from [thirty] percent two decades ago.”<sup>130</sup> Furthermore, the Global Commission on Drug Policy estimated that, “between 1998 and 2008, global use of opiates increased [thirty-four point five] percent, cocaine [twenty-seven] percent, and cannabis [eight point five] percent.”<sup>131</sup> Additionally, in 2011, over fifty percent of federal inmates were incarcerated for drug offenses, compared with four percent for robbery; three percent for homicide, assault, and kidnapping; and five percent for sex offenses.<sup>132</sup>

At the same time, rehabilitative services for such offenders is virtually non-existent.<sup>133</sup> Furthermore, sixty-one percent of individuals who are targeted by Special Weapons and Tactics (“SWAT”) teams for drug-related crimes are persons of color.<sup>134</sup>

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128. ALEXANDER, *supra* note 2, at 50; see also dré cummings, *Professor Calls War on Drugs an “Abomination”*, CORP.JUST.BLOG (July 15, 2013, 1:00 PM), <http://corporatejusticeblog.blogspot.com/2013/07/professor-calls-war-on-drugs-abomination.html>.

129. Branson, *supra* note 10.

130. Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES (July 3, 2012), [http://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html?\\_r=0](http://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html?_r=0).

131. Hao Li, *War on Drugs a “Total Failure” and Statistics to Prove It*, INT’L BUS. TIMES (June 17, 2011, 9:53 AM), <http://www.ibtimes.com/war-drugs-total-failure-statistics-prove-it-291447>.

132. *Id.*

133. *Id.*

134. See Avinash Thoroor, *Five Startling Statistics that Prove the War on Drugs is a Failure*, RESET.ME (July 7, 2014), <http://reset.me/story/five-startling-numbers-failed-war-drugs>.

These facts demonstrate that the War on Drugs is a complete failure and that it is a substantial factor underlying the perceived need for private prisons. It is not surprising, therefore, that corporations such as CCA would resist any changes to federal drug policy; if the War on Drugs ends, the need for profit-driven private prisons is significantly decreased.

## ii. Create Stricter Agency Oversight

Based on the substantial evidence of abuse and inhumane treatment at private prisons, corporations like CCA should be subject to oversight by a federal administrative agency. This would enable the federal government to establish standards governing the administration of private prisons, including maintenance of facilities, treatment of prisoners, and financial viability. In doing so, the agency could increase transparency and accountability and more readily uncover instances of prisoner abuse.

## iii. Afford Private Prisoners Limited Constitutional Protections

In *Minneci v. Pollard*,<sup>135</sup> the United States Supreme Court, by an eight to one vote, held that federal inmates may not recover damages for alleged Eighth Amendment violations that were committed by private prison employees, even where their employer is under contract with the federal government.<sup>136</sup> The Court's rationale was based in substantial part on the fact that prisoners have alternative remedies under state law, thus rendering damages for alleged constitutional violations unnecessary.<sup>137</sup> Writing for the majority, Justice Stephen Breyer explained that "state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of

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135. *Minneci v. Pollard*, 132 S. Ct. 617 (2012); *see also* *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that, in some circumstances, citizens may sue federal officials for violations of constitutional rights).

136. *Minneci*, 132 S. Ct. at 626 ("[W]here, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law.").

137. *See id.*

the eight States where privately managed secure federal facilities are currently located.”<sup>138</sup>

To an extent, the Court’s decision to not permit such suits makes sense, particularly given that inmates may sue prison officials in state court for alleged violations. However, one problem, as recognized in Justice Ruth Bader Ginsburg’s dissent, is that state law may not always provide a *sufficient* remedy for misconduct by private prison officials.<sup>139</sup> Furthermore, Justice Ginsburg correctly noted that suits for constitutional violations, which are available for inmates in federal facilities, should not be denied to those who by chance are placed in a private prison.<sup>140</sup>

In addition, Justice Ginsburg emphasized the majority’s failure to sufficiently consider deterrence as a reason to permit inmates to sue prison officials.<sup>141</sup> Specifically, Respondent’s suit sought “damages *directly* from individual officers”;<sup>142</sup> thus, under *Bivens*, a successful suit “would have precisely the deterrent effect”<sup>143</sup> to justify citizens’ suits against federal officials.<sup>144</sup>

#### iv. Provide a Statutory Cause of Action for Injuries Sustained in Private Prisons

It is unlikely that civil suits against prison officials will result in the type of systemic change that is needed to reform private prisons. These suits—which would be brought by prisoners acting

138. *Id.* at 624 (citing DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, WEEKLY POPULATION REPORT (Dec. 22, 2011), [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) (listing eight states where prison guards have duty of reasonable care)). The Court rejected the argument that there are certain “kinds of Eighth Amendment claims that state tort law does not cover,” holding that respondent failed to provide examples demonstrating this fact and that “State-law remedies and a potential *Bivens* remedy need not be perfectly congruent.” *Id.* at 625.

139. *Id.* at 625 (“[S]tate tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages . . . or by forbidding recovery for emotional suffering unconnected with physical harm . . . or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels in medical malpractice cases . . .”).

140. *Id.* at 626–27 (Ginsburg, J., dissenting).

141. *Id.* at 627.

142. *Id.* (emphasis added).

143. *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71 (2001) (prohibiting suit against CCA because a suit against a *corporate* employer “would not serve to deter *individual* officers from conduct transgressing constitutional limitations on their authority”) (emphasis added)).

144. *Id.*

in a pro se capacity in many cases<sup>145</sup>—would not likely be successful on a consistent basis. In addition, the sheer length of time from the filing of a complaint through formal adjudication would mean that prison officials’ wrongdoing would likely persist over this time.<sup>146</sup>

Accordingly, and particularly in light of *Minneci*, Congress should enact a statute prescribing a specific cause of action for violations of inmates’ constitutional rights, including the Eighth Amendment right against cruel and unusual punishment and the Fourteenth Amendment right to due process of law. Such a statute should provide remedies that will operate to deter prison officials and administrators from engaging in such conduct, including—but not limited to—respondeat superior liability and punitive damages where conduct is particularly egregious.

## V. CONCLUSION

When did imprisonment in the United States become a system characterized by the inhumane treatment of prisoners, rather than by a system of rehabilitation, recovery, and reduced recidivism? Why did we decide to incarcerate low-level, non-violent drug offenders along with hardened criminals who are convicted of truly deprave acts of violence and anti-social behavior? The result of this policy has been to create a generation of formerly incarcerated persons that have been brutalized and hardened despite “no truly good law enforcement reason.”<sup>147</sup>

Draconian carceral policies continue in our nation’s laws that deprive former felons of opportunities to truly re-enter society successfully.<sup>148</sup> For example, gangs dominate many of our nation’s prisons.<sup>149</sup> Failing to affiliate with a gang upon prison entrance can lead to vicious attacks from all sides.<sup>150</sup> Many inmates in state and

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145. See, e.g., *id.* at 620 (majority opinion).

146. See, e.g., *id.* at 620–21; Alice Brennan, *Right to a Speedy Trial? This Innocent Teenager Waited 3 Years in Jail*, FUSION (Apr. 28, 2014, 11:41 AM), <http://fusion.net/story/5419/right-to-a-speedy-trial-this-innocent-teenager-waited-3-years-in-jail>.

147. Holder, *supra* note 8.

148. See ALEXANDER, *supra* note 2, at 186.

149. See Kate King et al., *Violence in Supermax: A Self-Fulfilling Prophecy*, 88 PRISON J. 144, 152 (2008).

150. See FED. BUREAU OF INVESTIGATION, NAT’L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS (2011), <https://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment>.

federal prison experience sexual assault.<sup>151</sup> Physical danger is a daily concern for those that are locked up, from both prison guards and fellow inmates.<sup>152</sup> Dehumanization and mind-bending hours of solitary confinement are regularly imposed upon those in our prisons.<sup>153</sup> Many prisoners spend their days and nights in literal cages, treated no better than common animals.<sup>154</sup>

As a nation, we can, and should, do better. Juxtaposing the way that prisoners are treated in the United States against the way prisoners are treated in countries such as Norway and Austria can be a useful exercise for those charged with carceral policymaking in the United States. Some of the prisons in Norway and Austria are centers constructed around the notion of humane and safe treatment of violent criminals.<sup>155</sup> They are solidly constructed and secure, yet bear no resemblance to the cages used to house inmates in the United States.<sup>156</sup> One of the reasons that some European jails are so much more humane than United States prisons is because these nations, and indeed all of the nations in the world, incarcerate at far lower rates and percentages than we

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151. ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 8 (2012); Keri Huus, *Nearly 10 Percent of Inmates Suffer Sexual Abuse*, MSNBC (May 17, 2012, 10:14 AM), [http://usnews.nbcnews.com/\\_news/2012/05/17/11745732-report-nearly-10-percent-of-inmates-suffer-sexual-abuse?lite](http://usnews.nbcnews.com/_news/2012/05/17/11745732-report-nearly-10-percent-of-inmates-suffer-sexual-abuse?lite). Of those inmates that admit to suffering sexual assault:

A quarter of those who reported they had suffered unwanted sexual contact at the hands of other inmates said they had been physically held down or restrained and a quarter had been physically harmed or injured. Nearly a quarter (23 percent) reported serious injuries, including anal/vaginal tearing (12 percent), chipped or lost teeth (12 percent), being knocked unconscious (8 percent), internal injuries (6 percent), knife/stab wounds (4 percent) or broken bones (4 percent), according to the survey of former prisoners.

*Id.*

152. See Huus, *supra* note 151.

153. Sherwood Ross, *America's Dehumanizing Prisons*, GLOBAL RES. (Mar. 22, 2009), <http://www.globalresearch.ca/america-s-dehumanizing-prisons/12851>.

154. *Id.*

155. Compare Jim Lewis, *Behind Bars . . . Sort of*, N.Y. TIMES MAG. (June 10, 2009), [http://www.nytimes.com/2009/06/14/magazine/14prisons-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/06/14/magazine/14prisons-t.html?pagewanted=all&_r=0), with *Norway's Halden Prison*, REUTERS, <http://www.reuters.com/news/pictures/slideshow?articleId=USRTR2PCU0#a=1> (last visited Feb. 29, 2016).

156. See Lewis, *supra* note 155. But see Laura Gottesdiener, *California Prison System Inmates Suffer from Cruel and Unusual Punishment, Supreme Court Rules*, HUFFINGTON POST (July 24, 2011), [http://www.huffingtonpost.com/2011/05/24/california-prison-system-supreme-court-ruling\\_n\\_866486.html](http://www.huffingtonpost.com/2011/05/24/california-prison-system-supreme-court-ruling_n_866486.html).

do.<sup>157</sup> This allows for common sense construction of prisons that are humane and not overcrowded, and a carceral policy in which the need to protect public safety does not entail subjecting prisoners to appalling abuse.

A wiser and safer prison policy in the United States begins by ending the scourge of the private prison corporation and returning crime and punishment to public function. In addition, sentences should be reduced for non-violent offenses. Likewise, the War on Drugs should end, marijuana should be legalized, and treatment for addicts should be widely available. We should also stop the current criminalization of immigration in its tracks and block the private prison lobby from influencing legislation concerning immigration policy. Furthermore, prisoners should be provided a fair wage for work done in prison, allowing them a re-entry account upon release filled with the money they earned while working in prison.<sup>158</sup> Finally, prison cells should be humane, habitable, and populated by one inmate. The result will be safer crime and punishment policies, with fewer American citizens incarcerated.

At their core, private prisons reflect a continuation of policies that have tainted the criminal justice system with perceptions of arbitrariness, unfairness, and injustice. As this article has shown, the continued proliferation of private prisons does not save taxpayers money, increase prison safety, or elevate the conditions of the prison environment. They do the opposite. Inmates are being physically abused, denied medical care, and forced to endure inhumane living conditions, as corporations like CCA and GEO Group realize higher profits from a marketplace in which prisoners are in high demand. Indeed, CCA is a textbook example of the grave injustices that can occur when profit maximization clashes with human dignity. In truth, private prisons have existed on dubious constitutional grounds since their inception in the 1980s.

The time has arrived for private prisons to be eliminated and for legislators and courts to realize that this experiment is one that has failed. Until that time comes, Congress should implement

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157. See CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2 (Nov. 2006), [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/factsheet-us-incarceration.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf).

158. *Emancipate the FLSA*, *supra* note 24, at 682.

purpose-driven reforms to ensure that private prisons can no longer be institutions where inmates have theoretical rights but no remedies.