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**PRIVATE PRISONS: PROFITING FROM, AND CONTRIBUTING TO,
MASS INCARCERATION**

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I. INTRODUCTION

In her book, *The New Jim Crow—Mass Incarceration in the Age of Colorblindness*,¹ scholar Michelle Alexander wrote: “The nature of the criminal justice system has changed. It is no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed.”² Professor Alexander’s book focuses on the most notable group of dispossessed citizens—African-American men.³ Alexander maintains that “[n]o other country in the world imprisons so many of its racial or ethnic minorities.”⁴ “Jim Crow and slavery were caste systems. So is our current system of mass incarceration,”⁵ Alexander argues. Certainly, the individuals “labeled criminals” are “control[led]” and oppressed by many systemic “laws, policies, customs and institutions,”⁶ as Alexander aptly notes.

With a focus on African-American men, Alexander’s insightful scholarly study effectively addresses “the role of the criminal justice system in creating and perpetuating racial hierarchy in the United States.”⁷ However, she states, “[i]t is not possible to write a relatively short book that explores all aspects of the phenomenon of mass incarceration and its implications for racial justice.”⁸ Alexander encourages other scholars to expand her examination and explore subjects that are relevant to “other groups and other contexts” impacted by mass incarceration.⁹

This Article aims to enlarge the dialogue and detailed evaluation that Alexander began on mass incarceration and her brief discussion of private, for-profit prisons by examining the origin, growth, and destructive consequences generated when profit-seeking businessmen form corporations and manage prisons. Noticeably, innumerable private, for-profit prisons emerged over the past several decades, profiting from America’s distinction of holding the world’s “highest rate of incarceration.”¹⁰ As the War on Drugs and other factors led to

¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

² *Id.* at 188.

³ *Id.* at 16.

⁴ *Id.* at 6.

⁵ *Id.* at 12.

⁶ *Id.* at 13.

⁷ *Id.* at 16.

⁸ *Id.* at 15.

⁹ *Id.* at 16.

¹⁰ *Id.* at 6.

overcrowded state and federal prisons, the door opened wide. Wealthy businessmen rushed in seeking lucrative government contracts as they eagerly sought to invest in the big business of private prisons in the United States.

In Part I, this Article considers the history and expansion of private prisons, and notable laws and practices that paved the way for local, state, and federal government officials to delegate the operations and management of government prisons to the private sector.

Part II evaluates arguments in support of private prisons. Part III examines failures cited by private prison opponents, and the negative circumstances that emerge when private, for-profit businesses are given authority to manage functions that are best suited for government supervision. The examination addresses private prison opponents' contention, that the practice of outsourcing local, state, and federal prisoners to private prisons must end, as the limited benefits gained are overshadowed by the destructive consequences generated from profit-seeking business owners acquiring and operating government prisons.

Given the many years of abuse, mismanagement, and other problems that exist at private prisons operating under federal government contracts,¹¹ the Department of Justice ("DOJ") announced on August 18, 2016, that it will "end its use of private prisons after officials concluded the facilities are both less safe and less effective at providing correctional services than those run by the government."¹² The Deputy Attorney General's Memorandum, sent to the Acting Director of the DOJ Bureau of Prisons ("BOP"), included the following directive:

I am directing that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau's inmate population.¹³

¹¹ See *infra* Part III for a discussion of the destructive practices that occurred in private federal prisons over the past decades.

¹² Matt Zaptosky & Chico Harlan, *Justice Department Says It Will End Use Of Private Prisons*, WASH. POST (Aug. 18, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/?utm_term=.74b0db69b0ae.

¹³ See Letter from Sally Q. Yates, Deputy Attorney General, Memorandum for the Acting Director Federal Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>; see also ZAPATOSKY AND HARLAN *supra* note 12.

The August 2016 directive represented a first step, and a necessary response to the harmful historical practice of the federal government passing responsibility to private sector businesses to staff and manage federal prisons. However, approximately six months later, after President Donald J. Trump was sworn into office, he appointed Jeff Sessions as his Attorney General—and shortly after Session’s confirmation hearing, the memorandum initiated to implement “the process of reducing—and ultimately ending—. . . [the federal government’s] use of privately operated prisons” was rescinded.¹⁴ Thus, the tables turned, and most BOP private prisons’ contracts were reinstated.¹⁵ Part IV recommends steps that should be implemented to end the practice of privately operated federal, state, and local prisons.

II. HISTORY, EXPANSION, AND LAWS AUTHORIZING PRIVATE PRISONS

America holds the distinction of having the highest rate of incarceration in the world.¹⁶ Indeed, “[n]o other country in the world imprisons so many of its racial or ethnic minorities,” as Professor Michelle Alexander aptly notes.¹⁷ This alarming state of affairs is attributable to various factors, including the War on Drugs, and a rise in the length of prison sentences for many nonviolent offenders.¹⁸

Innumerable privately operated, for-profit local, state, and federal prisons have emerged over the past several decades, profiting from the

¹⁴ *Id.*; see also Matt Zapatosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.922312d1f55e. When addressing the reversal of the decision to close private prisons, many sources discuss the campaign contributions made in support of President Trump. Among other substantial subsidiary company donations made, sources report that private prison companies GEO Group and CoreCivic—two of the three largest private prison corporations—each donated \$250,000 to President Trump’s inaugural event funds. *Id.* See also *Transaction Query by Individual Contributor*, FED. ELECTION COMM’N, <http://classic.fec.gov/finance/disclosure/norindsea.shtml> (last visited July 7, 2017).

¹⁵ See ZAPATOSKY, *supra* note 14.

¹⁶ See ALEXANDER, *supra* note 1, at 6.

¹⁷ *Id.*; see generally Danielle Kaebler et al., *Correctional Populations in the United States, 2014*, U.S. DEP’T OF JUSTICE (2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>; Antonio Moore, *President Bill Clinton Gets It Wrong on Mass Incarceration*, HUFF. POST (Apr. 4, 2016), http://www.huffingtonpost.com/antonio-moore/president-bill-clinton-gets-it-wrong-on-mass-incarceration_b_9638934.html.

¹⁸ See ALEXANDER, *supra* note 1, at 16–19.

quandary that has become known as mass incarceration in the United States.¹⁹ A for-profit organization is defined as follows: “A business or other organization whose primary goal is making money (a profit) [. . .] .”²⁰ Consistent with the general definition, privately operated prisons are corporations—operating with the obvious objectives of making money, enriching private prison business shareholders, minimizing expenses, and growing prison corporations in order to reap maximum profits.²¹ As such, unsurprisingly, the objective of a for-profit corporation is antithetical and incompatible with the BOP mission—the BOP was formed to “protect public safety by ensuring that federal offenders serve their sentences of imprisonment in facilities that are safe, humane, cost-efficient, and appropriately secure, and provide reentry programming to ensure their successful return to the community.”²² In the same way, the primary profit-making motivation of private prisons contradicts the purpose of local and state government prison officials who are employed to provide safe, well-managed facilities and provisions for inmates.²³ Since the early nineteenth century, the private sector has been involved in United States prison operations, participating in government initiated practices and abuses that were implemented, primarily, after the American Civil War ended and the Thirteenth Amendment was enacted.²⁴

The aim of this examination—of the historical facts pertinent to the Thirteenth Amendment, convict lease system, and War on Drugs—is not to recount history to cast aspersions on our nation’s founders and subsequent leaders. It is necessary to understand how the nation arrived at a point where more citizens—disproportionately people of color—are incarcerated in the United States than any other country, with the government placing many prisoners under the management and supervision of private, profit-seeking businesses. The historical facts,

¹⁹ See *infra* Part IV for a discussion of the dominant three private prison corporations. The BOP

defines private prisons as: “[p]rison facilities run by private prison corporations whose services and beds are contracted out by state governments or the Federal Bureau of Prisons.” *Terms and Definitions: Corrections*, DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tdtp&tid=1> (last visited Oct. 1, 2016).

²⁰ BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/for-profit-organization.html> (last visited Aug. 2, 2016).

²¹ See generally ALEXANDER TABARROK, *CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME* 19–21 (2003).

²² *About Our Agency*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/agency/> (last visited Jan. 2, 2018).

²³ See *infra* Part III for a discussion of the negative aspects of for-profit prisons.

²⁴ TABARROK, *supra* note 21, at 72–73.

events, and societal conditions that led to mass incarceration and the privatization of several prisons, must be examined and understood before constructive, recommended changes to end the business of private prisons can be implemented. As such, this article starts with an examination of the Thirteenth Amendment.

A. Thirteenth Amendment

In 1864, Senator Charles Sumner, a devoted abolitionist, submitted a resolution to his fellow Senators proposing to abolish slavery via an amendment to the U.S. Constitution. Sumner's resolution, unlike the final version of the amendment, did not include the prison slavery clause language that legally allowed slavery to persist in American prisons after the Civil War ended in 1865.²⁵

Senator Sumner's proposed Thirteenth Amendment language: "Everywhere within the limits of the United States, and of each state or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."²⁶ Notably, Sumner's language recognized the "equality for all persons before the law."²⁷ If adopted, the amendment would have completely abolished slavery in the United States. But the proposed resolution failed. The Senators reached a compromise, overlooking language that recognized "the equality of all human beings," and adding a prison slavery clause.²⁸ Afterwards, the House passed the Thirteenth Amendment, which was then signed by President Abraham Lincoln and ratified by the states on December 18, 1865. Slavery was

²⁵ See *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875*, LIBR. CONGRESS, <http://www.memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=064/llcg064.db&recNum=592> (last updated January 2, 2018). See U.S. CONST. amend. XIII; see also BARBARA ESPOSITO & LEE WOOD, PRISON SLAVERY 92 (1982).

²⁶ See *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875*, LIBR. CONGRESS, <http://www.memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=064/llcg064.db&recNum=592> (last updated January 2, 2018); see also ESPOSITO & WOOD, *supra* note 25, at 92-93.

²⁷ See *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875*, LIBR. CONGRESS, <http://www.memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=064/llcg064.db&recNum=592> (last updated January 2, 2018); see also ESPOSITO & WOOD, *supra* note 25, at 93.

²⁸ ESPOSITO & WOOD, *supra* note 25, at 93. See also RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 41 (Marvin D. Free, Jr., ed. 2003).

Constitutionally upheld “as a punishment for crime whereof the party shall have been duly convicted.”²⁹ Consequently, the Thirteenth Amendment abolished slavery but, as noted, the amendment left one major exception—a prison slavery clause.³⁰ The concession fulfilled the desires of pro-slavery Senators and fellow slaveholders, allowing them to continue enslaving human beings, after conviction, as punishment for crime.³¹ Thereafter, if the former slaveholders arrested and imprisoned black people, they could legally send them back to the fields to serve as slaves.³²

Only a few African-Americans were imprisoned before the Civil War ended in 1865. But by exploiting the Thirteenth Amendment’s prison slavery clause exception, many southern states quickly enacted laws and initiated practices to unjustly imprison African-Americans to keep the population in the fields and slave-driven industries to work without compensation.³³ In *Prisons Today and Tomorrow*, various scholars provide a sound explanation for why few African-Americans were imprisoned in “early penitentiaries,” before 1865, concluding, “most were essentially incarcerated on slave plantations.”³⁴ However, after the Civil War, enactment of the Thirteenth Amendment, beginning of the Reconstruction Period, and passage of new state laws, significant numbers of African-Americans were still imprisoned in the southern states.³⁵

“The new laws—so-called Black Codes [and early Jim Crow laws]—generally deprived African-Americans of basic civil rights,”³⁶ unjustly, sending many to prison for offenses that white citizens were not subjected to. The laws mimicked legislation from the slavery era—including requirements that African-Americans carry passes and imposing vagrancy charges if black men were unemployed.³⁷ Obviously, most African-American men living in the southern states were unable to find employment, as they confronted enormous limitations given their recent release from slave plantations, in a land where black men had been forced

²⁹ U.S. CONST. amend. XIII.

³⁰ *Id.*; see also FREE, *supra* note 28, at 41.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ PRISONS TODAY AND TOMORROW 26 (Ashley G. Blackburn et al., eds., 3d ed.

2014).

³⁵ See generally Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, but Title VII has not Reached its True Potential*, 89 ST. JOHN’S L. REV. 693, 749-750 (2016).

³⁶ *Id.* at 750.

³⁷ *Id.*

to work for free rather than receiving equitable compensation for work.³⁸ Arresting the newly freed men for being unemployed, was nothing more than a corrupt, immoral strategy, implemented by southern state and local legislators, who manipulated the rule of law to oppress and imprison African-American men.³⁹ Indeed, once African-American men were placed in prison, they were rushed back onto plantations and into industries to toil under cruel conditions without compensation.⁴⁰ Imprisonment, therefore, was key to the former slaveholders' strategy and the success of their new initiative—the convict lease system—another tool used to force African-American men back to work for free on plantations and factories throughout the nineteenth century.⁴¹

B. Convict Lease System

The convict lease system allowed companies, state governments, and plantation owners to lease prisoners and force them to work in industries and on farms—picking cotton and planting crops—without pay.⁴² In exchange for prison labor, government-operated prisons reduced their costs since the company, or individual plantation owner, paid for the prisoners' food and housing.⁴³ The abuses that this system perpetuated were horrendous, including an unacceptable number of hours worked, inadequate food and medical care, and substandard working facilities—hence, “cruel and unusual punishment.”⁴⁴

In 1893, activist Frederick Douglass spoke about the egregious practices and abuses resulting from the government leasing prisoners to private organizations and individual plantation owners.⁴⁵ He stated:

Alabama had a state penitentiary before the war. This was leased out after the war, and subsequently burned. The

³⁸ *Id.*; see FREE, *supra* note 28, at 41.

³⁹ Free, *supra* note 28, at 41; see TOMPKINS, *supra* note 35, at 751–53.

⁴⁰ See FREE, *supra* note 28, at 41–42.

⁴¹ *Id.*

⁴² See *id.* See also ESPOSITO & WOOD, *supra* note 25, at 103.

⁴³ See also ESPOSITO & WOOD, *supra* note 25, at 103.

⁴⁴ *Id.* This Article's examination of private prisons, which houses federal and state prisoners today, includes striking similarities to the 19th century convict lease system—particularly regarding their similar profit motivation. See *infra* Part III for a discussion of the profit motivation, abuses, low wages, inadequate food, and substandard working facilities occurring at state and private prisons in the 21st century). See U.S. CONST. amend. VIII.

⁴⁵ Frederick Douglass, *Convict Lease System* (1893) (unpublished manuscript) LIBR. CONGRESS, <http://hdl.loc.gov/loc.mss/mfd.01008> (last visited July 27, 2017).

state controls and supports the convicts who are hired out by a Board of Inspectors. Of the state convicts, the best of them physically, are leased out under contract, and worked in coal mines and on lands, Corporations being generally the lessees. Others are leased to work on plantations, and the state also owns plantations which the convicts cultivate.

The County convicts are mostly leased out to coal companies and worked in mines. The idea is, first, that the convict must pay by labor all costs in prosecution. . . . The vice of this proceeding is that the County Officials and Corporations are mutually interested in increasing the Convict class for selfish and pecuniary purposes, and that, instead of lessening the number of convicts, it is for their interest to increase the number. Alabama has been very cruel to her convicts. At the meeting of the National Prison Association, at Boston, in 1880, Mr. Dawson, President of Alabama Board of Inspectors of Convicts, said that, at one time, the prison mortality had been 41 per 100, annually.⁴⁶

The convict lease system was alleged to be a form of punishment. Interestingly, since America's founding, academicians, philosophers, and criminologists have examined the evolving reasons and philosophies used to justify the punishment of human beings who commit crimes.⁴⁷ Rationales for punishment range from a "retributive rationale," which approves "the infliction of pain . . . as long as the punishment is deserved,"⁴⁸ to a biblical explanation,⁴⁹ and an "utilitarian rationale," that detests the infliction of punishment on human beings, believing it to be "essentially evil . . . because of the infliction of pain or discomfort."⁵⁰ The latter approach, however, still upholds punishment, finding the benefits that society at large reaps—"deter, incapacitate, or facilitate rehabilitation"—outweigh the harm.⁵¹ There are, of course, many different types of punishment, but incarceration is one of the most serious methods, given the deprivation of liberty. Ostensibly, this fact prompted early American prison officials, in 1870, to develop a "Declaration of

⁴⁶ *Id.*

⁴⁷ See BLACKBURN, *supra* note 34, at 3.

⁴⁸ *Id.* at 4.

⁴⁹ See Exodus 21:12, Romans 13:1-5.

⁵⁰ BLACKBURN, *supra* note 34, at 6

⁵¹ *Id.* at 6-8.

Principles” to guide the conduct of prison officials and the facilities that they manage.⁵²

Key portions of the 1870 Declaration and the updated 2002 principles address “humanity, justice, [and] protection”⁵³

The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering. . . .

. . . While industrial labor in prisons is of the highest importance and utility to the convict, and by o [sic] means injurious to the laborer outside, we regard the contract system of prison labor, as now commonly practiced in our country, as prejudicial alike to discipline, finance and the reformation of the prisoner, and sometimes injurious to the interest of the free laborer.⁵⁴

The founding correction officials’ written principles have been updated several times throughout the twentieth and twenty-first centuries; although in revised form today, they remain the guiding principles for the current American Corrections Association (“ACA”).⁵⁵ Moreover, humanity and justice are considerate and meaningful words printed in the Declaration of Principles—thus, it is unfortunate that the written values

⁵² *Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association*, AM. CORR. ASS’N, available at http://www.aca.org/aca_prod_imis/docs/Exec/1870Declaration_of_Principles.pdf (last visited July 15, 2017).

⁵³ *See id.*; see also *American Correctional Association: Declaration of Principles Approved Jan. 16, 2002.*, available at

http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Declaration_of_Principles/ACA_Member/AboutUs/Dec.aspx?hkey=a975cbd5-9788-4705-9b39-fcb6ddc048e0 (last visited January 2, 2018).

⁵⁴ *Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association*, AM. CORR. ASS’N, available at http://www.aca.org/aca_prod_imis/docs/Exec/1870Declaration_of_Principles.pdf (last visited July 15, 2017).

⁵⁵ *See id.*; see also *American Correctional Association: Declaration of Principles Approved Jan. 16, 2002.*, available at

http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Declaration_of_Principles/ACA_Member/AboutUs/Dec.aspx?hkey=a975cbd5-9788-4705-9b39-fcb6ddc048e0 (last visited January 2, 2018).

have not been applied consistently to ensure that all Americans are treated humanely when punished and imprisoned.⁵⁶

Noticeably, the Declaration of Principles was developed in 1870.⁵⁷ Yet, the convict lease system, which the principles—on paper—explicitly rejected, spread throughout many southern states after the abolition of slavery, arguably, to keep many aspects of the Institution of Slavery in operation.⁵⁸ The lease system, as noted, applied almost exclusively to the former African-American slaves. And the principles of “humanity, justice, and protection” were ignored when African-Americans were arrested and imprisoned, allowing the system to essentially keep African-American men enslaved for “pecuniary purposes.”⁵⁹ In a disturbing 1871 Virginia Supreme Court case, Justice Christian made the following statement:

A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords [sic] to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*; see FREE, *supra* note 28, at 41.

⁵⁹ *Declaration of Principles*, *supra* note 52; see also DOUGLASS: *Convict Lease System*, *supra* note 45.

State to whom their service is due in expiation of their crimes.⁶⁰

Clearly, slavery continued even after its abolition, given the prison slavery clause exception.⁶¹ Hence, the court in *Ruffin v. Commonwealth*, maintained that prisoners have none of the rights “endowed by their Creator . . . Life, Liberty, and the pursuit of Happiness.”⁶² Comments and opinions rendered in line with the *Ruffin* decision were often deemed appropriate in light of a provision commonly referred to as the “Hands Off Doctrine”—promoting the view that incarcerated prisoners forfeited numerous rights when committed to the penitentiary.⁶³ The doctrine endured for decades, until the 1970’s, when the Supreme Court of the United States denounced it, and made clear through pertinent court decisions, that prisoners incarcerated in American prisons maintain various constitutional rights while incarcerated.⁶⁴ Even with certain rights recognized, the prison clause exception remains a part of the Thirteenth Amendment, legally allowing prisoners to receive minimal pay, if any, for work performed.⁶⁵

While there are distinct differences between the nineteenth century convict lease system and the present-day private, for-profit prison arrangements, there are also notable similarities that can—and should—be drawn between the two initiatives. Under the nineteenth century convict lease system, prison officials increased their revenue and reduced expenses by leasing prisoners to work for private plantation owners and industries.⁶⁶ Likewise, private prison proponents argue that today’s federal and state prison officials reduce expenses by awarding contracts to the private sector, allowing private businessmen to build and manage prisons.⁶⁷ Moreover, a key purpose of today’s for-profit, prison businessmen: “[They are] interested in increasing the Convict class for selfish and pecuniary purposes,” is analogous to Frederick Douglass’s

⁶⁰ *Ruffin v. Commonwealth*, 62 Va. 790, 795-96 (1871).

⁶¹ See U.S. CONST. amend. XIII.

⁶² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *Ruffin*, 62 Va. 790, 796.

⁶³ See generally Gary D. Spivey, Annotation, *Censorship of Convicted Prisoners’ “Nonlegal” Mail*, 47 A.L.R. 3d 1192 § 4.

⁶⁴ See *Bell v. Wolfish*, 441 U.S. 520 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Valencia v. Wiggins*, 981 F.2d 1440 (1993) (establishing that prisoners both lose certain rights and privileges while housed in prison, but they also retain various constitutional rights); U.S. CONST. amend. XIV, § 1.

⁶⁵ U.S. CONST. amend. XIII.

⁶⁶ See FREE, *supra* note 28, at 41-42.

⁶⁷ See generally TABARROK, *supra* note 21, at 3, 57-59.

observations of the nineteenth century convict lease system.⁶⁸ The convict lease system, therefore, was the beginning of the United States prison population having a disproportionate number of black males. The next criminal justice initiative that has disproportionately impacted African-Americans and other people of color, is the War on Drugs.

C. War on Drugs and the Disproportionate Impact of Mass Incarceration on People of Color

The need for additional facilities to house America's prison population was sparked in large part by the 1970's to 1990's War on Drugs—Michelle Alexander is among the scholars and criminal justice reformers who have noted alarming details concerning the War on Drugs. Alexander states:

Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States. . . . Drug arrests have tripled since 1980. As a result, more than 31 million people have been arrested for drug offenses since the drug war began.⁶⁹

The drug war has been directed, mainly, at those users and distributors of drugs residing in African-American neighborhoods and other communities with large groups of people of color, despite the high incident of drug use in communities housing other ethnic groups—further marginalizing primarily inner-city black men and people of color.⁷⁰ Moreover, politicians and government officials have consistently waged the War on Drugs in poor neighborhoods, rather than waging war against other violators of criminal codes, such as wealthy white-collar criminals.⁷¹ Professor Michael A. Hallett reasons in his article *Slavery's Legacy? Private Prisons and Mass Incarceration*:

[P]rivate Prisons reveal truths about our current culture and social system that have little to do with crime control, but have much to do, instead, with the often racist and exploitative character of our capitalistic economic system. . . . When we declare “wars” on crime, do we do so against

⁶⁸ DOUGLASS, *Convict Lease System*, *supra* note 45.

⁶⁹ ALEXANDER, *supra* note 1, at 60 (citing MARC MAUER and RYAN KING, *A 25-Year Quagmire: “The War on Drugs” and Its Impact on American Society* (Washington DC: Sentencing Project, 2007), 3.

⁷⁰ *Id.*

⁷¹ See FREE, *supra* note 28, at 4-5.

corrupt accounting firms that cost thousands of jobs, as with Arthur Anderson in the recent Enron scandal, or do we declare war against lower-class, uneducated, and already largely condemned street offenders?⁷²

President Richard Nixon introduced the War on Drugs.⁷³ In the 1980's, President Ronald Reagan expanded the initiative.⁷⁴ Reagan's zero tolerance drug program was designed to target not only drug dealers, but also drug users, as the war objective promoted increased arrests and prosecutions for drug possession, instead of treatment, education, and rehabilitation—the noteworthy, alternative methods of addressing drug addiction and deterring drug distribution.⁷⁵

Additionally, the billions of dollars allocated for the drug war being waged against drug users and distributors largely focused on the use and distribution of crack-cocaine, rather than powder-cocaine.⁷⁶ Congress passed new crime legislation in 1986, and the Anti-Drug Abuse Act of 1986 was signed by President Reagan.⁷⁷ As scholar Michelle Alexander explains, “[a]mong other harsh penalties, the legislation included mandatory minimum sentences for the distribution of cocaine, including far more severe punishment for distribution of crack-associated with black—than powder cocaine, associated with whites.”⁷⁸ As a result, arrests and prosecutions for drug possession and distribution catapulted.

The drug initiatives advanced during the Reagan administration continued throughout President George H. W. Bush's 1989-1993 term in office, escalating the prison population.⁷⁹ Then, in the mid-1990's, President William Jefferson “Bill” Clinton expanded the discourse on tough crime by focusing on several law enforcement objectives, including advancing the War on Drugs started by his predecessors.⁸⁰ During his campaign for president, Clinton promised that he would be as tough on crime as any Republican—unquestionably, this was a campaign promise that he kept, as Clinton's \$30 billion dollar 1994 Violent Crime Control and Law Enforcement Act was enormous.⁸¹ The legislation's provisions

⁷² *Id.* at 40-41.

⁷³ ALEXANDER, *supra* note 1, at 48.

⁷⁴ *Id.* at 48-54.

⁷⁵ *Id.* at 51-52.

⁷⁶ *Id.* at 52.

⁷⁷ *Id.* at 53.

⁷⁸ *Id.* at 53.

⁷⁹ See ALEXANDER, *supra* note 1, at 54-55.

⁸⁰ See generally *id.* at 56.

⁸¹ *Id.*

ranged from billions of dollars in grant money allocated for states to address the drug war, to payments authorized for states to hire thousands of police officers, to loss of prisoner education grants, and, most notably—the infamous Three-Strikes mandatory life imprisonment mandate for various “three-time offenders”.⁸² Specifically, pursuant to the Three-Strikes mandate “the defendant receives mandatory life imprisonment if he or she: is convicted in federal court of a ‘serious violent felony’ and has two or more prior convictions in federal or state courts, at least one of which is a ‘serious violent felony.’ The other prior offense may be a ‘serious drug offense.’”⁸³

In a 2015 interview addressing mass incarceration, “Clinton acknowledged [the Three-Strikes] policy’s role in over-incarceration:

The problem is the way [the Clinton administration crime bill] was written and implemented. . . we cast too wide a net and we had too many people in prison. . . And we wound up . . . putting so many people in prison that there wasn’t enough money left to educate them, train them for new jobs and increase the chances when they came out so they could live productive lives.⁸⁴

After Clinton’s crime bill was enacted into law and additional state, federal, and privately operated prisons were constructed, statistics confirm the prison population in the United States increased to levels higher than those during the terms of any other president in the history of the United States.⁸⁵ Clinton had reached his goal and remained true to his campaign promise that “he would never permit any Republican to be perceived as tougher on crime than he.”⁸⁶ A DOJ Justice Policy Institute study reported

⁸² *Id.*; see *Offices of the United States Attorneys: 1032. Sentencing Enhancement—“Three Strikes” Law Memorandum for all United States Attorneys*, U.S. DEP’T OF JUSTICE, OFFICES OF THE U.S. ATT’YS (Mar. 13, 1995), <https://www.justice.gov/usam/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law>; see also Meghan Keneally, *What’s Inside the Controversial 1994 Crime Bill That’s Plaguing Hillary Clinton on the Campaign Trail*, ABC NEWS (Apr. 11, 2016), <http://abcnews.go.com/Politics/inside-controversial-1994-crime-bill-plaguing-clinton-campaign/story?id=38313757>.

⁸³ *Three Strikes” Law Memorandum for all United States Attorneys*, *supra* note 82; see also ALEXANDER, *supra* note 1, at 56.

⁸⁴ Jeremy Diamond, *Bill Clinton concedes role in mass incarceration*, CNN, May 7, 2015, <http://www.cnn.com/2015/05/06/politics/bill-clinton-crime-prisons-hillary-clinton/>.

⁸⁵ ALEXANDER, *supra* note 1, at 56; see Jeff Stein, *The Clinton dynasty’s horrific legacy: How “tough-on-crime” politics built the world’s largest prison system*, JUSTICE POLICY INST. (Apr. 13, 2015), <http://www.justicepolicy.org/news/8992>.

⁸⁶ See Greg Krikorian, *Federal and State Prison Populations Soared Under Clinton*,

that “During Clinton’s eight-year tenure, the total population of federal and state prisons combined rose by 673,000 inmates—235,000 more than during Reagan’s two terms.⁸⁷ Moreover, Clinton exacerbated the war initiated against drug use and distribution that his predecessors Nixon, Reagan, and Bush started, as the vast majority of the offenders in federal prison, during his administration, were incarcerated for drug offenses.⁸⁸

To fully appreciate the impact of the War on Drugs and mass incarceration on communities of color, and to evaluate the private prison sector’s influence and involvement in a function that, many argue, should be an exclusive government role, it is worth noting relevant statistics provided by the U.S. Department of Justice, Bureau of Justice Statistics (“BJS”) and state officials, as follows:

The BJS, reports that “at yearend 2015, the United States had an estimated 1,526,792 prisoners under the jurisdiction of state and federal correctional authorities.”⁸⁹ Of this number, 196,455 were incarcerated in federal Bureau of Prisons (“BOP”)—34,934 housed in federal contract private facilities.⁹⁰ Moreover, BOP reports that approximately 187,432 federal inmates were housed in bureau prisons as of July 20, 2017—an enormous number compared to the 1980 population of 25,000 prisoners.⁹¹

Report Finds, L.A. TIMES (Feb. 19, 2001), <http://articles.latimes.com/2001/feb/19/news/mn-27373>; ALEXANDER, *supra* note 1, at 56.

⁸⁷ See Krikorian, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

There were 91,338 prisoners housed in state contract private prisons. BJS reports a small percentage decrease of 2% from the previous year prison population. *Id.* While this is only a small decrease, it still reflects progress, given the amount of reform efforts from the past few years, aimed at reducing the massive number of people currently serving time in United States prisons. See *id.* Regarding 2014 statistics, the BJS reported that “The United States held an estimated 1,561,500 prisoners in state and federal custody at the end of 2014”—that after many years of rising prison population numbers, the overall population declined, reflecting “the smallest total prison population since 2005 and the second largest decline in more than 35 years.” E. Ann Carson & William J. Sabol, *Prisoners in 2014*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14_Summary.pdf.

⁹⁰ Carson & Anderson, *supra* note 89.

⁹¹ *Statistics*, FEDERAL BUREAU OF PRISONS,

https://www.bop.gov/about/statistics/population_statistics.jsp (last visited July 20, 2017); Nathan James, *The Federal Prison Population Buildup: Options for Congress*, CONG. RES. SERV. (May 20, 2016), <https://www.fas.org/sgp/crs/misc/R42937.pdf>. See also *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, U.S.

While the number of prisoners housed in federal private prisons may seem nominal at first glance, in comparison to the overall BOP federal prison population, the percentage represents a significant population of prisoners who need well-managed, safe facilities. The overall money allocated to operate federal prisons rose from “approximately \$562 million in fiscal year (FY) 2011 to \$639 million in FY 2014.”⁹² Beyond the number of inmates serving sentences in federal prisons, many are incarcerated in state institutions—1,330,337.⁹³

As noted, after the Clinton War on Drugs, the United States prison population was enormous—new prisons were built, and the federal and state government began issuing contracts to private prisons to manage the burgeoning prison population—thus, permitting corporations to profit from mass incarceration. Corporate owners lobbied and competed for more government contracts and sought to fill their facilities with prisoners “instead of lessening the number of convicts, it is for their interest to increase the number,”⁹⁴ clearly, profiting from, and contributing to, mass incarceration.

Regarding demographics, as reported in the 2015 BJS findings, black males in 2014, represented the largest number of individuals of any prison group residing in American prisons:⁹⁵ Moreover, before that time, statistics, concerning the imprisonment of African-Americans and Hispanics in 2011, are astonishing—the BJS issued the following report:

In 2011, blacks and Hispanics were imprisoned at higher rates than whites in all age groups for both male and female inmates. Among prisoners ages 18 to 19, black males were imprisoned at more than 9 times the rate of white males. In 2011, Hispanic and black male prisoners age 65 or older

DEPT OF JUSTICE, OFFICE OF THE INSPECTOR GEN. (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

⁹² *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, *supra* note 91.

⁹³ Carson & Anderson, *supra* note 89.

⁹⁴ DOUGLASS, *Convict Lease System*, *supra* note 45. Like the old convict lease system, businessmen have profited from prison labor. See Terry Carter, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On*, ABA JOURNAL, at 46 (Oct. 2012). It is reported that two of the big three prison profiteers—GEO and CC had “combined revenues of \$2.9 billion in 2010 Private prison operators have spent tens of millions of dollars for lobbying and campaign contributions in the past three decades.” *Id.*

⁹⁵ *Prisoners in 2014*, BUREAU OF JUSTICE STATISTICS (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14_Summary.pdf. See also ALEXANDER, *supra* note 1.

were imprisoned at rates between 3 and 5 times those of white males. Excluding the youngest and oldest age groups, black males were imprisoned at rates that ranged between 5 and 7 times the rates of white males. Among persons ages 20 to 24, black males were imprisoned at about 7 times that of white males. Among persons ages 60 to 64, the black male imprisonment rate was 5 times that of the white male imprisonment rate. In comparison, Hispanic males were imprisoned at 2 to 3 times the rate of white males in 2011. Black females were imprisoned at between 2 and 3 times the rate of white females, while Hispanic females were imprisoned at between 1 and 3 times the rate of white females.⁹⁶

Additional demographic facts reported by BJS in 2014, shows that “[a]n estimated 516,900 black males (37%), 453,500 white males (32%), and 308,700 Hispanic males (22%) were in custody at the end of 2014.”⁹⁷ Notably, the Bureau of Justice Statistics reports: “More than 2% of male residents ages 30 to 34 were sentenced to more than 1 year in state or federal prison at yearend 2015. In this age group, imprisonment rates were 5,948 per 100,000 black males, 2,365 per 100,000 Hispanic males, and 1,101 per 100,000 white males.”⁹⁸

Since 2011, criminal justice reformers have admirably helped facilitate new legislation and generate media attention on the issue of mass incarceration and its disproportionate impact on people of color. Their efforts have led to noticeable changes; while African-American males and people of color, in general, still represent the largest group of people in United States prisons, the figures are not as bleak, as the 2015 yearend BJS report revealed these numbers:

In 2015, imprisonment rates for white, black, and Hispanic adults were at their lowest levels since 2005 . . . Between December 31, 2014, and December 31, 2015, the rate of imprisonment for black adults decreased 4% (from 1,824 per 100,000 in 2014 to 1,745 in 2015). The rate for Hispanic adults decreased 5%, from 860 per 100,000 to 820. The rate for whites also declined, from 317 per

⁹⁶ Carson & Sabol, *supra* note 89.

⁹⁷ *Id.* See ALEXANDER, *supra* note 1, at 6, 16, & 188.

⁹⁸ Carson & Sabol, *supra* note 89.

100,000 U.S. residents age 18 or older in 2014 to 312 per 100,000 in 2015.⁹⁹

Despite the decreased numbers of African-Americans in United States prisons since 2014, like the nineteenth century prison population that existed and grew during the era of the convict lease system, African-Americans and other people of color continue to be overrepresented in United States prisons. Reform efforts to reduce the United States prison population, especially the immense numbers of people of color overrepresented, must continue. Additionally, the massive numbers of people (largely African-American males), serving sentences in United States prisons for drug offenses, must diminish. The history of disproportionately incarcerating African-Americans, in some instances for minor offenses, or more harshly than white Americans—a pattern that started immediately after the Thirteenth Amendment was enacted and continued with the disparate drug penalties for crack versus powder cocaine, must end. Similarly, the practice of targeting black males via so called Wars on Drugs, with minimal attention and resources devoted to wealthy white-collar offenders, must end. As the recent BJS reports reflect, positive steps have been taken since 2014 to reduce the numbers, but more reforms are needed to overcome the inequality that people of color and African-Americans have endured in the criminal justice system since America's founding.

Arguably, one of the most tragic consequences of the War on Drugs and mass incarceration, has been the emergence and growth of private prisons, becoming a billion-dollar empire that enriches corporate businessmen and shareholders.¹⁰⁰ BJS data reveals that “[p]rivate prison facilities, including nonsecure community corrections centers and home confinement, housed almost 18% of the federal prison population on December 31, 2015.”¹⁰¹ Thus, private prisons continue to flourish—in fact, BJS data reflects a steady growth in the use of private corporate facilities in the recent decade: “The size of the private prison population grew 90%, from 69,000 prisoners in 1999 to 131,3000 in 2014.”¹⁰² There were a total of 126,272 private prison inmates at yearend 2015 (34,934 housed in federal and 91,338 in state prisons).¹⁰³

⁹⁹ Carson & Anderson, *supra* note 89.

¹⁰⁰ 2016 *Annual Report*, THE GEO GROUP, INC. (2016), <http://www.sn1.com/Interactive/newlookandfeel/4144107/2016-GEO-Annual-Report.pdf>.

¹⁰¹ *Id.* at Appendix Table 2.

¹⁰² Carson & Sabol, *supra* note 89.

¹⁰³ Carson & Anderson, *supra* note 89.

Like government operated prisons, a recent study by Scholar Christopher Petrella, suggests that private, for-profit prisons have a disproportionate number of people of color housed in their facilities.¹⁰⁴ Petrella's exploration of nine states, selected in large part because of the significant pool of individuals housed in the state facilities, relates to a cost, profit analysis and finds that the decisions made to house more minorities relates to cost savings rather than a racial motivation.¹⁰⁵ He explains:

Elderly and/or geriatric prisoners tend to cost more to incarcerate My study firmly suggests that private prison management companies responsible for providing health services exempt themselves contractually from accepting and housing prisoners with chronic medical conditions as well as those whose health care costs will be "above average." This fact results in a prisoner profile that is far younger and far "darker" in minimum and/or medium security private facilities than in select counterpart public facilities.¹⁰⁶

Some scholars and criminal justice reformers find Petrella's findings equally surprising and interesting, particularly since the

¹⁰⁴ Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the*

Overrepresentation of People of Color in Private Prisons, RADICAL CRIMINOLOGY (2014), <http://journal.radicalcriminology.org/index.php/rc/article/view/44/html>.

¹⁰⁵ *Id.* Petrella did not review all private prisons in the U.S. Rather, he notes the following restrictions used:

This study controls for differences in facility population profile. Therefore, only public and private facilities/units with a minimum and/or medium security designation are included in this comparison. And finally, as in my previous work, in order to avoid artificially inflating the over-incarceration of people of color in for-profit prisons this examination intentionally excludes figures from federal detention centers controlled by U.S. Immigration and Customs Enforcement (ICE), the U.S. Marshals Service, and detention facilities managed at the local level. For similar reasons, it strategically excludes data from transfer centers, work release centers, community corrections facilities, and reception centers. *Id.*

¹⁰⁶ *Id.* Petrella's study excluded various private prison facilities, such as federal prisons that house primarily immigrants, which he believed would have skewed the findings. *Id.* See also Rina Palta, *Why For-Profit Prisons House More Inmates of Color*, NPR (Mar. 13, 2014), <http://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color>.

conclusions do not suggest a racial motive for the designation of more people of color housed in private prisons.¹⁰⁷ Nevertheless, Petrella's findings are drawing attention to the vital social justice topic of private, for-profit prisons, which needs review. So, while some scholars may question the validity of Petrella's findings, few would oppose his effort to examine the subject to try and explain the excessively high percentage of young people of color housed in private prisons in the United States.

D. Private Prisons Big Three Corporate Profiteers

Privatization of prison operations and management creates a structure where profit is the aim—not punishment, rehabilitation, or other government purposes. Americans should ponder how private, for-profit prison corporations can meet their business objective of increasing profits for shareholders and reducing revenues if the companies are not generating profits from products, such as, the sale of luxury cars, or from the delivery of services, such as providing financial planning. It is a peculiar situation, but private, for-profit prison shareholders generate profits by filling the prison cells to full capacity in their privately-operated prisons. Moreover, businesses' revenues are reduced by cutting back on valuable services—adequate medical care, suitable living conditions, and other necessities—that the companies are expected to provide to the prisoners housed in the private facilities.

In *Economic Freedom and the American Dream*, Scholar Joseph Shaanan, “explores the overwhelming effect of freedom to profit on America.”¹⁰⁸ Shaanan notes, “The exercise of the freedom to profit overpowers other freedoms and values. The right to make money and spend it without restrictions are fundamental American principles with far-reaching implications.”¹⁰⁹ In support of his theory, Shaanan addresses the bailouts of 2008, citing these initiatives as solid examples of what happens—the government is forced to rescue, or bailout failing businesses—when there is “unrestricted freedom to profit.”¹¹⁰ Shaanan further explores “the freedom to profit by circumventing the market,

¹⁰⁷ See Rina Palta, *Why For-Profit Prisons House More Inmates of Color*, NPR (Mar. 13, 2014), <http://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color.id>.

¹⁰⁸ JOSEPH SHAANAN, *ECONOMIC FREEDOM AND THE AMERICAN DREAM* 1 (2010).

¹⁰⁹ *Id.* at 3.

¹¹⁰ *See id.* at 1, 4, 7, & 18.

especially through government help.”¹¹¹ In those instances, he maintains that the government helps advance a corporation’s “unrestricted freedom to profit.”¹¹² Shaanan views this type of arrangement as “a conflict between a corporation’s primary economic responsibility of maximizing profits and demands for greater social responsibility.”¹¹³ He writes: “A common criticism is that when giant corporations focus exclusively on profits and shrug off social responsibility, their activities may impose large social costs on the nation.”¹¹⁴ Such is the case with private, for-profit prison shareholders and CEO’s—where businessmen are becoming wealthy, “through government help,” at the costs of more human beings being locked up in prison cells in the era of mass incarceration.¹¹⁵

Consider the fact that three private corporations have acquired nearly all the federal, state, and local government contracts to manage U.S. prisons: CoreCivic, (“CC”) formerly Corrections Corporation of America¹¹⁶, GEO Group, Inc. (“GEO”)¹¹⁷, and Management and Training Corporation (“MTC”).¹¹⁸ CC executives boast that they are “the nation’s largest owner of partnership correctional, detention and residential reentry facilities. . . . [claiming to be] a flexible and dependable partner for government for more than 30 years.”¹¹⁹ About “70,000 inmates in more than 70 facilities, the majority of which are company-owned, with a total bed capacity of more than 80,000,” have been directed to serve their sentences in the CC private prisons.¹²⁰ CC’s impact is broad, given the partnerships formed “with all three federal corrections agencies (The

¹¹¹ *Id.* at 2.

¹¹² *Id.*

¹¹³ *Id.* at 89.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2. *See generally* 2016 Annual Report, The GEO Group *supra* note 100.

¹¹⁶ Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, CORECIVIC, (OCT. 28 2016, 11:00 AM), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic>. CC was incorporated in 1983, receiving its first contract from the DOJ. *Id.*

¹¹⁷ *GEO Group History Timeline*, THE GEO GROUP, INC., http://www.geogroup.com/history_timeline (last visited July 1, 2017). GEO formed under the name Wackenhut Corrections Corporation in 1984. The company name was changed to The GEO Group, Inc. in 2003. *Id.*

¹¹⁸ *MTC Corrections: Rehabilitating Offenders*, MTC, <http://www.mtctrains.com/corrections/> (last visited July 1, 2017).

¹¹⁹ *CoreCivic 2016 Annual Report on Form 10-K*, CORECIVIC, <http://www.cca.com/investors/financial-information/annual-reports>, (last visited July 1, 2017).

¹²⁰ *About CCA: Who We Are*, CORECIVIC, <http://www.cca.com/who-we-are> (last visited July 1, 2017).

Federal Bureau of Prisons, the U.S. Marshals Service, and Immigration and Customs Enforcement), many states and local municipalities.”¹²¹ Revenue generated by CC, in 2016, totaled \$1,849,785, while reports of inadequate medical care, poorly managed facilities, and inadequate resources for prisoners serving out their time at the big-three private prisons continued to catapult—a glaring example of companies pushing profits, while “shrug[ing] off social responsibility.”¹²²

CC President and CEO, Damon T. Hininger, wrote a letter to his “fellow shareholders” in 2015, emphasizing that CC “provided meaningful growth opportunities [in 2015] that required capital investment in corrections and detention capacity with demand coming from both state and federal partners . . . [and there are long-term] attractive growth opportunities with stable, growing cash flow driving attractive dividend yield.”¹²³ Hininger ensured the shareholders that the “strategies for growth” that CC had implemented would be beneficial, since the company was providing “solutions to existing and new government partners.”¹²⁴ Despite Hininger’s occasional references to “government partners . . . [and] individuals entrusted in our care,” CC’s overall objective, as the letter expresses, is the need to expand the corporate holdings and cash flow.¹²⁵

GEO’s Chairman of the Board, Chief Executive Officer (“CEO”), and Founder, George C. Zoley, boasted that his company’s “total revenues increased in 2015, to \$1.84 billion from \$1.69 billion a year ago,” with “net earnings increasing to \$368.7 million.”¹²⁶ Reported earnings for 2016 increased to \$2.18 billion.¹²⁷ CEO Zoley begins his letter to the GEO Shareholders promoting the company’s profitmaking goals. He writes:

In 2016, we took significant steps to strengthen our position
as the world’s largest provider of correctional, detention,

¹²¹ *Id.*

¹²² *Id.*, SHAANAN, *supra* note 108, at 89; *see infra* at Part III for a discussion of the abuses, failures, and poorly managed private prison facilities.

¹²³ Letter from CoreCivic President and CEO, Damon T. Hininger, to CoreCivic Shareholders (2015) http://media.corporate-ir.net/media_files/IROL/11/117983/2015%20Annual%20Letter%20to%20Shareholders%20-%20Final.pdf.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ GEO-THE GEO GROUP, INC., 2015 ANNUAL REPORT 3, <https://www.sn1.com/interactive/lookandfeel/4144107/2015AnnualReport.pdf>.

¹²⁷ GEO-THE GEO GROUP, INC., 2016 ANNUAL REPORT 3, <http://www.sn1.com/Interactive/newlookandfeel/4144107/2016-GEO-Annual-Report.pdf>.

and community reentry services. During the year, our company achieved several financial and operational milestones, and our companywide performance reached new highs driven by strong results from our diversified business units of GEO Corrections & Detention and GEO Care.¹²⁸

When research for this article was initiated in 2016, GEO's website reported that the company, through its partnership with the federal, state, and local government, "oversees the operation and management of approximately 66,500 beds in 58 correctional and detention facilities [in the United States.]"¹²⁹ GEO's 2017 website data reports a substantial increase in beds and facilities, rising to "75,000 beds in 70 correctional and detention facilities," despite the fact that the Bureau of Justice Statistics reports a slight 2% decrease of prisoners imprisoned in the 2015 U.S. prison population.¹³⁰

Additionally, CEO Zoley enthusiastically reports "276,000 admissions and 267,000 releases" in corrections and detentions in 2016.¹³¹ It is worth noting, that during this same period, when Zoley and his company shareholders succeeded in processing voluminous admissions and filling to full capacity their private prison beds to increase profits, criminal justice reformers were endeavoring to decrease the massive United States prison population and the persistent growth of private prisons. Clearly, the noted data, reflecting private prisons' aggressive, deliberate pursuit of full capacity private prisons, in order to ensure a consistent increase in private prison profits, establishes the profit-seeking objective of private prison company executives and shareholders. Their purpose directly contradicts criminal justice reformers social justice purpose—the reformers strive to reduce prison overcrowding and end government contract awards to private companies in the disgraceful age of mass incarceration.

Interestingly, in his 2016 letter to shareholders, CEO Zoley states that GEO staff were successfully "managing an average daily population of

¹²⁸ *Id.*

¹²⁹ *GEO: Management & Operations*, THE GEO GROUP, INC.,

http://www.geogroup.com/Management_and_Operations (last visited Jan. 20, 2017).

¹³⁰ *Id.*; see E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, NCJ 250229, PRISONERS IN 2015 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>. The report notes the decreased prison population from December 2014 to December 2015.

¹³¹ *GEO: Management & Operations*, THE GEO GROUP, INC.,

http://www.geogroup.com/Management_and_Operations (last visited Jan. 20, 2017).

more than 60,000 individuals throughout the year without any significant incidents at our facilities across the United States.”¹³² Zoley’s contention, however, is disputed by several notable reports of abuse and egregious incidents that occurred in 2016, and earlier years at GEO facilities in the United States.¹³³ Indeed, the large numbers of reported infractions and violations, led to the 2016 DOJ Office of Inspector General (“OIG”) review of private prisons.¹³⁴

E. Laws Authorizing Private Prisons

Congress has not proposed or enacted legislation specifically authorizing the federal government to issue contracts to private prisons—for operation, management, and in some instances, ownership of the facilities; although, as discussed earlier, the BOP routinely awards private prison contracts pursuant to their authorized procedures. Among others, the BOP contract awards are administered in accordance with the following pertinent regulations and procedures:

The BOP’s contracting process is governed by the Federal Acquisition Regulations (FAR) and the Justice Acquisition Regulations. The BOP’s acquisition policy supplements the FAR and the Justice Acquisition Regulations and provides uniform acquisition procedures. Contractors must comply with all applicable federal, state, and local laws and regulations, as well as all applicable executive orders, case laws, and court orders. In addition, contractors must follow a number of BOP policies and requirements as defined in their contracts. One specific requirement applicable to all contract prisons is obtaining and maintaining accreditation from the American Correctional Association (ACA) and the Joint Commission on Accreditation of Healthcare Organizations.¹³⁵

¹³² GEO-THE GEO GROUP, INC., 2016 ANNUAL REPORT 3, <http://www.sn1.com/Interactive/newlookandfeel/4144107/2016-GEO-Annual-Report.pdf>.

¹³³ See *infra* Part III, for more details of private prison abuse at GEO facilities.

¹³⁴ The OIG findings, generally unfavorable, are examined in this Article, at Part III. In addition, MTC is the third largest private prison corporation, employing “8,446 people worldwide.” *MTC Rehabilitating Offenders*, MTC, http://www.geogroup.com/history_timeline (last visited July 1, 2017) See *infra* at Part III for a discussion of the MTC private prison corporation’s failures.

¹³⁵ EVALUATION & INSPECTIONS DIVISION 16-06, OFF. OF THE INSPECTOR GEN., U.S.

Only a small number of states, such as the state of Illinois, prohibit private prisons through legislation.¹³⁶ In fact, thirty or more states have enacted legislation authorizing government contracts with private prison business owners—for operation, management, and in some instances, ownership of the facilities.¹³⁷

In the mid-1980's, when state and federal government contracts were awarded to the private sector, observers, including those in academia, believed that the contracts would be revoked—many scholars predicted successful legal challenges and other minefields. The presumption was understandable, given the odd circumstance of private, for-profit corporations managing facilities that, arguably, should be operated and managed solely by the government.¹³⁸ Legal challenges raised, however, have generally been unsuccessful, thus, allowing the trend of private businessmen running prisons to proceed.

The non-delegation doctrine¹³⁹ has often been raised by private prison opponents—the doctrine developed from the Due Process Clause of the Fifth and Fourteenth Amendments, and Article I, § 1, of the United States Constitution: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁴⁰ However, the United States Supreme Court has concluded that delegation of various functions to the private sector is constitutional; as such, the non-delegation doctrine has not prevented government contract awards to private prisons.¹⁴¹

In addition to the non-delegation doctrine, for several decades, the most significant legal challenge waged against private prisons related to concerns that prisoners serving time in private prisons could have their constitutional rights violated without access to legal remedies. Private prison opponents considered the following question: Whether prison

DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 6 (2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹³⁶ 730 ILL. COMP. STAT. ANN. 140.

¹³⁷ See, e.g., COLO. REV. STAT. ANN. § 17-1-201(1) (West 2008); FLA. STAT. ANN. § 994.715(1) (West 2009); IND. CODE ANN. § 31-9-2-115(a) (West 2009).

¹³⁸ See generally TABARROK, *supra* note 21.

¹³⁹ The non-delegation doctrine is generally defined as “[t]he principle in administrative law that

congress cannot delegate its legislative powers to agencies.” *Nondelegation Doctrine*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine (last visited Feb. 1, 2017).

¹⁴⁰ U.S. CONST. art. I, § 1.

¹⁴¹ See Ira P. Robbins, *The Impact of the Nondelegation Doctrine on Prison Privatization*, 35 UCLA L. Rev. 911, 916 (1988).

officials employed in private prisons could be sued by inmates for violations of their Eighth Amendment rights under the United States Constitution. The United States Supreme Court considered the Eighth Amendment rights of private prison inmates in 2012, and in an 8-1 decision, the Court issued its holding in *Minneeci v. Pollard*, ruling, as follows:

Where, 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.¹⁴²

While prisoners generally may pursue the state tort law option, private prison opponents have voiced concerns about the *Minneeci* majority court ruling—opponents’ misgivings resonated in Justice Ginsburg’s *Minneeci* dissenting opinion. Justice Ginsburg wrote:

Were Pollard incarcerated in a federal-or state-operated facility, he would have a federal remedy for the Eighth Amendment violation he alleges. For the reasons stated in the dissenting opinion I joined in *Correctional Services Corp. v. Malesko*, I would not deny the same character of relief to Pollard, a prisoner placed by federal contract in a privately operated prison. Pollard may have suffered “aggravated instances” of conduct state tort law forbids, but that same aggravated conduct, when it is engaged in by official actors, also offends the Federal Constitution. Rather than remitting Pollard to the “vagaries” of state tort law, I would hold his injuries, sustained while serving a federal sentence, “compensable according to uniform rules of federal law.”¹⁴³

As private prison contracts continue to be issued by the government, additional legal challenges are likely, particularly considering the heightened public attention directed towards privately operated prisons during the 2015–2016 presidential campaign. In 2015, former presidential candidate, Senator Bernie Sanders, and Representatives Raul Grijalva,

¹⁴² *Minneeci v. Pollard*, 565 U.S. 118, 130 (2012).

¹⁴³ *Id.* at 130-31.

Keith Ellison, and Bobby Rush co-sponsored the *Justice is Not For Sale Act of 2015*.¹⁴⁴ The proposed bill sought to ban all of the nation's for-profit, private prisons.¹⁴⁵ The legislation was removed from the Congressional list of pending bills because it was not enacted before Congress concluded the term session that began January 2015 and ended January 2017—however, the bill was reintroduced on July 13, 2017; “[i]t will typically be considered by committee next before it is possibly sent on to the House or Senate as a whole.”¹⁴⁶

III. ARGUMENTS PROMOTING PRIVATELY OPERATED FOR-PROFIT PRISONS

This Article's examination of arguments in support of private, for-profit prisons is considerably shorter than the examination of arguments in opposition to private prisons. The abbreviated discussion is not intended to downplay arguments made by private prison proponents—rather, there are significantly fewer solid arguments made in support of private prisons. In fact, there is only one prominent argument that is consistently made in support of private, for-profit prisons and, not surprisingly, it relates to money—the costs related to building and managing prisons. Indeed, for several years, federal, state, and local bureaucrats argued that government contracts awarded to private businessmen to operate and manage prisons reduce agency costs.¹⁴⁷ While some scholars agree with the government officials' cost savings assessment, others, citing a GAO 2007 study, argue that, at least for federal private prisons, “[a] methodologically sound cost comparison analysis of BOP and private low and minimum security facilities is not currently feasible because BOP does not gather data from private facilities that are comparable to the data collected on BOP

¹⁴⁴ JUSTICE IS NOT FOR SALE ACT OF 2015, H.R. 3543, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3543>.

¹⁴⁵ *Id.* The bill also addresses the quota imposed on Immigration and Customs to fill thousands of beds in private prisons, and proposes changes to private entities profiting from telephone services provided to inmates.

¹⁴⁶ JUSTICE IS NOT FOR SALE ACT OF 2015, H.R. 3543, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/hr3543>; see JUSTICE IS NOT FOR SALE ACT OF 2017, H.R. 3227, 115th Cong. (2017), <https://www.govtrack.us/congress/bills/115/hr3227>.

¹⁴⁷ See generally JAMES AUSTING & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, NCJ 181249, EMERGING ISSUES ON PRIVATIZED PRISONS 15-18 (2001) <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

facilities.”¹⁴⁸ Nevertheless, researchers studying private prisons generally agree that private prison buildings are constructed in less time than government facilities and at a lower price.¹⁴⁹ Faced with rising prison populations, sparked from the War on Drugs and subsequent crime control legislation, the government responded to the need to quickly find enough facilities and beds to house the burgeoning number of offenders. Faster construction and cost savings generated from private sector prisons supports proponents’ argument that more private prisons should be owned and operated by the private sector.¹⁵⁰

Further, private prison proponents, particularly the big-three corporate CEO’s, maintain that when new prisons are built the economy improves, as new jobs are generally offered to citizens in communities where private prisons are constructed.¹⁵¹ Another argument made in support of private prisons is the concept that, because private prison contracts are easier to cancel, performance goals and outputs from staff will be exemplary because the threat of losing a private prison contract will improve the quality of work performed; and, the argument is made, that inmates are provided better living facilities than government-run prisons.¹⁵²

Some of the noted proponent arguments might have seemed reasonable when private prisons were first initiated in the early 1980’s. However, from 2001-2015, studies began to reflect the failures of privately operated and managed prisons, as Part III establishes.

IV. ARGUMENTS OPPOSING PRIVATELY OPERATED FOR-PROFIT PRISONS—FAILURES AND NEGATIVE CONSEQUENCES

Federal, state, and local government officials emphasize, that the most pressing matter impacting the decision to award contracts to private, for-profit prison corporations, concerns the need to address the challenges associated with overcrowded prisons. Even so, many criminologists, reformers, and scholars question the propriety of the government shifting

¹⁴⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMMITTEES ON COMMERCE, JUSTICE, AND SCIENCE, SENATE AND HOUSE APPROPRIATIONS COMMITTEES (2007) <https://www.gao.gov/assets/270/267843.html>. See Friedmann, *Apples-To-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URBAN L.J. (2016).

¹⁴⁹ TABARROK, *supra* note 21, at 87.

¹⁵⁰ *See id.*

¹⁵¹ *See generally* TABARROK, *supra* note 21, at 130-131.

¹⁵² *Id.*; James Austin & Gary Coventry, *Emerging Issues on Privatized Prisons*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

responsibility to the private sector to perform essential governmental functions related to correctional operations.¹⁵³

Concerns are raised about the huge amount of funds awarded to private companies, with some of the funds supporting the immense salaries of company CEO's and making shareholders wealthy. Criminal Justice reformers who oppose private prisons cite innumerable contract failures, including substandard management, abuses inflicted upon private prison inmates, the inability to effectively address the exceptional needs of female prisoners, the negative and disproportionate impact that building more private prisons has on communities of color and notably, disturbing policies and practices that promote and further the overpopulation of prisons to generate profits. The dilemma of overcrowded prisons, officials note, was central to "[t]he [federal] BOP's annual expenditures on contract prisons increasing from approximately \$562 million in fiscal year (FY) 2011 to \$639 million in FY 2014."¹⁵⁴

In early 2016, the Department of Justice OIG began a review to determine how the BOP "monitors" facilities operated by the CCA, GEO, and MTC. The review was long overdue given the number of federal prisoners housed in private BOP facilities since contracts were first awarded in 1997, and considering the numerous problems that have occurred in BOP contract prisons the past several years. Notable incidents include:

2008 and 2009 riots at the Reeves County Detention Center, assaults on prison staff in 2011 at the Big Springs Correctional Center, a killing of a prison officer and innumerable other injured people in 2012 at the Adams County Correctional Center—"the disturbance involved approximately 250 inmates who . . . [reportedly] were angry about low-quality food and medical care," – and a 2015 incident where the Willacy County Correctional Center was severely damaged following fires set by disgruntled inmates.¹⁵⁵

¹⁵³ Gabriel Eber & Margaret Winter, *Private Prisons Are the Problem, Not the Solution*, ACLU (Apr. 30, 2012, 4:38 PM), <https://www.aclu.org/blog/private-prisons-are-problem-not-solution>.

¹⁵⁴ See DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, 16-06, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS (2016), available at <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁵⁵ *Id.*

In addition to assessing how BOP monitors private prison facilities, the OIG review gathered data from “2011-2014”.¹⁵⁶ The investigation considered “whether contractor performance meets certain inmate safety and security requirements and analyzed how contract prisons and similar BOP institutions compare with regard to inmate safety and security data.”¹⁵⁷ To reach the glaring conclusions cited in the investigation report, the OIG collected and analyzed data from 14 contract prisons that were operational during the period of . . . review and from a select group of 14 BOP institutions with comparable inmate populations to evaluate how the contract prisons performed relative to the selected BOP institutions.”¹⁵⁸ OIG data was gathered from a review of eight specific areas: “contraband, reports of incidents, lockdowns, inmate discipline, telephone monitoring, selected grievances, urinalysis drug testing, and sexual misconduct.”¹⁵⁹ The OIG reached the following conclusions:

[T]hat in a majority of the categories we examined, contract prisons incurred more safety and security incidents per capita than comparable BOP institutions. OIG site visits revealed safety and security concerns and inappropriate housing assignments. While the contract prisons had fewer positive inmate drug tests and sexual misconduct allegations than BOP institutions they had more frequent incidents of contraband finds, assaults, uses of force, lockdowns, guilty findings on inmate discipline charges, and selected categories of grievances. BOP contracts place the responsibility for quality control on the contractor rather than on the BOP. BOP’s monitoring of contract prisons needs improvement.¹⁶⁰

The OIG findings were disturbing, though not surprising to many reformers, criminologists, and scholars who had—for several decades—argued that private prisons create more problems than they solve. Thus, the investigation, ostensibly, confirmed many of the reformers concerns, that private prisons are poorly managed and staff are not accountable to BOP quality control oversight.

The OIG report presents clear and regrettable examples of mismanagement of staff, operations, and contract funds, and inadequate

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

BOP monitoring of the facilities. Additionally, the audit also “found that the contractor had failed to comply with contractual requirements in the areas of billing and payment.”¹⁶¹ Arguably, the findings validate concerns raised by criminal justice reformers, who maintain that private prisons form mainly to make a profit, rather than using adequate funds and resources to provide prisoners proper medical care, necessities, and safe and secure facilities. For example, the report revealed that the GEO contractor could not validate a significant “3 million in costs that were either unallowable or unsupported or funds that should be put to better use.”¹⁶² It is unclear how the “unallowable or unsupported” funds were used. However, what is clear, is the fact that GEO Group Corporation, paid its CEO approximately \$6.6 million dollars in compensation, stocks, and bonuses in 2015, and a little more than \$5 million in 2016.¹⁶³

Regarding the BOP’s findings “that BOP facilities incurred more safety and security incidents per capita than comparable BOP institutions,” GEO’s Executive Vice President for Contract Compliance, Patricia McNair Persante submitted a written response to the BOP, offering an incredible explanation for why her company is unable to maintain safe and secure prisons. Persante complained, that the OIG failed to “include additional information on the differences in the [contract facilities] population demographics [from the BOP facilities] and its effects on the data analysis.”¹⁶⁴ She explained that GEO private prisons house “criminal aliens [primarily from Mexico] and not U.S. citizens,” which she claims, leads to a “very homogeneous” group of people who . . . responds as one to any issue, real or perceived.”¹⁶⁵ Persante insists that “this is a factor . . . as certain prohibited acts are higher in CAR [Criminal Alien Requirement] facilities for this reason and the need for facility lockdowns is higher”¹⁶⁶

Part of the exaggerated description, given by the GEO executive, is unsubstantiated, and some might argue, illogical. That is, while different

¹⁶¹ *Id.* at 2; *see id.* at 28-31, 32-34, 44-45.

¹⁶² *Id.*, at 2.

¹⁶³ U.S. SECURITIES AND EXCHANGE COMM’N, SCHEDULE 14A INFORMATION, THE GEO GROUP, INC. (2016), <https://www.sec.gov/Archives/edgar/data/923796/000119312516510415/d54235ddef14a.htm>,

(2015 salary details); U.S. SECURITIES AND EXCHANGE COMM’N, SCHEDULE 14A INFORMATION, THE GEO GROUP, INC. <http://pdf.secdatabase.com/2716/0001193125-17-087321.pdf> (2016 salary details).

¹⁶⁴ *See* DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, 16-06, *supra* note 154, at 72-73.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 73.

cultures may often form alliances and more willingly reach agreements amongst themselves than with people from a culture other than their own, it simply is unreasonable to suggest that a “very homogeneous group of people” will all agree on “any issue, real or perceived.” Over 80% of the population of prisoners in CAR GEO facilities (1,000 or more people) are from Mexico or Central America, serving time for immigration convictions.¹⁶⁷ Even accounting for the gang presence that Persante references, which may occasionally set the stage for group leaders controlling large groups of people, is it feasible that approximately 1,000 individuals, imprisoned at either of the applicable contract facilities, all agree “as one” on “any issue” placed before the group?

Like GEO, the executives for the other big contract prisons—CC and MTC—adopt Persante’s position, that the “homogenous foreign national population, will have a significant impact on rates of inmate misconduct.”¹⁶⁸ MTC executives added, that the OIG’s failure to address the homogeneous population that they serve led to “misleading information that made contract prisons appear to be more violent than public prisons—when they serve completely different populations.”¹⁶⁹ Their responses, however, do not include the extreme position taken by Persante, on behalf of GEO. It should be noted, also, that the OIG investigators acknowledge their belief that “a higher incidence of substantiated misconduct [at contract facilities housing federal prisoners] may be an indication of greater inmate behavioral challenges in contract facilities, which merits further analysis and action by the BOP.”¹⁷⁰ Even

¹⁶⁷ *Id.*, at 1, 73.

¹⁶⁸ *Id.* at 70; *see id.* at 76.

¹⁶⁹ *M.T.C Corrections Position Statement* CHLOE NORDQUIST, JUSTICE DEPARTMENT CONSIDERING NO CONTRACT RENEWALS FOR PRIVATE PRISONS, INCLUDING TAFT (Aug. 18, 2016) available at <https://www.turnto23.com/news/local-news/justice-department-considering-no-contract-renewals-for-private-prisons-includes-taft-prison>.

Professor Alexander, “Sasha” Volokh, is among the scholars who questioned the O.I.G.’s findings, noting concerns about various sections of the report, including criticizing the O.I.G for not sufficiently considering the demographic population in the contract prisons. Volokh adopts the same position as the big-three private prison executives, albeit, his argument does not reach the exaggerated position that Persante articulated. SASHA VOLOKH, DON’T END FEDERAL PRIVATE PRISONS, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/19/dont-end-federal-private-prisons/?utm_term=.463d4db3d438 (last visited Jan. 2, 2018).

¹⁷⁰ *See* DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, 16-06, *supra* note 154, at 22. The O.I.G report notes, that G.E.O, C.C, and M.T.C “corrected the safety and security deficiencies that the B.O.P identified,” which kept their contracts from being revoked while they were under review by the O.I.G. *Id.*

so, Persante's stereotypical description is extreme, as it is filled with implicitly biased, harmful stereotypes that potentially contribute to groups of people—in this case Mexicans—being stigmatized rather than addressing valid problems that may exist in regards to the large demographic population of individuals residing in the contract facilities.

In response to the troubling OIG report, it is noteworthy that the DOJ announced in August 2016, that it would move to reduce and eventually close all BOP private prison facilities. Nonetheless, when Attorney General Jeff Sessions was appointed by President Trump in February 2017, he reversed the August 2016 directive.¹⁷¹ As such, once again, private prisons housing federal prisoners, in addition to state and local contract prisons, are thriving and profiting from mass incarceration. It will take a concentrated plan and significant oversight to close the lucrative federal, state, and local private corporations that receive an immense amount of government funds each year to operate private prisons. Recommendations for ending private prisons are set forth in this Article's Part IV discussion.

In addition to safety and security concerns, noted in the OIG report, there were due process violations, as the OIG found that some newly committed prisoners were “improperly” placed in Special Housing Units commonly designated for unruly prisoners, or those who needed “administrative segregation.”¹⁷² The restrictions placed upon prisoners housed in the special units include “restricted and controlled movements; limited access to programs such as educational or vocational programs, as well as work details; and limited telephone calls.”¹⁷³ The men and women placed there had not committed any infractions—they were simply there because they were new arrivals and beds were not available in the general unit.¹⁷⁴ The OIG found that the practice was initiated because of the lack of available beds, “contrary to both ACA [American Correctional Association] standards and BOP policies.”¹⁷⁵ As journalists James Ridgeway and Jean Casella note:

Serving time in prison is not supposed to be pleasant. Nor, however, is it supposed to include being raped by fellow

¹⁷¹ See JEFFERSON B. SESSIONS III, OFFICE OF THE ATT'Y GEN., MEMORANDUM FOR THE ACTING DIRECTOR FEDERAL BUREAU OF PRISONS (2017), available at <http://www.politico.com/f/?id=0000015a-6d3f-d49b-a77a-7fbf234a0001>.

¹⁷² See DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, 16-06, *supra* note 152, at ii.

¹⁷³ *Id.* at 29.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

prisoners or staff, beaten by guards for the slightest provocation, driven mad by long-term solitary confinement, or killed off by medical neglect. These are the fates of thousands of prisoners every year—men, women, and children housed in lockups that give Gitmo and Abu Ghraib a run for their money.¹⁷⁶

Notably, while some private prisons provide for a specified number of prisoners to be housed in the contract facilities, other private prisons' profits increase based on their ability to fill the institutions' beds with prisoners. Both approaches lead to maximum profits for the corporations that oversee the prisons. And in the latter situation, since the prospect of increasing profits for shareholders and paying higher salaries to executives is based on the number of beds filled at each contract facility, it is not likely that corporate staff will consistently turn down the opportunity to accept additional prisoners, even if the facilities are ill-equipped to meet the needs of the increased number of occupants.

In November 2014, journalist Shane Bauer applied for jobs at several private prisons, "to see the inner workings of an industry that holds 131,000 of the nation's 1.6 million prisoners."¹⁷⁷ Specifically, Bauer wrote:

As a journalist, it's nearly impossible to get an unconstrained look inside our penal system. When prisons do let reporters in, it's usually for carefully managed tours and monitored interviews with inmates. Private prisons are especially secretive. Their records often aren't subject to public access laws; CCA has fought to defeat legislation that would make private prisons subject to the same disclosure rules as their public counterparts. And even if I could get uncensored information from private prison inmates, how would I verify their claims? I keep coming back to this question: Is there any other way to see what really happens inside a private prison?¹⁷⁸

¹⁷⁶ James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Reeves County*, MOTHERJONES (May 10, 2013), <http://www.motherjones.com/politics/2013/05/americas-10-worst-prisons-reeves-county-detention-complex/>.

¹⁷⁷ Shane Bauer, *My Four Months as a Private Prison Guard, Part One: Applying to CCA*, MOTHERJONES (July 10, 2017), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/>.

¹⁷⁸ *Id.*

When Bauer applied for the private prison jobs, he did not use an undercover name, or alter his resume to conceal the fact that he worked for the Foundation for National Progress—the organization that publishes *Mother Jones*.¹⁷⁹ With a quick Internet search or brief background check, (Bauer used his actual social security number) it would have been obvious that Bauer works for an organization that has written extensively about the problems in private prisons, generally condemning their existence.¹⁸⁰ Bauer was offered a job at the CCA (now known as CoreCivic (CC)). He accepted the position and worked at the Winn Correctional Center, “a CCA-run Louisiana prison, [for several months] and then . . . [Mother Jones staff] spent 14 more months reporting and fact-checking.”¹⁸¹ Bauer’s reported findings are astounding and eye-opening for all. Particularly revealing are the executives’ and staff officials’ numerous references made about the lack of experience needed to gain employment at CC private prisons. Bauer learned the following facts during in person and video-recorded training sessions, and from fact-checking details about CC’s operations:

I studiously jot down notes as the HR director fires up a video of the company’s CEO, Damon Hininger, who tells us what a great opportunity it is to be a corrections officer at CCA. Once a guard himself, he made \$3.4 million in 2015, nearly 19 times the salary of the director of the Federal Bureau of Prisons.¹⁸²

Regarding staff qualifications and the profit-seeking mission of private prisons, Bauer learned these facts:

¹⁷⁹ See *What is Mother Jones?* MOTHERJONES, <http://www.motherjones.com/about/> (last visited July 15, 2017). MOTHERJONES operates through reader-supported donations, with a full staff dedicated to “independent and investigative reporting.” *Id.* MOTHERJONES maintains, that “Our only bias is for the truth. When it’s in the public interest, we investigate anyone, regardless of political persuasion. We also have one of the most rigorous fact-checking and verification protocols in the industry.” *Id.* The nonprofit organization, which has been in operation for 40 years, was named after Mary Harris “Mother” Jones—an activist who “fought for the underdog, [and] battled child labor.” *Id.*

¹⁸⁰ Clara Jeffery, *See Why We Sent a Reporter to Work as a Private Prison Guard*, MOTHERJONES (Aug. 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-investigative-journalism-editors-note/>.

¹⁸¹ *Id.*

¹⁸² Shane Bauer, MY FOUR MONTHS AS A PRIVATE PRISON GUARD, CHAPTER 1: INMATES RUN THIS BITCH (Dave Gilson, ed., MotherJones 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/>.

People say a lot of negative things about CCA,” the head of training, Miss Blanchard, tells us. “That we’ll hire anybody. That we are scraping the bottom of the barrel. Which is not really true, but if you come here and you breathing and you got a valid driver’s license and you willing to work, then we’re willing to hire you.” She warns us repeatedly, however, that to become corrections officers, we’ll need to pass a test at the end of our four weeks of training. We will need to know the name of the CEO, the names of the company’s founders, and their reason for establishing the first private prison more than 30 years ago. (Correct answer: “to alleviate the overcrowding in the world market.”)¹⁸³

Thomas Beasley and T. Don Hutto are the founders of CC.¹⁸⁴ Bauer watched a video while attending a CC training session in which Beasley discussed the private prison business method—a simple process, as he sees it. In a magazine interview in 1988, Beasley stated: “You just sell it like you were selling cars, or real estate, or hamburgers.”¹⁸⁵ Bauer’s assessment of Beasley’s statement: “Beasley and Crants ran the business a lot like a hotel chain, charging the government a daily rate for each inmate. Early investors included Sodexho-Marriott and the venture capitalist Jack Massey, who helped build Kentucky Fried Chicken, Wendy’s, and the Hospital Corporation of America.”¹⁸⁶

For the CC private prison CEO to receive a multi-million-dollar salary that is 19 times higher than the BOP director—who manages the nation’s largest population of federal prisoners—it is worth pausing to ponder:

What level of knowledge and skills does CEO Hininger and the other big-three private prison CEO’s bring to prison operations and management to merit the gargantuan amount of annual taxpayer money paid? And what skills are required to gain employment as a correctional officer at one of the big-three facilities that receive about \$639 million in government contracts for operations and expenses annually?¹⁸⁷ Moreover, under the leadership of the big-three, private prison company CEO’s, have contract/private prisons met the requirements of providing safe and secure

¹⁸³ *Id.* at Chapter 2: Prison Experiments.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, 16-06, *supra* note 152, at ii.

facilities, are the prisons adequately staffed, and are prisoners receiving adequate medical care, and so forth?

The 2016 BOP OIG report was discussed earlier to provide a general overview of private prisons' breaches of responsibility owed to the prisoners that they house, and to address the fiscally irresponsible designation of government money. However, to fully grasp the gravity of the matter at hand—the dangers, abuses, and failures of the government privatizing what should remain a function of the federal or state government—this Article examines the horrendous operations, management, living conditions, and lawsuits at two private prisons: Reeves County Detention Center (“Reeves”) and Walnut Grove Youth Correctional Center. The incidents and investigations examined all stem from facilities owned, operated, and managed by two of the big-three, private prison corporations—GEO and MTC.

Reeves is one of the BOP's largest and earliest private contractors; therefore, for this Article's examination of private prisons, a glimpse of the conditions at Reeves provides a useful assessment of how federal private prisons are functioning and addressing the needs of the prisoners housed in their facilities.

The Reeves County Detention Center, a private, for-profit prison owned and operated by the GEO Group and located in Pecos, Texas, received its first BOP contract in 2007.¹⁸⁸ GEO executives boast “Pecos is the seat of Reeves County in ‘far west’ Texas and home to . . . ‘the largest detention/correctional facility under private management in the world.’”¹⁸⁹ Reeves is populated with adult males who are not American citizens.¹⁹⁰ Prisoners at the facility are commonly referred to as criminal aliens because they are generally in detention for violating immigration laws.¹⁹¹ Facilities such as Reeves that house primarily house offenders of immigration laws, fall under the category designated as Criminal Alien Requirement prisons.¹⁹² Mass incarceration represents a cash-cow for private prisons, since revenues increase based on the number of people

¹⁸⁸ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS (Apr. 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>.

¹⁸⁹ Tom Barry, *A Death in Texas: Profits, poverty, and immigration coverage*, BOSTON REV., <http://bostonreview.net/us/death-texas> (last visited Jan. 2, 2018).

¹⁹⁰ *Id.*

¹⁹¹ See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS at ii (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁹² *Id.*

housed. Therefore, get tough on crime initiatives and mandatory sentencing laws that keep people in jail longer contribute to profits.

With stricter immigration laws implemented after the September 11, 2001 terrorist attacks, private prison profiteers seized the moment by acquiring multi-million-dollar government contracts. This increased the funds in existing contract awards that were awarded to build more prisons to hold the burgeoning population of individuals convicted for violating immigration laws. As the private prisons' businesses grew, so did the list of complaints about poor operations and substandard facilities. The list of problems at the Reeves private prison is so lengthy, that even proponents of private prisons should avoid arguing that the executives and staff employed there are providing beneficial services to society and the CAR facility prison population. Thus, after decades of complaints received about Reeves, DOJ OIG went to the facility to review the operations and management procedures. The OIG findings were alarming—there were safety and security glitches, and problems with the medical care that prisoners received, among others concerns. Many problems stemmed directly from the BOP's dereliction of its monitoring responsibilities.¹⁹³

Among others, significant deficiencies included two riots within a short period of time—December 2008 and January 2009—where poor staffing was found to be a contributory factor.¹⁹⁴ In other words, if the Reeves facility had been properly staffed, and other quality control measures had been met, the riots may not have occurred. One Texas official passed by the facility on the evening of the second riot, and after seeing smoke coming from the town, she stated: “The prison is burning again.”¹⁹⁵

The second prison fire was alleged to have started over prisoners' angry reactions following the death of a fellow prisoner—who died and was removed from the facility in what was presumed a “large black trash bag.”¹⁹⁶ The deceased prisoner, Jesus Manuel Galindo, was kept in solitary confinement before he died, despite his mother's daily calls to advise prison officials that her son “was suffering from severe seizures in

¹⁹³ See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS at ii (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁹⁴ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS (Apr. 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>.

¹⁹⁵ BARRY, *supra* at 189.

¹⁹⁶ *Id.*

the ‘security housing unit.’”¹⁹⁷ When prison officials finally responded to Galindo’s mother’s calls, they simply chose to “offer him Tylenol—and to move him out of isolation so he could get help quickly when he had seizures.”¹⁹⁸

In late 2010, the ACLU, representing Galindo’s estate, filed a lawsuit against GEO, the BOP, and the contractor that provided the inadequate medical treatment. The ACLU alleged “federal constitutional and/or state tort claims” against the officials for the “paucity of medical staffing; inadequate medical supervision, training, and quality-control; and a lack of medical observation beds.”¹⁹⁹

Given the millions of dollars awarded to Reeves annually to pay salaries, provide staff training, and manage the facility operations, it is inexcusable that officials failed to adequately staff the facility compounds, endangered the lives of innumerable prisoners, and jeopardized the safety of the prison staff. It is reported that GEO’s revenue totaled \$1.69 billion in 2014 with \$143.8 million in net income profits.²⁰⁰ However, it is apparent that the huge revenues were not being used to bring in a full, well-trained staff to ensure that the facilities are safe since even the BOP OIG review of Reeves established that “[w]hile low staffing levels alone were not the direct cause of the disturbances, they directly affected Security and Health Services functions.”²⁰¹

Like the federal BOP contract prisons, state private prison facilities have also been plagued with failures. A compelling New York Times headline—*Privately Run Mississippi Prison Called a Scene of Horror, Is Shut Down*—draws attention to the egregious private prison debacle.²⁰²

¹⁹⁷ *Id.*

¹⁹⁸ James Ridgeway & Jean Casella, *America’s 10 Worst Prisons: Reeves County*, MOTHERJONES,

<http://www.motherjones.com/politics/2013/05/americas-10-worst-prisons-reeves-county-detention-complex/> (last visited July 10, 2017).

¹⁹⁹ First Amended Complaint, *Galindo et al v. Reeves County et al.* (W.D. Tex. 2011), <https://assets.documentcloud.org/documents/686795/jesus-galindo-lawsuit.txt>. The results of the lawsuit filed are unknown. It is probable that a confidential settlement was entered.

²⁰⁰ 2015 ANNUAL REPORT, THE GEO GROUP, INC. 3

<https://www.sn1.com/interactive/lookandfeel/4144107/2015AnnualReport.pdf> (last visited Jan. 20, 2017).

²⁰¹ *Id.*; see U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS (Apr. 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>.

²⁰² Timothy Williams, *Privately Run Mississippi Prison Called a Scene of Horror, Is Shut Down*, N.Y. TIMES (Sept. 15, 2016),

The newspaper article addresses several horrifying incidents that occurred at the state-funded, private prison—Walnut Grove Youth Correctional Facility (“Walnut Grove”) located in Walnut Grove, Mississippi.²⁰³

In 2012, the DOJ investigated the Walnut Grove Youth Correctional Center. The final report revealed several failures, mismanagement, abuses, and civil rights violations at the facility.²⁰⁴ Walnut Grove housed thousands of young offenders, ranging in age from 13-22 years old. Cornell Corrections was the first operational manager of the Walnut Grove facility, before GEO corporation received a contract from the state of Mississippi. MTC was the final contractor responsible for the facility at the time of its September 2016 closing.

Among other violations, the DOJ concluded that Walnut Grove prison officials did not report and were “deliberately indifferent to staff sexual misconduct and inappropriate behavior with youth,” and that excessive force was used against inmates, and that inmate medical needs were not sufficiently addressed.²⁰⁵ The report emphasized that the sexual misconduct was the most egregious that DOJ staff had ever encountered.²⁰⁶ In September 2016, the Walnut Grove, Mississippi facility closed. The mission of prison officials is to provide care for the individuals housed in their facilities.²⁰⁷ In the United States, the Constitution prohibits the “infliction” of “cruel and unusual punishments” and provides each person with equal protection of the laws.²⁰⁸ Nevertheless, notable incidents from the Reeves private prison facility and Walnut Grove, such as poorly staffed units and failure to provide proper medical care, suggest that the duty to provide humane care and meet the ACA requirements was breached.²⁰⁹

<https://www.nytimes.com/2016/09/16/us/mississippi-closes-private-prison-walnut-grove.html>.

²⁰³ *Id.*

²⁰⁴ See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, RE: DOJ INVESTIGATION OF THE WALNUT GROVE YOUTH CORRECTIONAL FACILITY (Mar. 2012),

<https://www.justice.gov/sites/default/files/crt/legacy/2012/04/09/walnutgrovefl.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See *About Us*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/about/> (last visited June 1, 2017).

²⁰⁸ See U.S. CONST. amend. VIII, XIV.

²⁰⁹ U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 AWARDED TO REEVES COUNTY, TEXAS TO OPERATE THE REEVES COUNTY DETENTION CENTER I/II PECOS, TEXAS (Apr. 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>; see First Amended Complaint, Galindo et al v. Reeves County et al. (W.D. Tex. 2011), <https://assets.documentcloud.org/documents/686795/jesus-galindo-lawsuit.txt>.

Further, if government officials were fully managing and staffing the Reeves and Walnut Grove facilities and other contract prisons—not just having a few onsite monitors, or having BOP or state monitors located offsite—they would be considered public servants, employed to serve the public and societal interests. But, as noted throughout this Article, private sector corporate executives are not public servants—their objective, by definition, is to maximize profits and advance the interests of their shareholders—not public service interests. And, GEO, CC, and MTC, are private, for-profit businesses. The companies' CEO's unreasonably high, multi-million-dollar annual compensation packages, in addition to the shareholders multi-million-dollar annual profits—awarded during the time that Reeves, Walnut Grove, and other private prisons were insufficiently staffed—is a solid warning, that a for-profit, private prison corporation's main objective is to maximize profits.

Therefore, since the CEO's seem to be guided by the pursuit of profit maximization, not public service objectives, any increased expenses needed to hire and train additional staff, provide prisoners good medical care, and so forth, will likely not be met, because to adequately meet those requirements, profits would be reduced. For that reason, it is appropriate that the BOP finally decided to close Reeves units 1 and 2 (leaving unit 3 open) effective July 31, 2017,²¹⁰ and that the Mississippi Department of Corrections closed the Walnut Grove facility in September 2016. Considering the substantiated list of complaints, riots, mismanagement, and lack of proper BOP monitoring of Reeves, and the State of Mississippi's monitoring of Walnut Grove over the past decade, the decision to close two units at Reeves and the Walnut Grove facility is long overdue. The facilities stand as grave examples of the destructive consequences that result from private businessmen using prisons to maximize profits—these facilities and many more with similar problems and incidents, give the opponents of private prisons substantial reasons to petition for the elimination of all federal, state, and local private prison contracts.

V. RECOMMENDATIONS TO END PRIVATE PRISONS

The Reeves and Walnut Grove facilities' events examined, and the DOJ OIG investigation of the federal BOP's monitoring of contract

²¹⁰ *County Judge: Two Units at Reeves County Detention Center to be Closed Indefinitely*, CBS7 (MAY 26, 2017), <http://www.cbs7.com/content/news/County-Judge-Units-1-and-2-at-Reeves-County-Detention-Center-to-be-closed-424694823.html>.

prisons report on private prisons, represent clear examples of failures that have occurred at privately operated prisons holding contracts with federal, state, and local governments. In addition to Reeves and Walnut Grove, other BOP, state, and local contract facilities are also reeking with problems and mismanagement.²¹¹ The violations that have occurred at private prisons have prompted prison advocacy groups, scholars, elected officials, and many reformers to issue appeals to federal, state, and local governments requesting that officials halt contracts issued to private prison corporations, and close all federal, state, and local private prison facilities.²¹²

There are definitive steps that the DOJ BOP and state and local officials should take. Foremost, regarding federal contracts issued to private prisons, Attorney General Jeff Sessions' directive to reauthorize BOP private prisons should be reversed, based on the failures, abuses, exploitation, and problems examined in this Article and other studies. Yet, just because something should happen does not mean that it will. Indeed, it is unlikely that the federal BOP or state and local private prison contracts will be terminated anytime soon, as many reformers remain concerned that the big-three corporations seem to have a great deal of influence, given their exorbitant campaign contributions,²¹³ extensive lobbying,²¹⁴ and close association with ALEC.²¹⁵ Nevertheless, ending

²¹¹ See generally U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, at ii (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

²¹² See *Attorney General Jeff Sessions must stop doing private prison companies' bidding*, COMMON CAUSE, http://www.commoncause.org/take-action/act/attorney-general-jeff-sessions-doing-private-prisons-bidding-department-of-justice.html?gclid=EAIaIQobChMIh-Tnjb-y1QIVCUwNCh2p0QIIEAMYASAAEgIOKPD_BwE?referrer=https://www.google.com/ (last visited June 1, 2017).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ ALEC is the acronym for the American Legislative Exchange Council. Here is how ALEC describes their mission:

The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism. Comprised of nearly one-quarter of the country's state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United States. *About Alec*, ALEC: AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/about/> (last visited June 1, 2017).

ALEC claims to be "a leader in criminal justice reform," insisting that the

private prisons can happen—but it will take time, and a concentrated, intentional focus on the issues and problems at hand.

This Article sets forth a few additional steps that could lead to a gradual decline and eventual ending of private prisons. First, consider the BOP OIG recommendations, made in August 2016:

To ensure that the contract prisons are, and remain, a safe and secure place for housing federal inmates, we recommend that the BOP: (1) Convene a working group of BOP subject matter experts to evaluate why contract prisons had more safety and security incidents per capita than BOP institutions in a number of key indicators, and identify appropriate action, if necessary. To improve monitoring and oversight of BOP contract prisons, we recommend that the BOP: (2) Verify on a more frequent basis that inmates receive basic medical services such as initial medical exams and immunizations. (3) Ensure that correctional services observation steps address vital functions related to the contract, including periodic validation of actual Correctional Officer staffing levels based on the approved staffing plan. (4) Reevaluate the checklist and review it on a regular basis with input from

organization “has brought state legislators and stakeholders together to combat the trend of unforgiving and harsh criminal laws.” *Criminal Justice Reform*, ALEC: AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/issue/criminal-justice-reform/> (last visited June 1, 2017). However, it has been reported by available sources that ALEC has worked closely with CC to influence state immigration legislation, so that CC and can fill its private prison cell beds to generate big profits. Mike Elk & Bob Stone, *The Hidden History of ALEC and Prison Labor*, THE NATION (Aug. 1, 2011), <https://www.alec.org/issue/criminal-justice-reform/>.

Moreover, many private prison opponents share the following view espoused by Lisa Graves, of the Center for Media and Democracy. She writes:

The American Legislative Exchange Council (ALEC) describes itself as the largest “membership association of state legislators,” but over 98% of its revenue comes from sources other than legislative dues, primarily from corporations and corporate foundations.[1] After the 2010 congressional midterm elections, ALEC boasted that “among those who won their elections, three of the four former state legislators newly-elected to the U.S. Senate are ALEC Alumni and 27 of the 42 former state legislators newly-elected to the U.S. House are ALEC Alumni.” Lisa Graves, *American Legislative Exchange Council*, THE CENTER FOR MEDIA AND DEMOCRACY-SOURCEWATCH, http://www.sourcewatch.org/index.php/American_Legislative_Exchange_Council (last updated Oct. 12, 2017).

subject matter experts to ensure that observation steps reflect the most important activities for contract compliance and that monitoring and documentation requirements and expectations are clear, including for observation steps requiring monitors to engage in trend analysis.²¹⁶

Even though the OIG's recommendations were made with the intent of improving private prisons—not fully ending them²¹⁷—if the recommendations are followed at each contract prison, pertinent information about basic medical services and other information will be discovered by BOP officials through the tighter monitoring procedures implemented. All federal and state officials should implement similar recommendations, and even stricter procedures than those in the OIG report when contracts are awarded to private prisons.

Specifically, the information gathered from tighter monitoring procedures should uncover abuses and problems, such as those outlined at the Reeves and Walnut Groves facilities, making violations of the ACA Declaration of Principles and other human rights violations known to the highest-level BOP and state officials in a timely manner, rather than at the time of a long-overdue inspection or facility audit. BOP and state on-site staff monitors would, therefore, be required to promptly report egregious findings to the top-level government officials (not simply make notations on a checklist) and prompt and efficient decisions would need to be made about revoking contracts where the standards of care, safety, security, and other objectives are violated.

Most studies that address the problems with private prisons focus, in large part, on the failures and conflicts related to the private corporations. Yet, it is advisable to not shift all focus to the private entities. Certainly, DOJ, the federal BOP, and the state and local officials that award the contracts bear much of the blame for the private prison debacle. Especially since private prisons could not continue to profit from the tragic conditions of mass incarceration if all federal, state, and local contract prisons were terminated or reduced after violations at the facilities are sufficiently monitored and uncovered by BOP and state officials. If the apparent plan, however, is to continue the contracts (despite the compelling innumerable examples of failures, abuses, and profit

²¹⁶ See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, at ii (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

²¹⁷ The decision issued by former Deputy Attorney General to begin the process of closing BOP private prison facilities was not made until after the BOP report recommended improvements. See *id.*

motivation at the expense of quality care) federal BOP and state officials' role in monitoring private prisons must not be subordinate. Those responsible for monitoring the contracts must employ the steps outlined above and additional processes as well, such as the following objectives:

In addition to having current on-site facility monitors, contracts awarded should have written terms giving high-level BOP and state officials the right to enter any private prison at any time, without notice, to conduct a review of a private prison facility's operations. And, the BOP and each state should appoint a private prison grievance review board responsible for reviewing all private prisoner grievances—this responsibility should not continue to be the primary responsibility of private prison staff.

Both the unannounced, random facility visits conducted by the BOP and states' top-level officials, and the oversight given to grievances filed, will contribute to better care, safety, and more secure private prison facilities. It may also lead to the eventual closing of facilities, as needed. Because, as noted, careful monitoring by the most accountable officials (generally the top-level supervisors who will conduct unannounced inspections), and the cooperative oversight of grievances filed should not only reveal areas that need improvement, but will likely expose problems and egregious facts. Information gathered from careful, tighter monitoring procedures will hold private prison staff, BOP, and state on-site monitors accountable for poor management and inadequately staffed facilities. It will also bring to light the voluminous, complex, and continuing problems occurring at private prisons. Random inspections and reports of violations are helpful in exposing the abuses and problems occurring at private prisons, unlike the previous monitoring plans initiated by on-site monitors—because even with the long BOP checklist used to record issues, the OIG found that the BOP monitoring needed improvement.

The recommended steps to end private, for-profit prisons outlined in this Article are not made in vain. The Author does not naïvely overlook the influence of groups like ALEC and private prisons' lobbying strategies and large campaign donations. Instead, the recommendations are made with the expectation that public persuasion and information are powerful tools, essential to the success or failure of the recommendations. That is, when an organization is scrutinized, investigated, and performance is properly reviewed and documented by appropriate top-level officials, workforce performance either improves or information of violations occurring is exposed to the public. In the case of private, for-profit prisons, careful, appropriate, high-level officials' random on-site monitoring will likely uncover significantly more violations that will be

revealed to the public. If that happens, particularly in this age of social media—where information is easily discoverable and transmitted through mediums like Facebook and Twitter—public awareness and outrage, coupled with what will likely be innumerable validated findings, could compel officials to reduce and take necessary steps to end the inappropriate arrangements of government public servants placing a vital public service mission in the hands of private sector businessmen whose objectives are to make money, not serve society.

Terminating all private sector prison contracts would improve society. Private businessmen simply should not be profiting from a social dilemma as disgraceful as the mass incarceration of human beings to keep beds filled and increase profit margins. Moreover, considering the number of abuses that have occurred in private prison facilities, if any additional facilities are closed, BOP and states should make prominent public announcements to notify the public of each closure. Well-publicized public announcements of closures will draw the public's attention to the problems occurring at private prisons. Thus, transparency is an important and necessary step in the process to end private prisons.

VI. CONCLUSION

The laws and practices that effectively opened the doors for private, for-profit prisons to operate and manage prisons, need to be reviewed—and in most cases abolished—before the Jim Crow caste system that Professor Alexander observed can be eliminated, given private, for-profit prisons' "stake in the expansion—not the elimination—of the system of mass incarceration."²¹⁸

This Article aimed to draw attention to the history of imprisonment in the United States after slavery was abolished, the increase in the numbers of African-Americans' in American prisons beginning in 1865, and the Thirteenth Amendment's prison slavery clause to reflect how innumerable African-Americans were incarcerated in earlier centuries for minor, unjust violations of the Black Codes and Jim Crow laws and then placed under the convict lease system of bondage.

This Article's examination of vital historical facts, laws, and practices should have caused readers to recognize that the United States government's unjust imprisonment of many African-American citizens throughout the nineteenth century significantly and unjustly enlarged the

²¹⁸ ALEXANDER, *supra* note 1, at 231.

American prison population. Additionally, this Article explored the persistent expansion of the prison population in the twentieth century, after the purported War on Drugs was initiated and promoted by several twentieth century presidents.

Some of the nation's historical events, laws, initiatives, and biased practices resulted in African-Americans being disproportionately represented in United States prisons, and America's unfortunate distinction of having the highest rate of incarceration in the world.²¹⁹ These circumstances contributed to the government's need to build more prison facilities, and the rise of private, for-profit prisons to help house the massive number of prisoners.

Finally, this Article aimed to enlarge the dialogue and detailed evaluation of private prisons by exploring arguments in support and opposition of profit-seeking businessmen forming corporations and managing prisons. The detailed examination laid the foundation for the conclusion reached—that the practice of outsourcing local, state, and federal prisoners to reside in private prisons must end, as the limited benefits gained are overshadowed by the destructive consequences generated from profit-seeking business owners acquiring and operating government prisons. Profiting from crime, punishment, and biased laws and practices should not have been allowed in the nineteenth century, via the convict lease system. Likewise, profiteers today should not be profiting from a social dilemma as disgraceful as the mass incarceration of human beings.

²¹⁹ *Id.*