

## ***Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex***

Patrice A. Fulcher\*

### **ABSTRACT**

The Prison Industrial Complex (“PIC”) is a profiteering system fueled by the economic interests of private corporations, federal and state correctional institutions, and politicians. The PIC grew from ground fertilized by an increase in the U.S. prison population united with an economically depressed market, stretched budgets, and the ineffective allocation of government resources. The role of the federal, state, and local governments in the PIC has been to allocate resources. This is the first of a series of articles exploring issues surrounding the PIC, including (1) prison privatization, (2) outsourcing the labor of prisoners for profit, and (3) constitutional misinterpretations.

The U.S. prison population increased in the 1980s, in part, because of harsh drug and sentencing laws and the racial profiling of Blacks. When faced with the problem of managing additional inmates, U.S. correctional institutions looked to the promise of private prison companies to house and control inmates at reduced costs. The result was the privatization of prisons, private companies handling the management of federal and state inmates.

This Article addresses how the privatization of prisons helped to grow the PIC and the two ways in which governments’ expenditure of funds to private prison companies amount to an inefficient allocation of resources: (1) it creates an incentive to increase the prison population, which led to a monopoly and manipulation of the market by Correction Corporation of America (“CCA”) and The GEO Group, Inc. (“GEO”), the top two private prison companies, and (2) it supports the use of Blacks as property, which in

---

\* Associate Professor, Atlanta’s John Marshall Law School. J.D., Emory University School of Law; B.A., Howard University. I am indebted to Professors Robert A. Brown and Kimberly D’Haene for providing valuable comments to initial drafts of this Article and their unending support and Professor Michele Butts and Attorney Marian Parker for their encouragement and remarks on final drafts of this Article. I would like to thank my colleagues Jonathan Rapping, Sheryl Harrison, Helen de Haven, Kathleen Burch, Anthony Baker, Elizabeth Jaffe, Bruce Luna, Erika Walker-Cash, and friends Jeanne Aikins, Cathy Bennett, Felice Jerrells, Gladys Pollard, and Sylvia Jones for their support and help with staying on task. I would like to thank my research assistant Chad Alexis for his fortitude and outstanding work and Ginger Fowler for her excellent assistance. Finally, I would like to thank my family, my husband Rick, and my children Marley and Trinity for their continued encouragement, love, and patience.

turn prevents Blacks from participating in future economic activities because they are labeled as felons.

This Article first discusses how the increased prison population led to the allocation of government resources to prison privatization. Second, it establishes how funding private prison companies helped to develop the PIC into an economic, for-profit “*hustle*” for the involved partners and stakeholders, herein after referred to as *players*. Third, it makes it easy to see the “*flow*” of inequities stemming from the “*hustle*” and how they are the result of inefficient allocation of government resources. Finally, in order to stop the “*hustle*” and change the “*flow*” of inequities, this Article calls for a moratorium on the privatization of U.S. prisons, the end of private prison companies, and a change in drug sentencing laws in order to reduce the prison population.

I. INTRODUCTION.....	591
II. THE U.S. PRISON INDUSTRIAL COMPLEX: FROM GROWTH TO <i>HUSTLE</i> .....	593
A. <i>Drugs Laws Expanding the Prison Population</i> .....	593
1. The “War on Drugs” .....	593
2. The Drug War’s Impact on Blacks .....	595
a. <i>Sentencing Disparities: Crack Cocaine vs. Powdered Cocaine</i> .....	595
b. <i>Racial Profiling</i> .....	596
B. <i>Governments Turn to Prison Privatization for Solutions</i> .....	597
C. <i>Prison Industrial Complex: The Hustle Begins</i> .....	598
1. Public Purpose Turns to Private Profits: The Players Revealed .....	598
2. Private Prison Operations and the “Take Over” by CCA and GEO .....	601
III. GOVERNMENT ALLOCATIONS TO PRIVATE PRISON MANAGEMENT CORPORATIONS: THE FLOW OF INEQUITY .....	603
A. <i>Creating Incentives to Increase the Prison Population and Monopolize the Market</i> .....	605
1. Strategizing to Maintain High Incarceration Rates: Less Prisoners Equals Less Earnings .....	606
2. Monopolizing the Market .....	609
B. <i>Black Inmates Reduced to Property Thus Affecting Their Future Participation in Economic Activities</i> .....	610
1. Blacks as Property .....	610
2. Blacks Excluded from Future Economic Participation .....	612
IV. CONCLUSION: STOP THE <i>HUSTLE</i> AND CHANGE THE <i>FLOW</i> .....	614
A. <i>Moratorium on Prison Privatization</i> .....	614
B. <i>Disband Private Prisons</i> .....	615
C. <i>Decrease the Prison Population</i> .....	616

## I. INTRODUCTION

The United States has about two million people behind bars,<sup>1</sup> which is the largest prison population in the world.<sup>2</sup> The United States also has the highest incarceration rate in the world, imprisoning 743 people per 100,000 of America's national population.<sup>3</sup> In comparison, China's prison population is second to America's with 1.65 million convicted people in prison,<sup>4</sup> with an incarceration rate of 122 people per 100,000,<sup>5</sup> and Russia's prison population is third, having imprisoned 0.81 million people,<sup>6</sup> with an incarceration rate of 568 people per 100,000.<sup>7</sup> Moreover, Rwanda's prison population is also considerably lower than the United States's with 62,000 people in prison,<sup>8</sup> but it has the second highest incarceration rate in the world, incarcerating 595 people per 100,000 of its population.<sup>9</sup>

From 1925 to 1975, the average U.S. incarceration rate was much lower; America incarcerated 110 inmates in prison per 100,000 of the national population.<sup>10</sup> However, the United States began to see an increase in the rate in which people were imprisoned in the late 1970s.<sup>11</sup> This increase was directly attributed to changes in U.S drug and sentencing laws<sup>12</sup> and not to an increase in crime.<sup>13</sup>

The change in drug laws increased the prison population and at the same time disproportionately increased the numbers of Blacks<sup>14</sup> imprisoned in the criminal justice system because they became the specific targets of the drug

---

1. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (Dec. 2011), <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

2. ROY WALMSLEY, INT'L CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (NINTH EDITION) 1, available at <http://www.scribd.com/doc/77097293/World-Prison-Population-List-9th-edition> (last visited June 7, 2012).

3. *Id.*

4. *Id.*

5. *Id.* at 4.

6. *Id.* at 1.

7. *Id.* at 5.

8. *Id.* at 2.

9. *Id.*

10. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*', N.Y. TIMES, Apr. 23, 2008, <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=1>.

11. *Id.*

12. *Id.*

13. See U.S CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT, TABLE 306. CRIMES AND CRIME RATE BY TYPE AND OFFENSE: 1980–2009 (2012), available at <http://www.census.gov/prod/2011pubs/12statab/law.pdf>. The U.S. crime rate for 1980 was 5,950 crimes per 100,000 people. There was a consistent drop in the crime rate from 1980 to 2009. In 1990, the rate was 5,803; in 2000, the rate was 4,125; and in 2009, the rate was 3,466 crimes per 100,000 of the population. Specifically, the total crime rate for violent crimes dropped from 597 per 100,000 of the population in 1980, to 429 per 100,000 in 2009; and the rate for property crimes dropped from 5,353 per 100,000 of the population in 1980, to 3,036 per 100,000 in 2009. *Id.*; see, e.g., FBI, FBI RELEASES 2009 CRIME STATISTICS (Sept. 13, 2010), available at <http://www2.fbi.gov/ucr/cius2009/documents/pressreleasecius09.pdf>.

14. In this Article, I use the terms Black and African American interchangeably. I use the term Black when speaking in my own voice, and African American out of respect for the sources that utilize that term.

war.<sup>15</sup> Recent statistics indicate that in 2010, almost 37.9% of U.S inmates were African Americans<sup>16</sup> although Blacks made up only approximately 12.6% of the U.S. population.<sup>17</sup> Although Whites made up 34.5% of the prison population<sup>18</sup> and are approximately 72% of the population,<sup>19</sup> the disproportionate representation of Blacks versus Whites in prison is no surprise.<sup>20</sup> The Bureau of Justice Statistics (“BJS”) predicted that the current disparity would occur nine years earlier.<sup>21</sup> In 2001, a BJS study concluded that Black males had a 32.2% chance of going to prison, which was up from a 13.4% chance in 1974,<sup>22</sup> while White males had only a 5.9% chance of being incarcerated.<sup>23</sup> As expected, African American males began to fill federal, state, and local correctional facilities at alarming rates.<sup>24</sup> In 2002, only a year after the BJS study one of twenty-one adult Black males, and one of eight Black males in their late twenties was incarcerated on any given day.<sup>25</sup> With these trends, “one of every three (32%) [B]lack males born today can expect to go to prison in his lifetime.”<sup>26</sup>

I contend that the surge in the number of people incarcerated in the United States was a direct result of changes to drug sentencing laws. Once the population increased, America’s solution was to build private prisons because taxpayers did not want to expend additional money on managing inmates.<sup>27</sup> Thus, I surmise that the allocation of government resources to support the privatization of prisons was one way that the Prison Industrial Complex (“PIC”) became a “*hustle*”; it altered the public function of incarceration from rehabilitation, custody, and control to private profiteering. I submit that the PIC is a “*hustle*” because the *players* involved in prison privatization, private prison companies and government corrections agencies, are not unlike “pimps” and “johns” profiting from the exploitation of human beings.

---

15. See Keith Rushing, *The Reasons Why So Many Black People Are in Prison Go Well Beyond Profiling*, HUFFINGTON POST (June 23, 2011, 4:55 PM), [http://www.huffingtonpost.com/keith-rushing/the-reasons-why-so-many-b\\_b\\_883310.html](http://www.huffingtonpost.com/keith-rushing/the-reasons-why-so-many-b_b_883310.html).

16. See GUERINO, HARRISON & SABOL, *supra* note 1, at 26.

17. SONYA RASTOGI, TALLESE D. JOHNSON, ELIZABETH M. HOEFFEL & MALCOLM DREWERY, JR., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

18. *Id.*

19. LINDSAY HIXSON, BRADFORD HEPLER, & MYOUNG KIM, U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

20. See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 (Aug. 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

21. *Id.*

22. *Id.*

23. *Id.*

24. MARC MAUER & RYAN SCOTT KING, SENTENCING PROJECT, SCHOOLS AND PRISONS: FIFTY YEARS AFTER *BROWN V. BOARD OF EDUCATION* 1–2 (Jan. 2004), [http://www.sentencingproject.org/doc/publications/rd\\_brownvboard.pdf](http://www.sentencingproject.org/doc/publications/rd_brownvboard.pdf).

25. *Id.*

26. *Id.*

27. JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 2 (Feb. 2001), available at <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

Part I of this Article describes the growth of the PIC and how prison privatization became a part of PIC's economic "*hustle*." Part II addresses the two reasons why the allocation of resources to prison privatization is inefficient. Part III calls for three solutions, in part, to stop the "*hustle*" and change the "*flow*" of inequity.

## II. THE U.S. PRISON INDUSTRIAL COMPLEX: FROM GROWTH TO *HUSTLE*

The PIC is a multimillion-dollar commercial "*hustle*" and one of the fastest-growing industries in the United States.<sup>28</sup> The growth of this multifaceted structure can be largely attributed to the privatization of government correctional facilities.<sup>29</sup> In order to understand how the reliance on private prison companies helped to grow the PIC's "*hustle*," it is imperative to dissect the recent origins of prison privatization.

### A. *Drugs Laws Expanding the Prison Population*

The change in drug laws in the mid 1970s impelled an explosion in the number of people incarcerated in the United States. This "War on Drugs" (1) increased the overall prison population and (2) disproportionately increased the number of incarcerated Blacks.

#### 1. The "War on Drugs"

During the 1970s the path to the PIC was well paved with the passage of copious sentencing laws that increased the prison population.<sup>30</sup> In 1973, New York Governor Nelson Rockefeller gave a "State of the State" speech in which he demanded that drug dealers receive life sentences without parole.<sup>31</sup> The passage of the "Rockefeller" drug laws made prison sentences mandatory for the possession and sale of drugs. It also mandated prison terms for second felony convictions regardless of the circumstance.<sup>32</sup>

In 1982, President Regan officially launched the "War on Drugs."<sup>33</sup> This drug war culminated in the signing of the Anti-Drug Act of 1986, which appropriated \$1.7 billion to fight the drug crisis and \$97 million to build new

---

28. Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RESEARCH (Mar. 10, 2008), <http://www.globalresearch.ca/index.php?context=va&aid=8289>.

29. *Id.*

30. See Jelani Jefferson Exum, *Sentencing, Drugs, And Prisons: A Lesson From Ohio*, 42 U. TOL. L. REV. 881, 885 (2011).

31. Daniel E. Chodkowski, *Policy Process of the "Rockefeller Drug Laws": 1973 New York State Penal Law 220.05–220.44*, 5–6, <http://www.danielchodkowski.com/1Golden.pdf> (last visited June 7, 2012).

32. Eric Schlosser, *The Prison-Industrial Complex*, ATL. MONTHLY (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669/>.

33. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 3 (Sept. 2007), [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf).

prisons.<sup>34</sup> The Anti-Drug Act created mandatory minimum federal sentencing laws that led to an increase in drug arrests and convictions in the United States.<sup>35</sup> Likewise, when President George H.W. Bush was elected in 1984, he continued Reagan's "War on Drugs."<sup>36</sup> On September 5, 1989, President Bush called America's drug problem "the toughest domestic challenge we've faced in decades."<sup>37</sup> As a result, President Bush created a billion-dollar drug plan that sought "stiffer sentences for everyone involved in drugs, from occasional users to international drug traffickers" and shifted the focus from "stopping narcotics at the border to fighting drug trafficking on the street."<sup>38</sup> President Bush's drug plan was designed to increase federal assistance to state and local law enforcement agencies, enlarge the criminal justice system across the board, and create "more prisons, more jails, more courts, more prosecutors."<sup>39</sup>

The effects of this continued "War on Drugs" resulted in increased arrests for drug crimes.<sup>40</sup> Drug arrests enlarged from one in fourteen to one in eight between 1987 and 2005.<sup>41</sup> Specifically, the apprehensions for drug crimes in 1980 (581,000) more than tripled in 2005 (1,846,351).<sup>42</sup> During this time, people were not only arrested but also convicted for drug crimes at increasing rates.<sup>43</sup> The number of incarcerations for drug offenses increased from 41,100 in 1980 to 493,800 in 2003; an increase of 1100%.<sup>44</sup>

Moreover, mandatory minimum sentencing laws created during the "War on Drugs" also increased the duration of prison sentences for people incarcerated for drug crimes.<sup>45</sup> Drug offenders were incarcerated at greater rates as well as given longer prison sentences.<sup>46</sup> Drug offenders sentenced prior to the adoption of mandatory minimum sentences served an average of twenty-two months in prison, while drug offenders sentenced after the adoption of mandatory minimums were expected to serve almost sixty-two months in prison.<sup>47</sup>

---

34. *Thirty Years of America's Drug War, a Chronology*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited June 7, 2012).

35. See MAUER & KING, *supra* note 33, at 7–9.

36. Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. TIMES, Sept. 6, 1989, <http://www.nytimes.com/1989/09/06/us/president-offers-strategy-for-us-on-drug-control.html?pagewanted=all&src=pm>. President Bush created a plan that included four major elements: (1) the expansion of "law enforcement and criminal justice measures to deal with drugs"; (2) "international assistance to Colombia, Peru and Bolivia"; (3) increased "drug treatment centers"; and (4) an "increase in funds for school and community programs to help young people 'reject enticements to try drugs.' " *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. MAUER & KING, *supra* note 33, at 3.

41. *Id.*

42. *Id.*

43. *Id.* at 7.

44. *Id.* at 10.

45. *Id.* at 8.

46. *Id.* at 10.

47. *Id.* at 8.

Consequently, these outlined changes in drug sentencing laws not only amplified the number of people incarcerated but also increased the period of time they served in prison. Although these alterations alone resulted in an increase in the U.S. prison population, changes in the law regarding the use and sale of cocaine specifically led to an upsurge in the number of Black inmates.

## 2. The Drug War's Impact on Blacks

During the "War on Drugs," inner-city African American neighborhoods were singled out as havens for drug users and sellers.<sup>48</sup> Blacks, erroneously targeted as the highest crack cocaine offenders,<sup>49</sup> were arrested disproportionately to any other ethnic group and faced longer prison sentences.<sup>50</sup> They were also arrested and convicted disproportionately due to racial profiling.<sup>51</sup>

### a. Sentencing Disparities: Crack Cocaine vs. Powdered Cocaine

The "War on Drugs" not only swelled the U.S. prison population, it also had a disparate impact on the number of incarcerated Blacks due to its mandatory minimum sentences for crack cocaine.<sup>52</sup> Federal convictions for crack cocaine resulted in longer prison sentences.<sup>53</sup> A five-year mandatory sentence was imposed for a person selling five grams of crack cocaine, while the same sentence was imposed for a person selling five hundred grams of powder cocaine.<sup>54</sup> Along with this disparity in sentencing was the incorrect perception that more Blacks used crack because it was cheaper.<sup>55</sup> African American neighborhoods became the target for crack cocaine arrests, which resulted in the "imprisonment of hundreds of thousands of young [B]lack men and women."<sup>56</sup> In 2007, it was reported that two-thirds of crack users in the United States were White or Latino, yet 82% of defendants convicted for crack cocaine in federal court were African American.<sup>57</sup> Consequently, the disparity between crack and powdered cocaine laws resulted in more Blacks imprisoned for crack cocaine offenses than Whites or Latinos in the United States.<sup>58</sup>

---

48. See Rushing, *supra* note 15.

49. David Guard, *Time Is Running Out! Tell Congress to Vote Yes on Crack Reform*, STOP THE DRUG WAR (July 21, 2010), [http://stopthedrugwar.org/trenches/2010/jul/21/time\\_running\\_out\\_tell\\_congress\\_v](http://stopthedrugwar.org/trenches/2010/jul/21/time_running_out_tell_congress_v).

50. MICHELLE ALEXANDER, THE NEW JIM CROW 112 (2010).

51. Rushing, *supra* note 15.

52. See MAUER & KING, *supra* note 33, at 21–23.

53. *Id.* at 22.

54. *Id.*

55. *Id.* at 21.

56. *Id.* at 22.

57. *Id.* at 21.

58. *Id.* at 21–22.

The use of crack cocaine laws is just one reason why Blacks became disproportionately represented in the U.S. prison population. Blacks were also arrested and convicted due to racial profiling.

*b. Racial Profiling*

Racial profiling<sup>59</sup> coupled with U.S. drug laws resulted in a disproportionate number of Blacks being arrested and incarcerated.<sup>60</sup> Racial profiling in the United States first received national attention in 1998 when the U.S. Department of Justice investigated the activities of the New Jersey State Police Department.<sup>61</sup> Since 1998, there have been countless reports of police stopping Blacks solely because of their race.<sup>62</sup> Terms such as “driving while black” or “driving while brown” became commonplace<sup>63</sup> and local police departments across the United States racially profiled Blacks as criminals simply because of their race.<sup>64</sup> Blacks were stopped, arrested, and convicted arbitrarily and disproportionately.<sup>65</sup>

In 2011, the New York Police Department revealed that they still continue to stop and frisk Blacks at greater rates than Whites, even though Whites are more likely to be found with illegal drugs or weapons.<sup>66</sup> Of the 183,326 persons frisked in New York, 50.6% were Black although Blacks are only 23% of the city’s residents.<sup>67</sup> Racial profiling is not just limited to New York, it is found everywhere Blacks “live, work, or traverse.”<sup>68</sup>

Consequently, Blacks everywhere are arrested and wrongfully convicted for crimes they did not commit.<sup>69</sup> For example, protest erupted after Robert Taylor, a prominent Los Angeles Black minister and civic leader, was stopped and arrested on March 14, 2010.<sup>70</sup> The police claimed that he fit the same description and drove a similarly described vehicle as a suspect involved in an

---

59. “’Racial Profiling’ refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin.” *Racial Profiling: Definition*, ACLU (Nov. 23, 2005), <http://www.aclu.org/racial-justice/racial-profiling-definition>.

60. Rushing, *supra* note 15.

61. *History of Racial Profiling Analysis*, RACIAL PROFILING DATA COLLECTION RES. CTR. AT NE UNIV., <http://www.racialprofilinganalysis.neu.edu/background/history.php> (last visited June 7, 2012).

62. See Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 456 (2004).

63. See *id.* at 440.

64. *Id.* at 441.

65. *Id.* at 453–54.

66. Rushing, *supra* note 15.

67. *Id.*

68. Weatherspoon, *supra* note 62, at 444.

69. BARRY SCHECK & PETER NEUFLED, 200 EXONERATED: TOO MANY WRONGFULLY CONVICTED 2, 6 (2007), available at [http://www.innocenceproject.org/200/ip\\_200.pdf](http://www.innocenceproject.org/200/ip_200.pdf). Of the 200 wrongfully-convicted persons in the United States, 62% are African American. *Id.* at 6. These African Americans were wrongfully convicted in every area of the country, Northeast, South, Midwest, and West. See *id.* at 5–6.

70. Earl Ofari Hutchison, *California Police Stop Proves Racial Profiling Is Alive and Well*, GRIOT (Mar. 15, 2010, 8:37 AM), <http://www.thegrio.com/opinion/california-police-stop-proves-racial-profiling-is-alive-and-well.php>.

earlier crime.<sup>71</sup> The suspect was described as short, around thirty years old, with a dark complexion. Conversely, Taylor was tall, in his sixties, and had a light complexion when he was arrested.<sup>72</sup> Taylor's arrest occurred eight months after the arrest of Harvard University Professor Henry Louis Gates, a Black man, who was stopped and arrested when he attempted to enter his home in an affluent neighborhood in Cambridge, Massachusetts.<sup>73</sup> These incidents represent numerous undocumented examples where law-abiding Black citizens were singled out based on racial profiling, which disproportionately impacted Blacks represented in the prison population.

As the prison population exploded from changes in the drug laws and the targeting of Blacks, taxpayers were reluctant to pay higher taxes for correctional expenses.<sup>74</sup> Thus, federal, state, and local governments began to seek private agencies for solutions to the rising prison population.<sup>75</sup>

#### *B. Governments Turn to Prison Privatization for Solutions*

With the alarming growth in the rate of incarceration,<sup>76</sup> U.S. legislators and prison officials faced a dilemma of where to house inmates and how to finance the cost.<sup>77</sup> To solve these structural and economic issues, the states "turned to the private sector for help."<sup>78</sup> Private prison companies stepped in not only to ease financial concerns but also to provide day-to-day management of prison facilities.<sup>79</sup> These corporations promised to build prisons and provide management services at a much lower cost than their government counterparts.<sup>80</sup>

The formula that would allow private corporations to build and manage prisons cheaper than the government was simple: (1) they were not bound by governmental rules, such as political pressures, environmental issues, bidding and construction contracting,<sup>81</sup> and (2) they claimed to have the ability to get funds from private investors or lenders quickly, while governments have to get appropriations from state legislatures or get bonds.<sup>82</sup> In other words,

---

71. *Id.*

72. *Id.*

73. See Bernard E. Harcourt, *Henry Louis Gates and Racial Profiling: What's the Problem?* (Univ. of Chi. Inst. for Law & Econ. Olin Research Paper Series, Working Paper No. 482, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474809](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474809); Abby Goodnough, *Harvard Professor Jailed: Officer Accused of Bias*, N.Y. TIMES, July 21, 2009, <http://www.nytimes.com/2009/07/21/us/21gates.html>.

74. AUSTIN & COVENTRY, *supra* note 27, at 1–2.

75. *Id.* at 2–3.

76. See WALMSLEY, *supra* note 2.

77. JUSTICE POL'Y INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 5 (June 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) [hereinafter Gaming the System].

78. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 457 (2005).

79. *Id.*

80. *Id.*

81. AUSTIN & COVENTRY, *supra* note 27, at 15.

82. *Id.*

private prisons were built without public support and with private funds, although states were required to seek voter approval in order to build a prison facility with construction bonds.<sup>83</sup> For instance, in five-and-one-half months, Corrections Corporation of America (“CCA”), a leading private prison company, built a 350-bed detention center for the Immigration and Nationalization Service (“INS”) in Houston, Texas, for \$14,000 per bed, yet the INS had calculated construction to take “2 1/2 years at a cost of \$26,000 per bed.”<sup>84</sup>

The reliance on prison privatization spread across the country and resulted in thousands of inmates being housed in state correctional facilities run by for-profit prison management companies.<sup>85</sup> The federal government also contributed to the growth of the PIC by providing million-dollar contracts to private entities to manage the incarceration of federal inmates such as undocumented immigrants and juveniles.<sup>86</sup> With prison privatization as the primary and preferred solution to the increased prison population, the number of inmates housed in private facilities in the United States grew.<sup>87</sup> Although early U.S. statistics are sparse, it appears that there were approximately 3,100 inmates in privately-operated prisons and jails worldwide in the 1980s.<sup>88</sup> By 1994, U.S. figures became clearer, showing that there were 37,651 inmates housed in eighty-four different American private prisons.<sup>89</sup> In 1999, the number of inmates housed in private prisons greatly increased to 69,188 inmates housed in ninety-four different prisons.<sup>90</sup>

This reliance on private entities to manage inmates absolved governments of their public correctional duty to thousands of inmates and transformed it into a successful profit-generating enterprise.

### *C. Prison Industrial Complex: The Hustle Begins*

#### 1. Public Purpose Turns to Private Profits: The Players Revealed

The duty to incarcerate those convicted of crimes has always been a public responsibility vested in federal, state, and local governments and not

---

83. *Id.*

84. *Id.*

85. Dolovich, *supra* note 78, at 439–40.

86. See Graeme Wood, *A Boom Behind Bars*, BLOOMBERG BUSINESSWEEK (Mar. 17, 2011), [http://www.businessweek.com/magazine/content/11\\_13/b4221076266454.htm](http://www.businessweek.com/magazine/content/11_13/b4221076266454.htm) (reporting Corrections Corporation of America (“CCA”) was paid \$90 per day per person held); see also *Corrections Community Contracting*, FEDERAL BUREAU OF PRISONS, [http://www.bop.gov/business/ccc\\_contracting.jsp](http://www.bop.gov/business/ccc_contracting.jsp) (last visited June 7, 2012).

87. See SCOTT D. CAMP & GERALD G. GAES, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 4 (Sept. 21, 2001), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/pub\\_vs\\_priv/oreprres\\_note.pdf](http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/oreprres_note.pdf).

88. AUSTIN & COVENTRY, *supra* note 27, at 3.

89. CAMP & GAES, *supra* note 87, at 4.

90. *Id.*

private actors. Governments have relied primarily on four explicit justifications for imprisonment in the United States: incapacitation, deterrence, retribution, and rehabilitation.<sup>91</sup> Contrarily, in utilizing the services of private prison corporations, governments have not only given up the responsibility to manage inmate populations, they have also allowed the purpose of punishment to shift from its original public objectives to one of profiteering.

Consequently, prison privatization helped the PIC to flourish due to the solicitation of contracts and deals made by the players involved in the “*hustle*” to profit from the increase of prisoners.<sup>92</sup> The key players entangled in the PIC are the federal, state, and local correctional agencies that are the financers; the private prison companies that are the profiteers; and the prisoners who are the commodities.<sup>93</sup>

In order to manage and house government inmates, private prison management and construction companies place bids to receive federal, state, and local prison contracts.<sup>94</sup> Upon securing a contract, private companies agree to manage government prisoners as requested and to operate the corrections facility on the government’s behalf.<sup>95</sup> Thus, the survival of private prison companies is dependent on the transfer of resources from federal, state, and local governments to private entities in order to make a profit.<sup>96</sup> Ironically, the entire operation is contingent on the role of unwitting inmates, those generating the revenues for the PIC. Inmates in this instance generate funds for the PIC as documented commodities for private prison companies; many private prison contracts are based on the number of inmates in their facilities per day.<sup>97</sup>

Politicians and judges also play less obvious roles in the privatization of prisons. Politicians are players in the PIC because of their ability to effectuate criminal laws in the United States. This authority has not gone unnoticed by private prison companies because “tough on crime” laws mean more prisoners.<sup>98</sup> For example, private prison companies have solicited support from legislators and political candidates to propose and pass legislation that will keep incarceration rates high in order to continue to secure million-dollar prison management contracts.<sup>99</sup> Hence, the odds of private prison companies

---

91. See Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 9 (2003).

92. See GAMING THE SYSTEM, *supra* note 77, at 3–4.

93. See *id.* at 5–9.

94. Dolovich, *supra* note 78, at 458.

95. See *id.*

96. See GAMING THE SYSTEM, *supra* note 77, at 5–6.

97. See *id.* at 4.

98. See *id.* at 15.

99. See *id.*

receiving government contracts are increased by the guaranteed surplus of inmates.<sup>100</sup>

Judges also play a key role in the PIC given their authority to impose sentences. Judges have the ability to sentence convicted persons to probation over prison sentences unless the offense carries a mandatory minimum sentencing requirement.<sup>101</sup> Since private corporation players make money based on high incarceration rates,<sup>102</sup> the possibility exists that these entities will attempt to influence judges to sentence more people to prison.

Moreover, the exploitation of the exploding prison population created a system often laden with fraud. In Pennsylvania, two judges devised a scheme to make millions from sentencing juveniles to privately-run detention centers.<sup>103</sup> In 2000, Judges Mark Ciavarella and Michael Conahan hatched the idea to give Attorney Robert J. Powell, Judge Conahan's long-time friend, state contracts to house juvenile defendants.<sup>104</sup> Conahan, as president judge, signed a secret deal with Powell "agreeing that the court would pay \$1.3 million in annual rent, on top of the tens of millions of dollars that the county and the state would pay to house the delinquent juveniles."<sup>105</sup> By the end of 2002, Judge Conahan had eliminated funding for the county detention center, thereby allowing Powell to monopolize the juvenile detention market.<sup>106</sup>

Judge Ciavarella was charged with the task of ensuring that private juvenile facilities stayed full.<sup>107</sup> Evidentiary records indicate that Judge Ciavarella sentenced a quarter of the juveniles that appeared before him to the detention centers. Remarkably, this incarceration record was twice the state average.<sup>108</sup> One of Judge Ciavarella's cases involved the sentencing of fourteen-year-old Hillary Transue, a stellar student without any prior record, to three months confinement for building a spoof MySpace page mocking the assistant principal at her high school.<sup>109</sup> He also sentenced thirteen-year-old Matthew Klubeck to forty-eight days in custody for throwing a piece of steak

---

100. Judith Greene, *Banking on the Prison Boom*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 3, 13–16 (Tara Herivel & Paul Wright eds., 2008).

101. See Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1861–62 (1995).

102. See GAMING THE SYSTEM, *supra* note 77, at 3.

103. Ian Urbina & Sean Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, [http://www.nytimes.com/2009/02/13/us/13judge.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/02/13/us/13judge.html?_r=1&pagewanted=print).

104. Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES, Mar. 27, 2009, <http://www.nytimes.com/2009/03/28/us/28judges.html?pagewanted=print>.

105. *Id.*

106. *Id.*

107. Urbina & Hamill, *supra* note 103.

108. *Id.* Judge Ciavarella maintains those who received time deserved it and were not given the sentences because of the money he received. *Id.*

109. A *Judge's Victims*, N.Y. TIMES, Mar. 28, 2009, [http://www.nytimes.com/interactive/2009/03/28/us/20090328\\_JUDGES.html?ref=us](http://www.nytimes.com/interactive/2009/03/28/us/20090328_JUDGES.html?ref=us) (containing audio recordings of the personal stories of Hillary Transue, Matthew Klubeck, Chad Uca, and DayQuawn Johnson, all of whom were sentenced to serve time by Judge Ciavarella). Uca, who was eighteen years old, was sentenced to ninety days for pushing a student, and Johnson, thirteen years old, was held for four days for failing to appear in court as a witness. *Id.*

at his mom's boyfriend.<sup>110</sup> Eventually, Judges Ciavarella and Conahan were arrested and pled guilty in 2009 to wire fraud and income tax fraud for taking more than \$2.6 million in kickbacks.<sup>111</sup>

Clearly, the players in the PIC keep the industry wheels turning through intentional deals, contracts, and side agreements.<sup>112</sup> These deals have fueled the PIC and, at the same time, allowed two main private prison companies to emerge and thrive.

## 2. Private Prison Operations and the “Take Over” by CCA and GEO

In 1984, Hamilton County, Tennessee, and Bay County, Florida, became the first two local governments in modern times to contract with the private sector to operate their correction facilities.<sup>113</sup> Since then, the number of inmates housed in private prisons in the United States has steadily increased:<sup>114</sup> 36,567 inmates were housed in private prisons in 1995; 87,369 prisoners in 2000;<sup>115</sup> over 90,000 prisoners in 2001;<sup>116</sup> and 129,336 people were housed in private prison facilities in 2009.<sup>117</sup> In 2009, the five states that had over 5,000 inmates in private prisons were Texas, Florida, Arizona, Oklahoma, and Mississippi.<sup>118</sup>

Prison privatization took on one of three forms: (1) entirely private prisons owned and operated by private companies and financed by private investors, (2) prisons operated by public authorities but owned and financed by private companies, and (3) government-owned facilities operated by private companies.<sup>119</sup> Private prisons generally make a profit by charging the contracting state or federal government a daily rate, per person incarcerated, to cover investment and operation costs.<sup>120</sup> Although there are several private prison companies in existence, the two largest for-profit private prison companies operating in the United States are CCA and The GEO Group, Inc.

---

110. *Id.*

111. Urbina & Hamill, *supra* note 103. The judges were sentenced to serve eighty-seven months in prison and were disbarred. *Id.*; see also Urbina, *supra* note 104 (“[T]he State Supreme Court ordered that the records be cleaned for hundreds of the 2,500 or so juveniles sentenced by Judge Ciavarella . . .”).

112. See EVE GOLDBERG & LINDA EVANS, THE PRISON INDUSTRIAL COMPLEX AND THE GLOBAL ECONOMY 5–7 (1998).

113. GAMING THE SYSTEM, *supra* note 77, at 5.

114. *Id.* at 10.

115. *Id.*

116. See David Pozen, *Managing A Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. POLITICS 253, 253 (2003).

117. GAMING THE SYSTEM, *supra* note 77, at 10.

118. *Id.* at 11.

119. Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 360 (1998).

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

(“GEO”).<sup>121</sup> CCA and GEO had combined revenue of \$2.9 billion in 2010<sup>122</sup> and over \$3 billion in 2011.<sup>123</sup>

In 1983, CCA became the first private prison company in the United States.<sup>124</sup> Currently, it is the largest private prison company in the United States, specializing in owning, operating, and managing prisons and other correctional facilities.<sup>125</sup> According to CCA, it manages “approximately 75,000 inmates including males, females, and juveniles at all security levels in more than sixty facilities under contract for management in nineteen states and the District of Columbia.”<sup>126</sup>

Publicly traded on the New York Stock Exchange since 1994,<sup>127</sup> CCA recorded revenues of \$1.73 billion in 2011,<sup>128</sup> which was up from \$1.67 billion in 2010.<sup>129</sup> In 2011, a majority of CCA’s revenue came from state contracts, \$215.8 million, with the next significant portion coming from federal contracts, \$189.3 million.<sup>130</sup> For instance, on October 27, 2011, CCA was awarded a thirteen-month federal government contract in excess of \$400 million for the

management and operation of a contractor-owned/contractor-leased, contractor-operated correctional facility to house a population of approximately 1,750 low security, adult male inmates, that are primarily criminal aliens with ordinarily 90 months or less remaining to serve on their sentences. The population of approximately 1,750 inmates is presently housed at the McRae Correctional Facility in McRae, Georgia.<sup>131</sup>

A few years later, George C. Zoley,<sup>132</sup> CEO and Board Chair,<sup>133</sup> founded GEO, formerly known as Wackenhut Corporation.<sup>134</sup> Like its competitor CCA, GEO is publicly traded on the New York Stock

121. GAMING THE SYSTEM, *supra* note 77, at 5–8.

122. *Id.* at 2.

123. CORRECTION CORPORATION OF AMERICA, SUPPLEMENTAL FINANCIAL INFORMATION FOR THE QUARTER ENDED DECEMBER 31, 2011, at 2 (2012), <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-reportsother> [hereinafter CORRECTION CORPORATION COMMISSION]; *Investor Relations, The GEO Group, Inc.*, THOMPSON REUTERS INVESTOR RELATIONS SOLUTIONS, <http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=RssLanding&cat=news&id=1663040> (last visited June 7, 2012).

124. *About CCA*, CCA, <http://www.cca.com/about/> (last visited June 7, 2012). CCA was co-founded by Tom Beasley, then-chairman of the Tennessee Republican Party. GAMING THE SYSTEM, *supra* note 77, at 7.

125. GAMING THE SYSTEM, *supra* note 77, at 6.

126. *CCA Facility Locations*, CCA, <http://www.cca.com/facilities/> (last visited June 7, 2012).

127. *About CCA*, *supra* note 124.

128. CORRECTION CORPORATION COMMISSION, *supra* note 123, at 2.

129. *Id.*

130. *CCA Announces 2012 First Quarter Financial Results*, CCA, (May 3, 2012), <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-newsArticle&ID=1691020&highlight=>.

131. *Criminal Alien Requirement* 12, FEDBIZOPPS.GOV, [https://www.fbo.gov/index?s=opportunity&mode=form&id=0422f16890af0ef708c5067abe7cf6b8&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=0422f16890af0ef708c5067abe7cf6b8&tab=core&_cview=1) (last visited June 7, 2012).

132. *Geo Group Inc/The (GEO: New York)*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/people/person.asp?personId=313007&ticker=GEO:US> (last visited June 7, 2012). George C. Zoley made a total calculated compensation of \$5,734,949 as of fiscal year 2011. *Id.*

133. *Board of Directors*, GEO GROUP, INC., [http://www.geogroup.com/about\\_us/bod.html](http://www.geogroup.com/about_us/bod.html) (last visited June 7, 2012).

134. GAMING THE SYSTEM, *supra* note 77, at 7.

Exchange.<sup>135</sup> GEO is one of the world's largest correctional and detention organizations with approximately 80,000 beds and 114 facilities located in the United States, the United Kingdom, Australia, and South Africa.<sup>136</sup> In 1997, GEO became the first company hired by the Federal Bureau of Prisons when it signed a contract to manage a 2,048-bed facility.<sup>137</sup>

Undoubtedly, CCA and GEO, the profiteering players in the PIC, have been able to take over the private prison industry with their receipt of million-dollar contracts from federal, state, and local governments. As private corporations, they have successfully generated millions for their shareholders, yet public entities have suffered due to their receipt of government funds.

Government distribution of public funds to the privatization of prisons may have originally appeared to be a cost-saving measure; however, upon examination of the effects of this allocation, it is clear that it is inefficient for two reasons: (1) it has incentivized incarceration and allowed CCA and GEO to monopolize and manipulate the market and (2) it supports a system that specifically incarcerates Blacks and reduces their ability to participate in future economic activities.

### III. GOVERNMENT ALLOCATIONS TO PRIVATE PRISON MANAGEMENT CORPORATIONS: THE FLOW OF INEQUITY

Resources are limited, but society's needs are unlimited. In the face of economic adversity, human beings struggle to find ways to cut costs in order to fulfill necessities and wants. Governments have no less of a burden when contemplating the allocation of financial resources among competing groups or programs. Accordingly, the financial strain of expending resources to address the exploding prison population forced governmental entities to search for the least-costly means of confinement.<sup>138</sup>

In 2001, state correction departments spent \$38.2 billion on state correctional systems.<sup>139</sup> The estimated cost of housing one inmate was \$22,650 annually, or \$62.05 per day for state prisoners, and \$22,632 annually per inmate, or \$62.01 per day for prisoners held in Federal Bureau of Prisons facilities.<sup>140</sup> Not surprisingly, government agencies flocked to private companies when given the promise of cost reduction for comparable

---

135. See *GEO Group Inc.*, NEW YORK STOCK EXCHANGE, <http://www.nyse.com/about/listed/geowi.html> (last visited June 7, 2012).

136. *Who We Are*, GEO GROUP, INC., [http://www.geogroup.com/about\\_us/index.html](http://www.geogroup.com/about_us/index.html) (last visited June 7, 2012).

137. *Historic Milestones*, GEO GROUP, INC., [http://www.geogroup.com/about\\_us/history.html](http://www.geogroup.com/about_us/history.html) (last visited June 7, 2012).

138. See Dolovich, *supra* note 78, at 458.

139. JAMES J. STEPHAN, U.S. DEPARTMENT OF JUSTICE, STATE PRISON EXPENDITURES, 2001, at 1 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>.

140. *Id.*

control.<sup>141</sup> Federal, state, and local correction agencies started allocating resources to private prison companies through million-dollar contract agreements in order to salvage their budgets.<sup>142</sup> Private prison companies not only received funds from the agreements but also received government resources in the form of subsidies.<sup>143</sup> These lucrative subsidies were expansive and ranged from tax reductions to training grants. Most notably, these companies often receive (1) the issuance of revenue bonds to finance private prison projects, (2) property tax abatements or reductions, (3) low interest loans enabled by tax-free bonds, (4) infrastructure subsidies, and (5) training grants.<sup>144</sup>

A 2001 study of private prison subsidies concluded that the government subsidized forty-four out of sixty state correctional facilities studied under private management.<sup>145</sup> Of the sixty institutions considered, 78% of CCA's and 69% of Wackenhut's(now GEO) received subsidies in the amount of \$406.4 million and \$165.5 million respectively.<sup>146</sup> An example of successful profiteering can be seen in the business partnership between the city of Shelby, Montana, and CCA.<sup>147</sup> In this deal, the city obtained an \$800,000 grant from the U.S. Economic Development Administration and a \$500,000 Community Development Block Grant to pay infrastructure costs for a prison it contracted with CCA to build and operate.<sup>148</sup> Additionally, CCA has also received federal tax credits for some of its employees at its California City Correctional Center.<sup>149</sup>

Today's question: Have governments in the United States gotten the bang for their buck from the privatization of prisons? Scholars debated this issue early on,<sup>150</sup> yet, the data remains unclear as to whether private prisons

---

141. See GAMING THE SYSTEM, *supra* note 77, at 5.

142. See *id.*

143. PHILIP MATTERA & MAFRUZA KHAN WITH GREG LEROY & KATE DAVIS, INST. ON TAXATION AND ECON. POL'Y, JAIL BREAKS: ECONOMIC DEVELOPMENT SUBSIDIES GIVEN TO PRIVATE PRISONS 23–24 (2001), available at [http://www.privateci.org/private\\_pics/jailbreaks.pdf](http://www.privateci.org/private_pics/jailbreaks.pdf).

144. See, e.g., *id.* at 28, 37–38 (2001) “Reducing or eliminating taxes on businesses is the most common—and most costly—form of economic development subsidy.” The five most significant ways private prison companies receive tax subsidies are:

- Property tax abatements—full or partial exemption from tax for periods typically ranging from 5 to 20 years;
- Corporate income tax credits for capital investment, job creation, or other activities—dollar-for-dollar reductions in a company's state corporate income tax bill, using either flat-rate formulas (such as \$2,500 per new job created) or percentage rates (such as 5% of the value of a capital investment);
- Sales tax waivers on building materials for new construction;
- Utility tax breaks—lower rates, usually associated with new economic activity; and
- Enterprise zone-associated tax breaks such as property tax abatements, inventory tax exemptions and/or employment tax credits.

*Id.* at 37–38.

145. *Id.* at 29.

146. *Id.* at 30.

147. See *id.* at 44.

148. *Id.* at 44.

149. *Id.* at 45.

150. Compare M. WOLFGANG, PRISONS: PRESENT AND POSSIBLE 35–38 (1979) (noting private

are cost efficient.<sup>151</sup> In 2001, a Bureau of Justice Assistance study revealed that the average savings gained from the use of private prisons was 1% compared to the 20% that had been predicted.<sup>152</sup> The most recent comparative cost analysis of U.S. private prisons was conducted in 2007 by the University of Utah's Criminal Justice Center.<sup>153</sup> Utah's Criminal Justice Center report concluded, "privately managed prisons provide no clear benefit or detriment. Cost savings from privatizing prisons are not guaranteed and appear minimal."<sup>154</sup> Therefore, without clear evidence that prison privatization is demonstrably more cost efficient, government decisions to allocate funds to private prison companies must be reassessed.

Yet even assuming, as proponents suggest, that evidence exists that privatization has been cost efficient,<sup>155</sup> it still does not outweigh the efficiency arguments regarding government intervention into the market. Faced with the prison population explosion, governments in the United States settled on prison privatization as a simple solution to the problem.<sup>156</sup> This approach was made in haste and without a thorough analysis of the consequences of prison privatization. As a result, this allocation of resources became inefficient because it created a "flow" of inequity. The inequities of this system are presented in two apparent ways: (1) it created an economic scheme dependent upon mass incarceration fostering monopolies and manipulation of the system and (2) it continued the historical diminution of Blacks to the status of property.

#### A. *Creating Incentives to Increase the Prison Population and Monopolize the Market*

Private prison companies' profit motive is problematic because it intertwines private revenue benefit with public criminal justice issues. As a

---

contractors will be "far more efficient" than government agencies), *with* J. KEATING, SEEKING PROFIT IN PUNISHMENT: THE PRIVATE MANAGEMENT OF CORRECTIONAL INSTITUTIONS 48 (1984) (unpublished manuscript, on file with the *Columbia Law Review*) (arguing the supposed cost savings to be realized through privatization may be offset by the cost to the government of monitoring private facilities).

151. AMY CHEUNG, SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 1, 2 (2004), [http://www.sentencingproject.org/doc/publications/inc\\_prisonprivatization.pdf](http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf).

152. *Id.*

153. See generally See Brad W. Lundahl et al., Prison Privatization: A Meta-Analysis of Cost and Quality of Confinement Indicators, 19 RES. ON SOC. WORK PRAC. 383, 384 (2009). This report conducted a meta-analysis of twelve studies on private- versus public- managed prisons. The report analyzed cost effectiveness as well as the quality of confinement. *See id.*

154. *Id.* at 20.

155. See, e.g., J. Michael Quinlan, Charles W. Thomas & Sherril Gautreaux, *The Privatization of Correctional Facilities*, in PRIVATIZING GOVERNMENTAL FUNCTIONS 10-1, § 10.03[3] (Deborah Ballati ed., 2001) ("Today there is a growing body of research evidence on the cost savings issue, which shows significant savings in construction as well as operating costs."). Quinlan is the former director of the Federal Bureau of Prisons, and at the time of publication, the Executive Vice President and Chief Operating Officer of CCA. *Id.* at 10-1 n.\*\*.

156. See Dolovich, *supra* note 78, at 455–58.

result, private prison companies strive to increase the prison population and control the system in order to receive government financial distributions.

### 1. Strategizing to Maintain High Incarceration Rates: Less Prisoners Equals Less Earnings

Under the terms of coveted government resources, private prison companies like CCA are paid based on an inmate per diem rate of the actual or minimum guaranteed occupancy levels.<sup>157</sup> Thus, the number of prisoners determines the success of a private prison company in each facility; and a shortage of prisoners equals a shortage of profits.<sup>158</sup> In 2010, the number of people sentenced to state prison systems decreased by 0.8% (10,881 prisoners), while the federal prison population increased by 0.8% (1,653 prisoners).<sup>159</sup> With profits so closely tied to the number of people in prison, CCA and GEO sought ways to increase state prison populations and obtain additional federal contracts from the Federal Bureau of Prisons.<sup>160</sup>

Like similar private prison companies, CCA and GEO employed three principal marketing strategies to promote policies that led to higher incarceration rates and greater profit margins: lobbying, direct campaign contributions, and networking.<sup>161</sup> These efforts, funded by million-dollar government contracts and subsidies and the profits they earn, are used to persuade politicians to pass legislation to increase their profit margins. Moreover, in 2010, private prison corporations' ability to fund political candidates was advanced by the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*.<sup>162</sup> In *Citizens United*, the Supreme Court struck down restrictions on corporate spending for political advertising as violating the First Amendment, thereby allowing private prisons and other corporations to use their general treasury funds to participate in independent election activities.<sup>163</sup> This five-to-four decision was counter to anti-bribery and clean election law decisions of the past.<sup>164</sup> So, regrettably, this ruling

---

157. CORRECTIONS CORPORATION OF AMERICA, 2010 ANNUAL REPORT ON FORM 10-K, at 2 (2010) [hereinafter CCA REPORT], available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDE5MTEwfENoaWxkSUQ9NDMyMjglfFR5cGU9MQ==&t=1>.

158. *Id.* at 18.

159. GUERINO, HARRISON & SABOL, *supra* note 1, at 2.

160. See GAMING THE SYSTEM, *supra* note 77, at 15–16.

161. *See id.* at 3.

162. 130 S. Ct. 876 (2010).

163. *See id.* at 912–13.

164. See, e.g., Michael Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2–5 (2012) (explaining that four decades of campaign finance law “as we knew it died” with the Court’s ruling in *Citizens United v. Federal Election Commission*). “*Citizens United* overruled *Austin* [v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).] and traditional campaign finance understanding about corporate spending by striking down as unconstitutional an important element of campaign finance restrictions on corporate spending through independent expenditures.” *Id.* at 3. Kang also noted that “this new deregulated world of campaign finance is not a better world” and that “the removal of longstanding restrictions on independent expenditures is causing money rapidly to return to the least regulated, least restricted pathways.” *Id.* at 5; see also Andrew T. Newcomer, *The “Crabbed View of Corruption”: How the U.S. Supreme Court*

advanced private prison companies' capacity to line the pockets of politicians in order to obtain additional government contracts.<sup>165</sup>

Between 2003 and 2012, CCA, GEO, and Cornell Companies (prior to its merger with GEO) contributed a total of \$4,839,548 to state Democratic and Republican candidates and committees.<sup>166</sup> These corporations also contributed \$835,514 to federal candidates from 2000 to 2010.<sup>167</sup> CCA specifically lobbied on several pieces of federal prison impact legislation,<sup>168</sup> helped to draft the Support Our Law Enforcement and Safe Neighborhoods Act immigration bill in Arizona,<sup>169</sup> and helped to pass Georgia's Illegal Immigration Reform and Enforcement Act of 2011.<sup>170</sup> It is estimated that both bills will result in the increased placement of people into the federal custody of Immigration and Customs Enforcement ("ICE").<sup>171</sup> This will increase the need for more inmate beds and will likely lead to more contracts with private prisons.<sup>172</sup>

In an attempt to purchase twenty-four of Florida's state prisons in February 2012, CCA and GEO expended time and effort in order to pass Florida's SB 2038.<sup>173</sup> CCA and GEO donated nearly two million dollars to political campaigns in Florida during the last three election cycles in order to grease the wheels for the bill's passage; however, this measure failed by a

---

*Has Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf* [Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010)], 50 WASHBURN L.J. 235, 237 (2010) (noting that "the Court should have rejected the notion that independent expenditures do not pose a danger of corruption and instead recognized that they can be used to secure political favors or influence over officeholders").

165. See *Contributors Results, Corrections Corp of America*, NAT'L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/database/search.phtml?searchbox=corrections+corp+of+America> (last visited June 7, 2012); *Contributors Results, GEO Group*, NAT'L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/database/search.phtml?searchbox=GEO+Group> (last visited June 7, 2012); *Contributors Results, Cornell Companies*, NAT'L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org/database/search.phtml?searchbox=Cornell+Companies> (last visited June 7, 2012).

166. See sources cited *supra* note 165.

167. GAMING THE SYSTEM, *supra* note 77, at 15–16.

168. *Id.* at 23.

169. *Id.* at 30.

170. H.B. 87, 151st Gen. Assemb., 1st Reg. Sess. (Ga. 2011), available at [http://www1.legis.ga.gov/legis/2011\\_12/pdf/hb87.pdf](http://www1.legis.ga.gov/legis/2011_12/pdf/hb87.pdf); see Gwynedd Stuart, *Cashing in on a Crackdown: Georgia's Thriving Private Prison Industry Will Get a Boost From New Immigration Law*, CREATIVE LOAFING ATLANTA (July 28, 2011), <http://clatl.com/gyrobase/georgias-thriving-private-prison-industry-boost-from-new-immigration-law/Content?oid=3700500&showFullText=true> [hereinafter Stuart, *Cashing in on a Crackdown*]. In 2009 and 2010, eleven state senators and seventeen state representatives received a total of \$24,400 in campaign contributions from CCA. Gwynedd Stuart, *Follow the Money: Twenty-eight Georgia Politicians that Received Campaign Contributions from the CCA*, CREATIVE LOAFING ATLANTA (July 28, 2011), <http://clatl.com/atlanta/28-georgia-politicians-that-received-campaign-contributions-from-the-cca/Content?oid=3712165> [hereinafter Stuart, *Follow the Money*]. CCA also contributed \$5,000 to Governor Nathan Deal and his opponent Roy Barnes. *Id.* The politicians that received CCA funds were mostly Republican and voted overwhelmingly in favor of H.B. 87. *Id.*

171. See Stuart, *Cashing in on a Crackdown*, *supra* note 170.

172. GAMING THE SYSTEM, *supra* note 77, at 30.

173. See James Kilgore, *A Blow Against the Prison-Industrial-Complex: Florida's Prison Privatization Plan Defeated*, COUNTERPUNCH WEEKEND EDITION (Feb. 17, 2012), <http://www.counterpunch.org/2012/02/17/a-blow-against-the-prison-industrial-complex/>.

narrow margin.<sup>174</sup> If SB 2038 had passed, it would have been the largest deal in U.S. history for the privatization of state prisoners.<sup>175</sup> Notwithstanding SB 2038's failure, this loss was not the end of CCA and GEO's lobbying efforts.<sup>176</sup> The Huffington Post reported that CCA had also sent letters to forty-eight other state governments offering cash for prisoners to help cut costs.<sup>177</sup> In exchange for its services, CCA wants twenty-year management contracts from each state and an assurance that each prison will remain at least 90% full.<sup>178</sup>

Unfortunately, CCA makes no qualms about its aspirations to increase the prison population.<sup>179</sup> In CCA's 2010 Annual Report, the company conveyed the following to its shareholders:

Our industry benefits from significant economies of scale, resulting in lower operating costs per inmate as occupancy rates increase. We believe we have been successful in increasing the number of residents in our care and continue to pursue a number of initiatives intended to further increase our occupancy and revenue. Our competitive cost structure offers prospective customers a compelling option for incarceration.<sup>180</sup>

This report could easily be mistaken for a statement by the board of directors of a five-star hotel discussing how to increase the number of guests in order enlarge profit margins;<sup>181</sup> yet, unlike the hotel business, private prisons are not merely attempting to obtain a share of the current market. Instead, they are working to increase the market share of inmates. CCA clearly maintains that it will continue to "pursue a number of initiatives" to increase their "occupancy and revenue,"<sup>182</sup> which equates to increasing the quantity of human beings in private prisons.

As previously shown, CCA and GEO successfully lobbied for the passage of Arizona's and Georgia's immigration legislation—initiatives that will definitely increase the percentage of incarcerations.<sup>183</sup> CCA quickly reaped the benefits of its spending in Georgia as just five months after it

---

174. *Id.*

175. *Id.*

176. *Id.*

177. See Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFINGTON POST (Feb. 14, 2012), [http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons\\_n\\_1272143.html](http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html).

178. *Id.*

179. CCA REPORT, *supra* note 157, at 13.

180. *Id.*

181. See Schlosser, *supra* note 32, at 4.

The economics of the private-prison industry are in many respects similar to those of the lodging industry. An inmate at a private prison is like a guest at a hotel—a guest whose bill is being paid and whose check-out date is set by someone else. A hotel has a strong economic incentive to book every available room and encourage every guest to stay as long as possible. A private prison has exactly the same incentive. The labor costs constitute the bulk of operating costs for both kinds of accommodation. The higher the occupancy rate, the higher the profit margin.

*Id.*

182. See CCA REPORT, *supra* note 155, at 13.

183. See GAMING THE SYSTEM, *supra* note 77, at 30.

helped to pass Georgia's immigration bill in May 2011, it received a \$400 million contract to house criminal aliens in McRae, Georgia.<sup>184</sup> The procurement of the \$400 million contract provided an excellent rate of return on CCA's \$24,000 investment on lobbying Georgia's legislators and candidates for governor in order to get the immigration bill passed.<sup>185</sup>

The issue at hand is the capitalistic investment in the increased incarceration of human beings. Incarceration is typically considered to be a justice issue that requires public treatment and exposure; however, it is the process of the allocation of governmental funds that has essentially cloaked a public issue with private profit interests. These secret individual interests, normally out of view of public scrutiny, can no longer be overlooked when taxpayer dollars are being utilized to promote mass imprisonment. The failure to scrutinize this matter has allowed companies like CCA and GEO to monopolize the private prison industry. Hence, the issues challenging economic efficiency continue to grow.

## 2. Monopolizing the Market

Private prison corporations primarily exist to make a profit.<sup>186</sup> In 1996, the stocks of CCA traded at 111 times higher than their estimated earnings. Likewise, the stocks of GEO, then Wackenhut, traded at 100 times higher than their estimated earnings.<sup>187</sup> During this time, these two companies enjoyed the "lion's share of the industry,"<sup>188</sup> and still do today.<sup>189</sup> In order to maintain high return rates on their stocks, CCA and GEO have successfully obtained more U.S. government prison contracts than any other private corporation.<sup>190</sup> In doing so, CCA and GEO have monopolized the private prison corporation market<sup>191</sup> by buying out their competitors.<sup>192</sup>

CCA was the first of the two companies to ensure its dominance in the market by buying out smaller competitors.<sup>193</sup> In April 1995, CCA bought out Concept Inc., the third largest private prison corporation at the time.<sup>194</sup> Two months later, it bought out Corrections Partners Inc., another private prison corporation that was operating court correctional facilities in three states.<sup>195</sup>

---

184. *Criminal Alien Requirement 12*, *supra* note 131.

185. See Stuart, *Follow the Money*, *supra* note 170.

186. See Douglas Dunham, *Inmate Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1484 (1986).

187. Sandra Block, *Everybody's Doin' The Jailhouse Stock*, USA TODAY, June 5, 1996, at 3B.

188. Mattera, *supra* note 144, at 3. In 1996, CCA had 52% of the market share "based on the number of adult beds under contract." *Id.* GEO, then Wackenhut Corrections, had 25%, and U.S. Corrections Corp. had over 5%. *Id.*

189. See GAMING THE SYSTEM, *supra* note 77, at 6-8.

190. See *id.* at 2.

191. See *id.*

192. See *id.* at 5.

193. Mattera, *supra* note 144, at 3.

194. Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 372 n.46 (1996).

195. *Id.*

In August 2010, GEO acquired Cornell Companies, a rival private prison company in order to expand GEO's stock in the private prison market.<sup>196</sup> According to GEO, the company's merger with Cornell was projected to increase GEO's total annual revenues to more than \$1.5 billion.<sup>197</sup> Four months later, GEO acquired B.I. Incorporated, a private provider of compliance technologies, monitoring services, and evidence-based supervision and treatment programs for parolees, probationers, and pretrial defendants.<sup>198</sup> GEO estimated that the acquisition of B.I. Incorporated would increase their "annual revenues by approximately \$115 million to more than \$1.6 billion in 2011."<sup>199</sup> As predicted, on February 21, 2012, GEO announced that their total revenues for the full year of 2011 were \$1.6 billion.<sup>200</sup>

CCA and GEO's monopolization of the private prison industry is another example of how the allocation of government resources to the PIC is inefficient. With this monopoly in place, the cost of prison privatization is not affected by competition, thus CCA and GEO were allowed to accumulate vast capital gains. Due to CCA and GEO's billion-dollar resources, they have been able to manipulate the political market by influencing legislators to support the passage of legislation that directly affects their profits.<sup>201</sup> Moreover, government resources permitted this monopoly to flourish based on a need to save money that did not come to fruition. Instead of saving money, government allocations to private prison companies inadvertently incentivized incarcerating U.S. inhabitants and created private prison domination.

#### *B. Black Inmates Reduced to Property Thus Affecting Their Future Participation in Economic Activities*

##### 1. Blacks as Property

The use of Blacks as property during slavery and afterward as prison laborers is well-documented.<sup>202</sup> This manipulation of Blacks for profit

---

196. See Press Release, The GEO Group, Inc., The GEO Group Closes \$730 Million Merger with Cornell Companies (Aug. 12, 2010), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle\\_print&ID=1459689&highlight=-](http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle_print&ID=1459689&highlight=-).

197. *Id.*

198. Press Release, The GEO Group, Inc., The GEO Group Announces \$415 Million Acquisition of B.I. Incorporated (Dec. 21, 2010), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle\\_print&ID=1509666&highlight=-](http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle_print&ID=1509666&highlight=-).

199. *Id.*

200. Press Release, The GEO Group, Inc., The GEO Group Reports Fourth Quarter 2011 Results and Announces Adoption of Cash Dividend Policy (Feb. 21, 2012), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle\\_print&ID=1663040&highlight=-](http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-newsArticle_print&ID=1663040&highlight=-).

201. See GAMING THE SYSTEM, *supra* note 77 at 30.

202. See generally ALEXANDER, *supra* note 50; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2009); Weaver & Purcell, *supra* note 119.

continues to manifest itself in the modern day prison system as Blacks are arbitrarily arrested and quantified as property for the profit of private prisons companies.

W.E.B. Dubois insisted that “[t]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.”<sup>203</sup> This comment is still applicable nearly eighty years later because government-allocated resources, fueling the PIC, have resulted in the random re-enslavement of Blacks based on race.<sup>204</sup> These allocations have supported the PIC, a system that increased the prison population through drastic changes in the U.S. drug laws in the 1980s.<sup>205</sup> As established above, these laws caused Blacks to be disproportionately incarcerated in the United States.<sup>206</sup> In turn, Black inmates, as a part of this vast prison population, have become the exploited chattel that private prison company profiteers rely on.

This government expenditure of funds in the PIC is tantamount to the allocation of past state resources employed after the passage of the Thirteenth Amendment, which supported the effects of race-neutral statutes; both allocations have resulted in the disproportionate enslavement of Blacks through the use of criminal laws for economic gain.<sup>207</sup> With almost two million inmates housed in jails and prisons throughout the United States,<sup>208</sup> it is not difficult to ascertain that Blacks, at nearly 40% of the prison population, are more likely to be used as commodities to keep prisons filled and to carry out labor needs.<sup>209</sup>

Moreover, this diminution of Blacks to the status of property solely for the advancement of the PIC is an obvious continuation of one of the practices employed to maintain slavery in the United States.<sup>210</sup> Chief Judge A. Leon Higginbotham, Jr.’s<sup>211</sup> *Ten Precepts of American Slavery Jurisprudence* lends credence to this argument.<sup>212</sup> Judge Higginbotham’s *Ten Precepts* established “several premises, goals, and implicit agreements concerning the institution of slavery that at once defined the nature of American slavery and

---

203. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 24 (Henry Louis Gates, Jr. ed., 2007).

204. Weaver & Purcell, *supra* note 119, at 355.

205. MAUER & KING, *supra* note 35, at 3.

206. See TODD D. MINTON, BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR 2010—STATISTICAL TABLES 8 (June 28, 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf>.

207. See Weaver & Purcell, *supra* note 119, at 354–57.

208. GUERINO, HARRISON & SABOL, *supra* note 1, at 1.

209. See HEATHER C. WEST, BUREAU OF JUST. STAT., PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 2 (June 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. See tables 16–19 for totals and rates for Blacks, Hispanics, and Whites, which are broken down by year and gender. *Id.* at 19–21. See page 2 for “Selected characteristics of inmates held in custody in state or federal prisons or in local jails.” *Id.* at 2.

210. See Ronald K. Noble, *Between Complicity and Contempt: Racial Presumptions of the American Legal Process*, 72 N.Y.U. L. REV. 664, 671–72 (1997) (reviewing A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996)).

211. See generally Charles J. Ogletree, Jr., *Judge A. Leon Higginbotham, Jr.’s Civil Rights Legacy*, 34 HARV. C.R.-C.L. L. REV. 1, 2–6 (1999). Chief Judge Higginbotham is one of our nation’s most notable scholars and jurists on the jurisprudence of race, civil rights, and the law. *Id.*

212. Noble, *supra* note 210, at 669.

directed how it was to be administered with the imprimatur of the legal process.”<sup>213</sup> The precepts identified by Judge Higginbotham are: (1) inferiority, (2) property, (3) powerlessness, (4) racial “purity,” (5) manumission and free Blacks, (6) family, (7) education and culture, (8) religion, (9) liberty-resistance and (10) by any means possible.<sup>214</sup> Judge Higginbotham’s definition of precept two, “property,” is clearly germane to the principle operations of the PIC.

Judge Higginbotham explained the precept property by offering the following descriptions: “Define the slave as the master’s property, maximize the master’s economic interest, disregard the humanity of the slave except when it serves the master’s interest, and deny slaves the fruits of their labor.”<sup>215</sup> It is apparent that the PIC has defined Black inmates as property to maximize profits for private industry since private prison contracts are paid per inmate, per day.<sup>216</sup> This point is further validated by the use of drug laws and racial profiling to target and incarcerate Blacks, thereby disregarding their humanity.<sup>217</sup>

In order to begin to change the systematic re-enslavement of Blacks,<sup>218</sup> and the use of them as property, governments must first acknowledge that a slavery scheme still exists in the United States.<sup>219</sup> Judge Higginbotham confirmed this conclusion in the epilogue of his book, *In the Matter of Color*, referring to a conversation he had with Chief Justice Earl Warren:

[T]he impact of our heritage of slave laws will continue to make itself felt into the future. For there is a nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties of today. The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed.<sup>220</sup>

Without this recognition, Blacks will continue to be reduced to commodities, bought and sold for a profit. If this occurs, the number of Black felons in the United States will increase, which will in turn also have the effect of excluding Blacks from participating in future economic practices.

## 2. Blacks Excluded from Future Economic Participation

As established above, the “War on Drugs” led to the increased incarceration of Blacks through the disproportionate arrest and conviction of Blacks for drug offenses.<sup>221</sup> As Blacks continue to be labeled as felons, they

---

213. *Id.*

214. *Id.* at 670–71.

215. *Id.* at 670 n.45.

216. See Lundahl et al., *supra* note 120, at 384.

217. See Weaver & Purcell, *supra* note 119, at 351–52.

218. *Id.* at 351; see, e.g., ALEXANDER, *supra* note 50.

219. See LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 391 (1978).

220. *Id.*

221. See Cecilia Stiber, *Discriminatory Intent Requirement: The “Separate But Equal” Doctrine of the*

will be excluded from participation in economic practices because they will be unable to obtain jobs.<sup>222</sup>

It is not difficult to surmise that Blacks convicted of felonies, like other ex-offenders, face difficulties when attempting to secure employment upon release from prison.<sup>223</sup> Some of these barriers include state statutory prohibitions that prevent the hiring of ex-offenders for certain jobs.<sup>224</sup> For example, ex-offenders in Pennsylvania are barred from working in health care jobs, and in Florida and Minnesota felons are disqualified from public employment “where the crime relates to the job in question.”<sup>225</sup> Other challenges in obtaining employment arise from jobs that are dependent on occupational licensing requirements.<sup>226</sup> Jobs such as “ambulance drivers, billiard room employees, attorneys, physicians, pharmacists, nurses, barbers, embalmers, septic tank cleaners, real estate professionals, accountants, contractors, and sellers of alcoholic beverages” require a registration and license, and ex-offenders are often unable to obtain these jobs because they cannot meet the necessary conditions for a license.<sup>227</sup> Applicants typically have to satisfy two components when applying for a license: (1) the competency component and (2) the character component.<sup>228</sup> Black ex-offenders may be able to satisfy the competency component but have difficulties meeting the character component due to their prior convictions.<sup>229</sup> Additionally, Black convicted felons are excluded from federal military economies since the federal government excludes convicted felons from joining the armed forces.<sup>230</sup> Thus, continued inefficient allocations to prison privatization will prolong the exclusion of Blacks from participation in future economic activities. As branded felons, unemployed Blacks will be marginalized and unable to obtain jobs to sustain themselves and their families.

Consequently, in order to protect public interests of economic efficiency as well as social equality, government resources must be redirected from private prison companies. The United States cannot continue to fuel a system that disproportionately arrests Blacks, condones the use of them as property, and expels them as societal pariahs once released from prison.

---

*Twenty-First Century?—A Critical Examination of Felon Disenfranchisement Laws and Related Government Practices in the United States*, 41 GONZ. L. REV. 347, 369–70 (2006).

222. See Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1612 (2004).

223. *Id.*

224. *Id.*

225. *Id.* In Pennsylvania, an ex-offender could not sweep the halls of a hospital if convicted of bribery. *Id.*

226. *Id.* at 1613.

227. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 190–91 (1995).

228. *Id.*

229. *See id.*

230. SUSAN M. KUZMA, U.S. DEP’T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 3 (2000), [http://www.usdoj.gov/pardon/collateral\\_consequences.pdf](http://www.usdoj.gov/pardon/collateral_consequences.pdf).

#### IV. CONCLUSION: STOP THE *HUSTLE* AND CHANGE THE *FLOW*

The prison privatization “*hustle*” engrained in the PIC must cease immediately in order to change the inefficient “*flow*” of corporate monopolies and manipulation of the market that inevitably excludes Blacks from future economic activities. Of course it would be naïve to assume that federal, state, and local governments will immediately end all private prison management contracts or close every private prison. This reality notwithstanding, governments must reduce the need for prison privatization by: (1) calling for a moratorium on prison privatization, (2) disbanding private prison corporation monopolies, and (3) redirecting government funds to amend present drug legislation.

##### *A. Moratorium on Prison Privatization*

Corporations chase profits even when it conflicts with the public good.<sup>231</sup> Consequently, a majority of governments have turned a blind eye to the monopolization and manipulation of the system by CCA and GEO. Just like tobacco companies have misled the public on the harmful effects of smoking and oil companies dispute any harmful consequences to the environment,<sup>232</sup> CCA and GEO fight to keep people in prisons to fortify economic growth and high shareholder returns. Typically, employing strategic measures to maintain high profits is acceptable for private companies, but it should not be tolerated if one of the measures is the imprisonment of people in the United States.

Prison privatization has taken a publicly regulated function, transformed it into a nearly unregulated private enterprise, and allowed two top corporations to seize immeasurable wealth. Specifically, this wealth has allowed CCA and GEO to gain political influence over key players in the PIC through campaign contributions and allowed CCA and GEO to buy out their competitors thus monopolizing the economic market. Prison privatization has proved to be profitable for CCA and GEO, but governments still wait for the promise of significant savings to be fulfilled from investment in this system.

Therefore, in the face of such inequities, a nation-wide moratorium on prison privatizations is paramount. The solicitation of new private prison contracts must end and current contractual obligations should be fulfilled but not renewed. A moratorium of prison privatization will allow the government to conduct probing and thorough assessments of the utilization of private prison companies in the United States. The moratorium should not end until an independent, nonpartisan committee comprised of community

---

231. See Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 TEX. TECH L. REV. 89, 135 (2011).

232. *Id.*

organizations, correction officials, union members, and ex-offenders establishes that the distribution of government funds to private prisons is not inefficient in any way and that no other more efficient way exists to address the high prison population. This may be accomplished through a comparative cost efficiency analysis regarding the use of government correctional facilities versus funding private prison companies to build private prisons, manage inmates, and operate correctional institutions. However, if the use of private prisons continues to be inefficient, then the privatization of prisons should be banned completely.

#### *B. Disband Private Prisons*

CCA and GEO have effectively monopolized the private prison correctional system in the United States. U.S. antitrust regulations were designed to prevent or limit corporate monopolies in order to protect small businesses and promote competition. Thus, the proper solution may be to analyze CCA and GEO's monopolization of the market under antitrust regulations. Yet, because prison privatization helps to fuel the "*hustle*" of the PIC, I propose that we instead rid the United States of this inefficient allocation of resources via state and federal legislation.

Using government resources for prison privatization is inefficient because it provides an incentive to increase the prison population, which in turn has the effect of excluding Blacks from participating in future economic activities. In order to stop the "*flow*" of this inefficiency, federal and state governments need to pass legislation repealing prison privatization. The federal and state governments should follow Illinois's lead and make it illegal to contract with private prison companies.<sup>233</sup> The language of Illinois's Private Correctional Facility Moratorium Act proves helpful in crafting similar federal and state legislation:

[T]he State, any unit of local government, or a county sheriff, shall not contract with a private contractor or private vendor for the provision of services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department of Corrections, the Department of Juvenile Justice, or a sheriff; however, this Act does not apply to . . . State work release centers or juvenile residential facilities that provide separate care or special treatment operated in whole or part by private contractors . . .<sup>234</sup>

Yet contrarily, I disagree with the provision of this statute that still allocates prison privatization contracts for state work release centers and various juvenile residential facilities. Any opportunity to "purchase" prisoners for profit will continue to provide private prison companies with incentives to

---

233. See Private Correction Facility Moratorium Act, 730 ILL. COMP. STAT. 140/3 (West 2007).

234. *Id.*

keep U.S. inhabitants in prison. So, in order to change this “*flow*” of inequity, the private prison “*hustle*” must be stopped completely.

### *C. Decrease the Prison Population*

The expansive prison population will still exist even if we end prison privatization. So as the call for a private prison moratorium is sounded, solutions to the vast number of inmates must be explored.

It is evident that the change in U.S. drug laws caused the prison population explosion in the United States. Thus, it was disingenuous to suggest that the most viable solution to the increased prison population was to turn over correctional responsibilities to private for-profit corporations. The obvious path to solving the problem of expansive prison populations is to shift back to the rehabilitation goal of imprisonment and reform existing drug laws.

President Barack Obama has supported continued drug reform by adopting a new approach to crime; the administration advocates being “smart on crime” versus the former “tough on crime” methodology.<sup>235</sup> In 2007, the U.S. Sentencing Commission amended the Federal Sentencing Guidelines to reduce the disparity between crack and powdered cocaine sentences.<sup>236</sup> Thus, I propose that in light of this change in the law, the current federal prisoners eligible for a sentence reduction should be immediately released. This would result in the release of 20,000 prisoners, approximately 17,000 of whom are Black.<sup>237</sup>

Although this is a good first step, there needs to be complete drug sentencing reform, from the termination of mandatory minimum sentences and three strike laws, to the reallocation of funds, to transitional houses providing education, training, and employment opportunities to ex-offenders. These changes are important because (1) shorter sentences will decrease prison populations and further reduce the need for prison privatization and (2) both solutions will prevent Blacks from continued exclusion from economic participation. There will be fewer Blacks incarcerated, and even if convicted of a felony, they will have additional resources available to help them find employment. Therefore, this proposed solution has the potential of rectifying the negative effects of inefficient allocations to prison privatization. Specifically, the use of Blacks as quantified property will be reduced, and the exclusion of Blacks from future labor market participation will be minimized.

This Article has argued that the allocation of funds to the “*hustle*” of prison privatization resulted in an inefficient use of resources because governments’ budgets were stressed. This engrained “*hustle*” in the PIC has

---

235. See Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. OF C.R. & ECON. DEV. 161, 163 (2010).

236. *Id.* at 172.

237. See *id.* at 173.

2012]

*Hustle and Flow*

617

caused the “*flow*” of manifested inequities, particularly creating incentives to keep prison populations high. This in turn has led to private corporation monopolies and manipulation of the system and the exclusion of Blacks from future economic activities. These inefficiencies can be reduced and even halted if the outlined solutions are employed. The privatization of prisons is only one facet of the comprehensive PIC. The inequities of other industries fueling the PIC will be explored in future articles.