

Commodification of Black Bodies: Convict Leasing and Prison Privatization in the United States
of America

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Abstract:

The United States has the highest incarceration rate of any country in the world. The private prison industry is a significant contributor to this carceral system and allows for the

detention of human beings, particularly men of color, to be transformed into a multi-billion dollar industry. This paper traces the parallels between the post-civil war convict leasing system and the current system of prison privatization to argue that these institutions encourage the commodification of black bodies in order to maintain a racial hierarchy in the United States. I further analyze the fundamental incompatibility of prison privatization with the US Constitution. Private prisons, which hold African American men at a higher rate than state-run prisons, take various cost-cutting measures in order to increase profit and subsequently expose prisoners to higher rates of abuse and increased recidivism rates. Private prisons also have significant political power in determining crime control legislation, which has led to strict drug laws and harsh sentencing structures which serve to increase the number of young men of color behind bars. This paper concludes by providing a three-phase plan for abolishing private prisons and reducing overall incarcerations in the United States.

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I. Introduction

America prides itself on its flawless democracy, but it has a deeply embedded secret.

While the United States has only five percent of the world’s population, it has nearly 25% of the

entire world's prison population.¹ The US has earned the highest incarceration rate in the world through the privatization of prisons, which has turned detaining human beings into a billion dollar industry. This trend has been repeated throughout history, beginning with the convict leasing system of the post-civil war era, and re-emerging in the 1970s and 80s as new legislation that created an over-incarceration crisis. The political power that private prison firms hold in the US has dramatically influenced crime control legislation, shifting the focus from crime-reduction strategies to creating and sustaining a steady prison population to maintain their economic viability. Privatization overall negatively impacts the treatment, rehabilitation, and care of prisoners, indicating that the market-driven business model is fundamentally incompatible with an effective and humane corrections system.

II. Background/Context

A. *Historical Precedent: Convict Leasing*

1. *Economic Turmoil: The Rise of Convict Leasing*

Prison privatization is not a new phenomenon, but rather a trend that historically reemerges as a tool for maintaining the social productivity of criminals, even when they are separated from society at large. Prison labor has been used extensively throughout American history, beginning in the early colonial era. The most notable form emerged after the abolition of slavery in 1865, as Southern states' plantation economy faltered without a source of free, self-sustaining labor that slavery had once provided. In order to fulfill this demand and remedy the economic catastrophe, Southern states invented a new form of coercive labor allowable under the 13th Amendment, which officially ended slavery "...except as a punishment for crime."² The convict leasing system was augmented by the 1871 case *Ruffin v. Commonwealth* in which the

¹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (New York, New York: New Press, 2010), 27.

² Genevieve LeBaron. "Rethinking Prison Labor: Social Discipline And The State In Historical Perspective," *WorkingUSA* 15, no. 3 (2012): 327-51. doi:10.1111/j.1743-4580.2012.00397.x.

Supreme Court ruled that "[a] convicted felon has, as a consequence of his crime, not only forfeited his liberty, but all of his personal rights except those which the law in its humanity accords him. He is for the time being a slave of the state."³ This landmark case, reminiscent of *Dred Scott v. Sanford*, produced a new system of slavery in which prisoners were leased out to private enterprises, working in industries like mining or on railroads. Bidders paid an average \$25,000 a year to the state in exchange for control over the lives and labor of all of the prisoners.⁴ The system provided revenue for the state and allowed private plantation owners to continue to make high profits from the exploitation of a captive pool of labor.

2. Profit Incentives: Criminalization through the Black Codes

The convict leasing system arose during a period of chaos after the abolition of slavery derailed the deeply entrenched racial hierarchy that the United States was founded on. In order to reaffirm white hegemony and create a steady supply of convict workers, the identity and status that had previously accompanied having black skin, - "slave" - was altered to fit new times. A series of laws called the Black Codes were enacted criminalize most aspects of newly freed slaves' lives, solidifying the conflation of "Black" with "convict." Non-violent acts such as standing in one area of town or walking at night were redefined as "loitering" or "breaking curfew," reinventing African American men as criminals and forcing them to serve their time by doing hard labor.⁵ As a result of Black Codes, the percentage of African Americans in prison grew exponentially, surpassing whites for the first time.⁶ Soon, the South had a massive workforce, allowing white plantation owners to continue to garner extreme profits by exploiting black bodies.

³*Ruffin v. Commonwealth of Virginia*, Court of Appeals of Virginia, 62 Va. 790, 796 (Va. 1872).

⁴Michael A. Hallett, *Private Prisons in America: A Critical Race Perspective*, (Urbana, Illinois: University of Illinois Press, 2006), 41.

⁵Gloria J. Browne-Marshall, *Race, Law, and American Society: 1607 to Present* (New York, New York: Routledge, Taylor & Francis Group, 2013), 113.

⁶Michael A. Hallett, *Private Prisons in America: A Critical Race Perspective*, (Urbana, Illinois: University of Illinois Press, 2006), 27.

As profit seekers, convict leasing operators sought to reduce costs and increase the productivity of their laborers. A convict classification system was constructed in which leasing agents would test the men's productivity and ability to perform physical tasks. The relative tier of ability would determine how much money they would be leased for to private capitalists.⁷ In order to increase productivity, prisoners were regularly beaten, whipped, and forced to work hours that no free laborer would ever consider. Beyond increasing productivity of laborers, leasing operators cut costs by providing hugely inadequate living facilities. While the state's contracts did stipulate that the prisoners must be adequately housed and fed, the government neglected to create a mechanism to ensure that contractors would adhere to these conditions.⁸ The death rates for prisoners skyrocketed, reaching 45% among convicts in South Carolina.⁹ Tales of violence and torture eventually led to widespread reform and abolition movements that allied prisoner organizations, labor unions, and community groups. Beginning as a solution to economic crisis and augmented through legislation that criminalizes men of color and increases incarceration, the convict leasing system was deemed racist and an unjustifiable extension of state violence. By 1928, every state had abolished convict leasing.¹⁰ However, race-related crime panic in the 1960s, 1970s, and 1980s reinvented convict leasing in an updated but similarly exploitative enterprise- private, for-profit prisons.

B. The Rise of Modern Private Prisons

The reemergence of for-profit prisons in the United States began in the late 1960's, as "tough on crime" rhetoric proved to be a useful political tactic in Richard Nixon's presidential campaign. The use of "crack" cocaine, a less potent, cheaper form of powder cocaine, became

⁷Ibid., 51.

⁸Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928*, (Columbia, South Carolina: University of South Carolina Press, 1996), 62.

⁹Michael A. Hallett, *Private Prisons in America: A Critical Race Perspective*, (Urbana, Illinois: University of Illinois Press, 2006), 39.

¹⁰ Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928*, (Columbia, South Carolina: University of South Carolina Press, 1996), 91.

prominent throughout poor communities of color. A media frenzy about the emerging “crack epidemic” struck fear in the minds of the American people, leading to a dramatic push towards harsher drug legislation.¹¹ The subsequent “War on Drugs” enacted new legislation that criminalized many drug and instated three-strikes laws and mandatory minimum sentencing. These laws included disproportionate sentencing for crack, which is primarily used by poor blacks, versus cocaine, the drug of choice for affluent white Americans, and high discretion within the implementation and enforcement of supposedly ‘color blind’ legislation. As a result, incarceration rates for men of color increased and are vastly disproportionate, especially in private facilities.¹² In addition to new drug laws, the Reagan administration’s attempts to curb undocumented immigration also bolstered the need for private prisons. The 1986 Immigration Control and Reform Act increased control of the US-Mexico border and required the detention of undocumented immigrants within the US.¹³ This sharp increase in non-violent drug offenders and immigrants being sent to prison exceeded the government’s ability to build more space, leading to extreme overcrowding within prisons and a huge financial burden for both federal and state governments.

In order to turn the financially draining prison industry into a profitable one, private companies began to bid for government contracts by claiming that they could build and run the day to day operations of prisons at a fraction of the cost of the public prisons.¹⁴ The first private company to capitalize on the booming prison industry was the Corrections Corporation of America. Founded in Nashville in 1983, CCA entered a contract with the state of Tennessee to

¹¹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (New York, New York: New Press, 2010), 27.

¹² Sharon Dolovich. "State Punishment and Private Prisons." *Duke Law Journal* 55, no. 3 (2005). <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1274&context=dlj>.

¹³ David Bacon. "Uprooted and Criminalized: The Impact of Free Markets on Migrants." *The Oakland Institute* (2008), 2.

¹⁴ Sharon Dolovich. "State Punishment and Private Prisons." *Duke Law Journal* 55, no. 3 (2005). <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1274&context=dlj>.

run its Hamilton County facility the next year, growing to control 52% of all private prisons.¹⁵ Since then, the private prison industry has grown considerably, operating prisons, juvenile centers, and other correctional facilities under contract with the Federal Government and many state and local governments.¹⁶ At the end of 2013, there were 133,000 inmates held in 158 private prisons, making up 7% of the total state prison population and 19% of the federal prison population.¹⁷ These for-profit prisons house 12% more people of color than their state run counterparts.¹⁸ Just like in the convict leasing system, private prison firms choose the prisoners who will allow them to maximize profit. While they do not rank the productivity of convicts in the same way, private prison firms favor holding young, non-violent offender because they will not require costly medical care or pose a risk of creating costly security crises within the facilities.¹⁹ For this reason, victims of the “war on drugs,” mostly young Black men, are the perfect “customers” for private prisons. Private prisons are a thriving industry, today worth about \$70 billion. Most private prison companies have entered contracts with the government that ensure that they maintain at least 80-90% capacity, or else taxpayers have to pay for the unused bed.²⁰ This creates a serious incentive for the creation and maintenance of laws that continue the high rates of incarceration in the United States and further rewards private capitalists for commodifying and exploiting black bodies.

III. Discussion

¹⁵ Christopher Petrella, and Josh Begley, "The Color of Corporate Corrections: The Overrepresentation of People of Color in the For-Profit Corrections Industry." *Radical Criminology*, 2003, 139-48. Accessed June 4, 2015. <http://journal.radicalcriminology.org/index.php/rc/article/view/27/html>.

¹⁶ Matthew T. King. "History of Private Prisons." In *Prison Privatization: The Many Facets of a Controversial Industry*, ed. Byron Eugene Price, (Santa Barbara, California: Praeger, 2012), 17.

¹⁷ "Private Prisons." American Civil Liberties Union. Accessed May 20, 2015. <https://www.aclu.org/issues/mass-incarceration/privatization-criminal-justice/private-prisons>.

¹⁸ Christopher Petrella, and Josh Begley, "The Color of Corporate Corrections: The Overrepresentation of People of Color in the For-Profit Corrections Industry." *Radical Criminology*, 2003, <http://journal.radicalcriminology.org/index.php/rc/article/view/27/html>.

¹⁹ Michael A. Hallett, *Private Prisons in America: A Critical Race Perspective*, (Urbana, Illinois: University of Illinois Press, 2006), 51.

²⁰ Ann Carson, "Prisoners in 2013." U.S. Department of Justice. September 30, 2014. Accessed June 4, 2015. <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

A. *Legal issues: Questions of accountability and legitimacy*

The privatization of prisons presents a fundamental paradox regarding the role of the state. The state itself is defined by its ability to restrict liberty and dole out violence towards certain individuals, and to do so with legitimacy.²¹ By privatizing prisons, the state grants private companies the ability to use coercive force, and it has done so with little assurance that the contracted companies are maintaining constitutionally protected conditions for prisoners. Private prison companies are not held to the same accountability standards as the Federal Bureau of Prisons. Under the federal Freedom of Information Act, anyone can request records about prisoner demographics, violent incidents, and prison budgets for prisons operated by the government. However, private prisons are exempt from this act, and they are under no obligation to provide transparency about prisoner abuses to the public.²² The administration of legitimate violence is a role solely reserved for the state, and by delegating it to companies with no accountability to the people, the very legitimacy of private prisons comes into question.

Beyond this, privately paid prison guards—directly supervised by a company not the state—owe primary allegiance to their company but act as enforcers of the law on behalf of the state. At the same time, private prison guards are not held to the same accountability for their actions as agents in state run facilities. In *Minneeci v. Pollard* (2012) Richard Lee Pollard, a federal inmate held at a private prison run by GEO Group, sued the company when he slipped on a cart and injured both of his elbows. In transport to an outside orthopedic clinic, he was forced to wear a “black box” wrist restraint, causing him excruciating pain. He claimed his Eighth Amendment protection against cruel and unusual punishment had been violated. However, the Supreme Court held that prisoners cannot assert Eighth Amendment rights claims against private

²¹Max Weber. *Politics as a Vocation*, (Philadelphia: Fortress Press, 1965), 33.

²² Elaine Genders. "Legitimacy, Accountability and Private Prisons." *Punishment & Society* 4, no. 3 (2002): doi:10.1177/146247402400426752, 296.

prison employers.²³ This blatant denial of accountability for the actions of those granted an agentic role by the state cannot be ignored. When the state delegates its own functions to private actors and they are not held to the same constitutional liability, the very foundation of legitimacy on which the state's violence relies is undermined.

B. Are Private Prisons Really Saving Taxpayers Money?

The principal argument that private prison advocates make is that it saves United States taxpayers money, as private prison firms are able to build and run the day to day functions of prisons for a fraction of the cost of state prisons. Several studies have tested the legitimacy of this claim by controlling for the multiple variables that may contribute to the cost-effectiveness of facilities. One of the most successful studies was conducted in Tennessee in 1996. This project examined both the operational costs and quality of service for three multi custody (minimum to maximum security) prisons for male inmates. The study found little difference in the average daily operational costs per inmate between the one private and two state-run prisons- \$35.39 for the private facility versus \$34.90 and \$35.45 for the two public facilities.²⁴ While more research is needed to determine the relative cost-effectiveness of public versus private prisons across every state, it is clear that the savings to the US taxpayers are little if any and certainly not enough to justify the enhanced security risks that prisoners and guards face within the walls of privately run facilities.

Aside from immediate financial concerns, long-term indirect financial costs that arise out of privatization arrangements deserve consideration. Increased criminal recidivism among inmates in private institutions presents perhaps the largest hidden financial cost of privatization.

²³ Zach Howe. "Balancing the Separation of Powers and Right-Remedy Principles in *Minneeci V. Pollard*, 132 S. Ct. 617 (2012)." *Harvard Journal of Law & Public Policy* 36.2 (2013): 915-[i].

²⁴ James Austin, and Garry Coventry *Emerging issues on privatized prisons*, (Washington, DC: U.S. Dept. of Justice, Office of Justice Programs, 2001), 36

A comparative study of recidivism rates Oklahoma's private versus public prisons determined that prisoners released from private facilities are more likely to reoffend and return to prison.²⁵ This can be traced back once again to the profit-driven model, in which there is no incentive to focus on rehabilitation, and prisoner education and training programs are often cut in order to decrease expenditures. By abandoning goals of rehabilitation and reduction of overall recidivism rates in favor of increased profit, private prisons perpetuate a cycle of incarceration which not only increases the cost of prisons for US taxpayers, but also perpetuates a cycle of incarceration within African American and Latino communities.

C. Inmate Safety and Security Concerns

Advocates for privatization claim that private companies can offer superior quality and services for a fraction of the price as publicly run institutions. Private prisons face the challenge of cutting cost while maintaining safety and offering a quality of prisoner care that meets constitutional standards. In order to do so, personnel and programs, the two most expensive aspects of incarceration, receive comparatively less funding in order to contain costs. This is particularly true for labor costs, which normally account for 60 to 70 percent of annual operating budgets.²⁶ Private prisons cut cost by lowering employee salaries, giving fewer benefits and less opportunities for salary advancements. On average, private prison employees also receive 58 hours less training than their publicly employed counterparts. Consequently, there are higher employee turnover rates in private prisons than in publicly operated facilities, leading to institutional instability and increased safety problems, including an inmate assault rate that

²⁵ Andrew L. Spivak, and Susan F. Sharp. "Inmate Recidivism as a Measure of Private Prison Performance." *Crime & Delinquency* 54, no. 3 (2008): 482-508. doi:10.1177/0011128707307962, 504.

²⁶ Alan Mobley, and Gilbert Geis. "The Corrections Corporation of America." In *Privatization in Criminal Justice: Past, Present, and Future*. Comp. David Shichor and Michael J. Gilbert. (Cincinnati, OH: Anderson Pub., 2001), 222.

doubles publicly run facilities.²⁷ The for-profit model is in no way compatible for an institution which controls thousands of humans lives as it's cost cutting measures clearly will deteriorate the quality of the services provided, once again disproportionately affecting men of color who are held at higher rates within these private facilities. Detention facilities are meant to be a method of removing harmful people from society, not a place in which their constitutional rights are wantonly violated and their safety is constantly in jeopardy.

D. Private Prisons and Political Power

Private prisons are one of the most important political forces behind regressive criminal and immigration laws that contribute to the mass incarceration. Through campaign contributions, lobbying, and political connections, private prison companies have been able to promote policies that lead to higher incarceration rates and thus greater profit margins.²⁸ Private prison corporations contribute money to political candidates in order to increase their influence over policy decisions, choosing candidates who are likely to win the elections regardless of their political party. In 2010, the three largest private prison corporations contributed a total of \$2,223,941 to state political figures, largely focusing on states such as California and Florida which in turn have experienced increased overcrowding and privatization.²⁹ With increased power in the political realm, private prison firms are able to ensure that both their prison beds and pockets remain filled at the cost of Black and Latino men.

While it is difficult to directly track the lobbying efforts of private prison firms as reporting requirements are lacking, the three largest corporations (CCA, GEO, and Cornell Corrections) have spent hundreds of thousands of dollars over the past decade on employing

²⁷ Ibid, 225.

²⁸ "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies." *Justice Policy Institute* (2001), 3.

²⁹ "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies." *Justice Policy Institute* (2001), 15.

lobbyists to advance their business interests. Since 2003, CCA has spent more than \$900,000 annually on federal lobby efforts.³⁰ In Arizona, CCA played a direct role in the creation and passing of the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), which would increase police power to question and detain those who could not prove their citizenship status. The legislation was originally written and drafted at a meeting attended by CCA officials, and 30 of the bill's co-sponsors had received campaign contributions from CCA.³¹ Beyond this, a recent study affirmed the political power that prison firms hold, determining that states with higher percentages of prison privatization were less likely to reform the "three strikes law" which has contributed greatly to the incarceration of many non-violent offenders.³² Legislation like this, which on the surface is 'color blind,' has had similar effects to the 'black codes' of the convict leasing era, increasing incarceration of men of color to maintain the profitability of private prisons. Because of their weighty political influence, private prison firms are one of the most important hindrances to progressive policy reforms that reduce incarceration rates and create a more equal society.

IV. Recommendation

The privatization of the prison industry has created an economy in which there will always be a demand for the incarceration of human beings. As long as there is a profit incentive behind criminal and immigration detention in the United States, there is no chance of altering the laws and legislation which have made Black men the targets of law enforcement in order to sustain the socioeconomic and racial hierarchy and inflated prison populations. Today, the weighty political power that private prisons have dramatically influences crime control

³⁰ Ibid., 21.

³¹ Ibid., 24.

³² Matthew Cravens, and Andrew Karch, "States Are Less Likely to Reform "Three Strikes" Laws If They Use Them Regularly and Have Higher Levels of Prison Privatization," London School of Economics and Political Science.

legislation, perpetuating the strict drug laws and harsh sentencing structures that will continue to increase the number of young men of color behind bars. With the current deficiency of accountability for constitutional violations within private prisons, they entirely lack legitimacy over their use of coercive violence and should no longer be delegated this task by the state.

V. Implementation:

A. Phase 1: The Private Prison Information Act

With the current prison population, it is not financially viable for the government to immediately reassume the ownership and care for all prisoners in privately run facilities. A system of accountability for private prisons in reporting prisoner conditions and safety must be implemented immediately. The Private Prison Information Act (PPIA) would require that companies under contract with the federal government to comply with public records requests made under the Freedom of Information Act (FOIA) to the same extent as federally run prisons. Under the PPIA, states must alter their contracts with private prison firms to ensure that they maintain constitutional living standards for prisoners, including adequate staffing and health care. This amended contract will simultaneously act to increase the standard of care within private prisons and reduce the profitability of private facilities, slowly reducing their economic viability and political power.

B. Phase 2: Return to State Ownership and Operation of Prisons

Within five years of the amended contract, private prisons will no longer have the same capacity to cut costs that they once had, and will no longer be able to make the same drastic profit margins they once did. At this point, the US government will buy out the private firms at a reduced price and assume responsibility for the day to day operations of all prisons. While this will be a large financial burden for both the state and federal government initially, with the

following legislation reforms government run prison-facilities can swiftly reduce the number of prisoners under their care, saving taxpayers billions of dollars.

C. Phase 3: Reduction of Overall Incarceration Rates

With a reduced financial incentive in the political field and a return to government ownership of all prisons, it is in the best interest of society as a whole to pass legislation which will reduce incarceration rates across all states. Doing so will reduce overcrowding in all prison facilities, and will reduce the financial burden of maintaining such a large prison population.

Proposed legislation:

- 1) Repeal the Anti-Drug Abuse Act of 1986 and replace mandatory minimum sentencing for drug crimes with individualized sentencing. This new approach will reduce the number of non-violent criminals in prisons, and allow for judges to have increased discretion in sentencing for minor drug crimes.
- 2) Revise the “three-strikes” law in the twenty-four states where it still exists. The “three-strikes” law should only be applicable on an individualized basis for repeat perpetrators of serious violent crimes.
- 3) Reduce the use of physical detention for immigrants by only holding immigrants whose release would pose a danger to the community. For other immigrants awaiting their hearings, alternatives to detention, such as monitoring devices should be used. Estimates from the Department of Homeland Security show that the costs of these alternatives can range from 70 cents to \$17 per person per day.³³ If only individuals convicted of serious crimes were detained and less expensive alternative methods were used to monitor the

³³“The Math of Immigration Detention Comments.” *Policy Papers*. National Immigration Forum, 22 Aug. 2013, <https://immigrationforum.org/blog/themathofimmigrationdetention/>.

rest of the currently detained population, taxpayers could save more than \$1.44 billion per year—almost an 80 percent reduction in annual costs.³⁴

VI. Conclusion

The state of the modern prison system in the United States has taken a long digression from its original purpose of seclusion and rehabilitation of criminals. The privatization of prisons has instead allowed for the commodification of Black and Latino bodies in the search for profit, just as the convict leasing system once did. While the horrors of the Convict Leasing system eventually came to light, leading to its abolition, the abuses within private prisons remain largely absent from public discourse. The rise of for-profit prison corporations has led to harsh legislation aimed at increasing incarceration rates, rather than improving society as a whole, marking a deterioration of the democratic process in the United States. In a land which flaunts an equality of opportunities for all members of society, African Americans have been targeted and criminalized by the “war on drugs.” Once convicted Black men are more likely to be housed in private prisons, where they will have less opportunities to participate in rehabilitation and educational programs and face even more horrific conditions than in state-run facilities. Until the profit-incentive for the incarceration of human beings is eliminated, there will be little chance of altering the laws which have been detrimental, not only to minority communities, but to society as a whole. The abolition of private prisons will take time and resources, but it is a necessary step in order for the US to become the democracy it prides itself on.

³⁴ Ibid.

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