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The Rise of Mass Incarceration and the Private Prison Industry: 1970s-Present

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**The Rise of Mass Incarceration
and the Private Prison Industry: 1970s-Present**

A senior thesis submitted to
The Department of Humanities
College of Arts & Sciences

In partial fulfillment of the requirements for
a Bachelor of Arts degree in History

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Abstract

Over the past thirty years the prison population in the United States has rapidly increased to the point that the U.S. now has the largest prison population in the world. How did this happen? Through research, this thesis will argue that mass incarceration is a direct result of the war on drugs and tough on crime policies dating back to the 1970's. These policies largely targeted the urban poor and minorities. With a rapid increase in the prison population during 1980's, state governments began to look to the private sector for a more cost-effective alternative. Private prison companies started with immigration detention centers and later gained state contracts. After multiple scandals ranging from escapes, violence, and neglect these companies backed away from state contracts. They returned to immigration detention centers bringing with them all they had learned from operating prisons.

Keywords: mass incarceration, war on drugs, private prison industry, detention centers

Introduction

The United States accounts for only five percent of the world population, yet accounts for twenty-five percent of the world's prison inmates.¹ This is a statistic that is often thrown around in the media today with little to no explanation as to how the nation of the free is also home to the world's largest prison population. How can the United States have more prisoners than countries with greater populations like China and Russia? Is the United States inherently more violent and crime ridden than other countries? The simple answer is no, the United States is not more violent or prone to crime. The U.S. simply has a long history of punitive responses to medical and rehabilitative issues. These punitive responses increased the prison population, increased time served, and created systems of recidivism. With increased prison populations all over the country, state governments sought alternatives to taxpayer incarceration. Private companies promised a cheaper and effective form of incarceration. These companies cut costs in crucial areas that endangered their employees and inmates. After numerous scandals and lawsuits, these companies returned to operating immigration detention centers. These immigrants are less likely to file complaints against these companies for the inhumane conditions and treatment.

The first section will argue that tough on crime policies and the war on drugs, dating back to the 1970's, caused the mass incarceration seen today. Beginning with the Nixon administration and his tough on crime policies, believing in a connection between

¹ Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. La Vergne: The New Press, 2015. p. 1

drug use and crime. Followed by the Reagan administration who intensifies the war on drugs and revitalizes mandatory minimum sentencing. Then the Clinton administration who arguably made the most lasting effect through the passing of the Violent Crime Control and Law Enforcement Act of 1994 and others that barred felons from accessing federal assistance. Lastly, this section will address the racial disparity within the prison population and the effectiveness of mass incarceration.

Section two will analyze the rise of private prison companies seeking to capitalize on overburdened state and federal prisons. Companies like Corrections Corporation of America (CCA) rose to the occasion when states were struggling to balance budgets. For-profit companies offered what appeared to be viable cost-effective alternatives to state and federal prisons. These companies promised to maintain quality while cutting costs. The ways in which these companies cut costs has in many cases endangered prison guards and the inmates themselves. More importantly these companies have lobbied against prison reform and have financially backed political candidates that are tough on crime. These companies will continue to campaign for tough on crime policies in order to maintain profitability, preventing meaningful sentencing and prison reform.

Section three will then analyze the shift of private prison companies back towards immigrant detention centers. Increased criminalization of immigrants resulted in the United States also becoming the largest detention nation. The federal government once again sought financial alternatives. Private prison companies have been shifting back towards operating detention centers in recent years after numerous lawsuits and scandals within their state prisons. These facilities are operated similarly to prisons, unfortunately immigrant detainees are not afforded the same rights as U.S. inmates and are vulnerable

to abuse. Private companies have begun using many of the same cost cutting measures and lobbying efforts they used for private prisons in an effort to increase the immigrant detainee population.

I. The Rise of Mass Incarceration

The Nixon Administration

“We must declare and win the war against the criminal elements which threaten our cities, our homes and our lives.”² This is a quote from President Nixon’s State of the Union Address in 1970. Nixon’s policies greatly contributed to the mass incarceration problem that is seen today. During his presidency, Nixon advocated for law and order and took a tough on crime approach. He went as far as to declare illegal drugs, “public enemy number one,”³ and was the first President to use the term “war on drugs”. He believed that higher conviction rates would lower the crime rate⁴. He wanted higher conviction rates of drug users and distributors believing in a link between increased drug use and increased crime in the country. In order to achieve this, he tripled the federal law

² Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. La Vergne: The New Press, 2015. p. 29

³ Wood, E., Werb, D., Marshall, B. D. L., Montaner, J. S. G., & Kerr, T. (2009). The war on drugs: A devastating public-policy disaster. *The Lancet*, 373(9668), p. 989.

⁴ Andre Douglas Pond Cummings, "All Eyez on Me: America's War on Drugs and the Prison-Industrial Complex," *Journal of Gender, Race & Justice* 15, no. 3 (Spring 2012):p. 418

enforcement budget⁵. He also signed a bill creating the Drug Enforcement Agency (DEA) during his final year as president.

The Nixon administration also created an important piece of public policy; the Controlled Substance Act (CSA) or the Comprehensive Drug Abuse Prevention and Control Act of 1970. This act is significant as it is the first of its kind to consolidate all drug policies into one piece of legislation that is enforced by the newly created DEA. Prior to this, drugs like marijuana and heroin had separate pieces of legislation that governed their use, distribution, and sentencing. The CSA resulted in the creation of drug scheduling or classifications that are still in use today. Drugs are scheduled based on their potential for addiction and their medicinal uses, or lack thereof.⁶ Marijuana for example is classified as a schedule 1 drug with the likes of heroin. It was believed to be highly addictive and hold no medicinal purposes. These classifications also determined sentencing for distribution and possession. Possession of any illegal drug always resulted in a misdemeanor on the first offense.⁷ The penalties of a repeated offense may result in a felony and depending on the scheduling, sentencing and fines varied. The DEA and the Department of Health and Human Services (DHHS) created these scheduling guidelines and continues to monitor drug distribution and handling.⁸ This is one of the first policies that began the rapid increase of non-violent drug offenders in the prison population.

⁵ Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. La Vergne: The New Press, 2015. p. 29

⁶ "The Controlled Substances Act." 6.2 Drug Enforcement 2, 9 (1979) p. 6

⁷ *Ibid* p. 6

⁸ *Ibid* p. 4

Despite all of Nixon's tough on crime policies, the crime rate only further increased during his presidency and his policies failed to garner wide public support.⁹ He did succeed in increasing the number of convictions and the prison population since the 1970s has increased by more than six times.¹⁰ According to the Bureau of Justice Statistics the prison population upon the election of Nixon in 1969 was 196,007 in state and federal prisons.¹¹ By the end of Nixon's presidency in 1974 the prison population rose to 218,466, which may appear to be a rather small increase. 1974 is an important year because the prison population increased by 150,000 in the eight years that followed. This was the largest recorded increase in U.S. history at the time. The prison population would continue to rise rapidly after Nixon's presidency and many researchers deem this to be the start of mass incarceration. President Nixon's tough on crime rhetoric tapped into the public's fear of crime and violence. The Republican party continued to tap into this fear for years to follow.

The Reagan Administration

President Ronald Reagan is attributed with creating a moral panic within the country concerning drug use and escalating the war on drugs.¹² Where President Nixon failed to garner public support for the war on drugs, President Reagan made the issue a

⁹ Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. La Vergne: The New Press, 2015. p. 40

¹⁰ Gottschalk, M. (2011), The past, present, and future of mass incarceration in the United States. *Criminology & Public Policy*, 10:p. 483

¹¹ Bureau of Justice Statistics

¹² Hawdon, James E. "The Role of Presidential Rhetoric in the Creation of a Moral Panic: Reagan, Bush, and the War on Drugs." *Deviant Behavior* 22, no. 5 (September 30, 2001): p. 426

national epidemic. In the early 1980s only about, 2 percent of the American public viewed the drug problem as a national issue. By the end of 1980s this rose to nearly 60 percent, despite drug use being on the decline nationally.¹³ President Reagan, along with his wife Nancy, was very vocal of his distaste of illegal drugs and its harm to American society. Reagan was quoted describing the drug problem, “as a much a threat to the United States as enemy planes and missiles”¹⁴. Nancy also made similarly dramatic statements,

Today, there’s a drug and alcohol abuse epidemic in this country, and no one is safe from it—not you, not me and certainly not our children. Now you can see why drug abuse concerns every one of us, all the American family.¹⁵

Nancy Reagan also created her famous “Just Say No” campaign that relied on the use of children and celebrities as political props to further perpetuate the idea that drugs use has become an epidemic in the country.

President Reagan used this moral panic over the use of drugs in the United States to push many of his political initiatives. The first being the revival of mandatory minimum drug sentencing laws. The Boggs Acts of the 1950’s was the last proposed mandatory minimum drug sentencing laws and were quickly repealed by Congress.¹⁶

¹³ Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. La Vergne: The New Press, 2015. p. 61

¹⁴ Hawdon, James E. “The Role of Presidential Rhetoric in the Creation of a Moral Panic: Reagan, Bush, and the War on Drugs.” *Deviant Behavior* 22, no. 5 (September 30, 2001): p. 427

¹⁵ *Ibid* p. 428

¹⁶ Henry Scott Wallace, "Mandatory Minimums and the Betrayal of Sentencing Reform - A Legislative Dr. Jekyll and Mr. Hyde," *Federal Bar News & Journal* 40, no. 3 (March/April 1993): p. 159

Congress believed the sentencing guidelines to be a mistake and proved to cause disproportionate sentencing for first time offenders. It also did not allow for the discretion and case by case basis sentencing determined by judges. Despite this knowledge of the past, the 1986 Anti-Drug Abuse Act passed through Congress and implemented many mandatory minimum penalties. It is widely believed that the reason why these policies saw wide bipartisan support from Congress is due to the media frenzy surrounding crack use at the time. Crack cocaine became the major talking point for most media outlets, focusing their news coverage on inner cities. With President Reagan's public distaste of drugs and the media coverage surrounding the crack epidemic, it became political suicide to not support any form of legislation that tackled drug use in America. The most controversial penalty to come out of this period is the mandatory minimum of five years for the possession of five grams of crack cocaine.¹⁷ In order to reach the same penalty of five years, a person would have to have 500 grams of powdered cocaine. This discrepancy, known as the 1:100 ratio, has been deemed intentionally racist by many scholars as crack cocaine was widely found in African American communities due it being much cheaper than powdered cocaine. This provision was expanded upon in with the Omnibus Anti-Drug Abuse Act of 1988 whereby mere possession of any quantity of crack cocaine would result in a mandatory minimum sentence of five years.¹⁸ By 1994, every state had mandatory minimum sentencing laws in place, many for drug offenses.¹⁹

¹⁷ Ibid p. 160

¹⁸ Ibid p. 163

¹⁹ National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, Editors. Committee on

Researchers have noted that African Americans and White Americans used cocaine at roughly the same rate, yet African Americans were the majority of those sentenced to serve prison time for possession and distribution. In 2006, an American Civil Liberties Union (ACLU) study discovered that African Americans represented more than 80 percent of crack cocaine defendants even though whites made up almost two-thirds of the market.²⁰

Asset Forfeiture

In 1984, the Reagan Administration incentivized increased drug policing through the creation of the Comprehensive Crime Control Act (CCCA). This act created the National Assets Seizure and Forfeiture Fund, under the Department of Justice (DOJ), that collected resources gathered through asset seizure and forfeitures. In its first year of implementation in 1985, \$27 million of assets were seized that can then be distributed to local and federal law enforcement, creating a self-sustaining model of funding.²¹ The DOJ reported in 1990 that this fund increased asset seizure and forfeiture by 1,500% between the years of 1985 and 1990.²² The CCCA also greatly expanded what was forfeitable stating, “all real property, ... or any lot of land and any ... improvements, which is used, or intended to be used, ... to commit, or to facilitate the commission of, a

Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press.

²⁰ Matthew D. Lassiter; Impossible Criminals: The Suburban Imperatives of America's War on Drugs, *Journal of American History*, Volume 102, Issue 1, 1 June 2015, p. 131

²¹ Annemarie Bridy, "Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy," *Arizona State Law Journal* 46, no. 3 (Fall 2014):p. 695

²² Ibid p. 697

violation of this title punishable by more than one year's imprisonment.”²³ Any property in connection or suspected to be in connection to a drug operation could be seized and the profits are then distributed between local and federal law enforcement. The profits made from drug related arrests slowly became top priority for many police departments, so much so that they took precedence over other major crimes due to their lack of financial incentive. This greatly increased policing in inner cities and aided in the disproportionate mass incarceration of African Americans and other minorities. Racial profiling became an issue in many cities as police officers were more likely to search African Americans and Hispanics than whites.²⁴ These searches resulted in disproportionate arrests and convictions of minorities. According to the DOJ’s Bureau of Justice Statistics, the prison population by the end of Ronald Reagan’s presidency in 1989 rose to 607,000 from 353,167 at the start of his presidency in 1981.²⁵

The Clinton Administration

The election of democrat President Bill Clinton put an end to a long chain of conservative Republican presidents. This upset was largely due in part to the democratic parties changing strategy. The democratic party learned from its loss in 1988 after a political ad run by republican candidate George H.W. Bush against democrat candidate Michael Dukakis. The ad highlighted the case of convicted felon Willie Horton who escaped from custody during a furlough or what is often called a home leave or a

²³ Ibid p. 698

²⁴ Marc Mauer, "Addressing Racial Disparities in Incarceration," *Prison Journal* 91, no. 3 Supplement (September 2011):p. 925

²⁵ Bureau of Justice Statistics

temporary community release. After escaping custody during this furlough, he burglarized the home of a young couple and during the burglary raped a young woman named Angela Miller.²⁶ This case was used as a political attack ad against Michael Dukakis as he was an avid supporter of furlough leaves for prison inmates. When questioned after the incident and the attack ad he refused to change his stance. Bush would later give a speech further attacking Dukakis stating,

What did the Democratic Governor of Massachusetts think he was doing when he let convicted first-degree murderers out on weekend passes? Why, even after one of the criminals that he let out brutally raped a woman and stabbed her fiancé, why won't he admit his mistake? Eight months later he was still defending his program and only when the Massachusetts Legislature voted by an overwhelming majority to abolish the program for murderers, did he finally give in. I think that Governor Dukakis owes the people of the United States of America an explanation as to why he supported this outrageous program.²⁷

George H.W. Bush used this fear of crime and possible racial prejudice, Willie Horton was African American, and won the 1988 president election as the crime control candidate.

Bill Clinton, learning from the mistakes of Dukakis, changed the typical democrat rhetoric on crime and campaigned as being tougher on crime while also promoting more progressive measures. Clinton campaigned to add 100,000 more police officers onto the streets stating, "The simplest and most direct way to restore order in our cities is to put more police on the streets".²⁸ At the same time Clinton differed from Republican crime

²⁶ Skolnick, Jerome H. "Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice." *The American Prospect*, no. 25 (1996)

²⁷ Harry A. Chernoff; Christopher M. Kelly; John R. Kroger, "The Politics of Crime," *Harvard Journal on Legislation* 33, no. 2 (Spring 1996):p. 537

²⁸ *Ibid* p. 543

rhetoric by claiming that the root of crime is on the lack of jobs and opportunities for the poorest of the nation.²⁹ Clinton, knowingly or unknowingly, put himself in a compromising position of attempting to please everyone. Where he often spoke of building up communities he was also an open supporter of the death penalty. At the time this was the ultimate determination that proves a candidate is truly tough on crime. He would follow through on these promises with the signing of the Violent Crime Control and Law Enforcement Act of 1994, or the 1994 Crime bill for short. The bill contained a moderate amount of community building funds but at the same time contained a three strikes provision and a truth in sentencing provision. These provisions further increased the prison population, but even more importantly these provisions increased time served and dissolved parole for many inmates. Clinton became a polarizing figure as he attempted to please both liberals and conservatives through his signing of the Violent Crime Control and Law Enforcement Act of 1994.

Violent Crime Control and Law Enforcement Act of 1994

During President Clinton's State of the Union Address he directly addressed the issue of crime in the United States stating,

Let's give our children a future. Let us take away their guns and give them books. Let us overcome their despair and replace it with hope. Let us, by our example, teach them to obey the law, respect our neighbors, and cherish our values. Let us weave these sturdy threads into a new American community that can once more stand strong against the forces of despair and evil because everybody has a chance to walk into a better tomorrow.³⁰

²⁹ Kramer, R., & Michalowski, R. (1995). The iron fist and the velvet tongue: Crime control policies in the clinton administration. *Social Justice*, 22(2), pg. 3

³⁰ Ibid p. 5

Clinton continued to claim the idea that crime needed to be solved by using more community development measures rather than punitive. A little later during Clinton's first year in office, the senate proposed the Violent Crime Control and Law Enforcement Act of 1994. The bill pushed to add 100,000 more police officers on the street, provide funding for the construction of more prisons, increased death penalty offenses, increased mandatory life imprisonment offenses, contained a three strikes provision, and contained a truth in sentencing provision. The bill was hotly contested and shut down multiple times throughout its development. Republicans and Democrats fought over multiple provisions from increased community development funding to a ban on assault rifles. The bill was eventually passed and many Democrats viewed it as a victory as it was the largest and most expensive crime prevention bill to be passed. It totaled at \$28 billion with \$9 billion going towards crime prevention programs, \$13.5 billion for prison construction, and \$3.5 billion for 100,000 new police officers. One of the crime prevention programs created provided grants for communities high in poverty and joblessness called the Local Partnership Act. There are many other grant programs centered around education, crime prevention, drug prevention, and gang prevention in high risk communities. Clinton succeeded in getting his 100,000 new officers that were focused on community policing. He also succeeded in passing a bill that in some ways pleased both conservatives and liberals alike. The bill did however greatly add to the issue of mass incarceration through the three-strikes and truth in sentencing provisions. At the start of his presidency in 1993 the prison population numbered an estimated 948,881 according to a Department of Justice press release.³¹

³¹ Bureau of Justice Statistics

“Three Strikes and You’re Out” Provision

Three-strike laws refer to habitual offenders being sentenced to mandatory life in prison after committing a violent felony and two other prior convictions. The Violent Crime Control and Law Enforcement of 1994, signed by President Clinton, contains a provision implementing three-strikes law on the federal level. Washington state was the first state to pass a three strikes law in 1993 followed by California and Georgia.³² Opponents to the three-strikes law in Washington state prior to its implementation, a group of prosecutors, provided a scenario,

An 18-year-old high school senior pushes a classmate down to steal his Michael Jordan \$150 sneakers-Strike One; he gets out of jail and shoplifts a jacket from the Bon Marche, pushing aside a clerk as he runs out of the store-Strike Two; he gets out of jail, straightens out, and nine years later gets in a fight in a bar and intentionally hits someone, breaking his nose-criminal behavior, to be sure, but hardly the crime of the century, yet it is Strike Three. He is sent to prison for the rest of his life.³³

This scenario demonstrates how three-strikes can inadvertently cause more harm than good as the punishment does not necessarily fit the crime. In this particular scenario, this young man cannot qualify for parole until he has served a minimum of 25 years in prison. The term “violent offense” can also be interpreted in many different ways depending on the state. On the federal level the term “violent offense” refers to,

punishable by a maximum term of imprisonment of ten years or more that has as an element the use, attempted use, or threatened use of physical force against the

³² Cole F. Heyer, "Comparing the Strike Zones of Three Strikes and You're out Laws for California and Georgia, the Nation's Two Heaviest Hitters," *Suffolk University Law Review* 45, no. 4 (2012):p. 1221

³³ Nkechi Taifa, "Three-Strikes-and-You're-Out - Mandatory Life Imprisonment for Third Time Felons," *University of Dayton Law Review* 20, no. 2 (Winter 1995):p. 718

person of another or that, by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.³⁴

Non-violent drug offenses can result in a felony charge depending on the amount of drugs involved. This has caused some concern among opponents of three-strike laws as low-level drug dealers and couriers are being sentenced to life in prison sometimes without the possibility of parole. These laws increase the amount of time a person spends in prison and eventually becomes a burden on the taxpayer. A provision known as the “geriatric exception”³⁵ gives inmates of seventy years of age who have served at least thirty years of their sentence the opportunity to prove that they are no longer a danger to society and be released. Three strike laws are also compounded upon with truth in sentencing and mandatory minimums making three strike laws unnecessary.

California has become an excellent case study for why this system is failing. In California prison overcrowding has become a major issue, and research shows that prisons have been forced to release young offenders in order to make room for those serving life sentences.³⁶ Young offenders are statistically more likely to continue to commit crime when compared to older offenders. A 2011 report by California’s Department of Corrections and Rehabilitation shows that since the implementation of three strikes in 1994, 8813 people have been sentenced to 25 years to life in prison.³⁷ Of

³⁴ Ibid p. 719

³⁵ Ibid p. 721

³⁶ Cole F. Heyer, "Comparing the Strike Zones of Three Strikes and You're out Laws for California and Georgia, the Nation's Two Heaviest Hitters," *Suffolk University Law Review* 45, no. 4 (2012):p. 1228

³⁷ Ibid p. 1232

that 8813, more than 2000 were a result of a drug offense and less than one-third were due to a violent offense.³⁸ Like many other punitive measures to fight crime, three strikes laws have not been reliably shown to reduce crime. Three strikes laws however, have been shown to disproportionately affect minority communities resulting in more minorities being sentenced to serve longer prison sentences. One study discovered a racial bias in sentencing stating,

race and ethnicity do play an important role in contemporary sentencing decisions. Black and Hispanic offenders sentenced in State and Federal courts face significantly greater odds of incarceration than similarly situated white offenders. In some jurisdictions, they also may receive longer sentences or differential benefits from guideline departures than their white counterparts.³⁹

This racial bias contributes to the mass incarceration of minorities and is compounded by the fact that most of them will have to serve their full sentence due to Truth in Sentencing laws.

Truth in Sentencing Provision

Truth in Sentencing refers to a legislative requirement for prison inmates to serve a majority of their prison sentence, typically 85% of their original sentence. This law mainly applies to violent offenders and repeat offenders in order to ensure that these inmates are serving their time and not being released on good behavior, parole, or overcrowding. Prior to truth in sentencing laws, the majority of states used an indeterminate sentencing system. In this system judges gave a range of years to be served for an offense, the maximum being set by the federal guidelines. After the sentencing, a

³⁸ Ibid p. 1233

³⁹ Marc Mauer, "Addressing Racial Disparities in Incarceration," *Prison Journal* 91, no. 3 Supplement (September 2011):p. 935

parole board would then monitor an inmates' rehabilitation and decide whether or not they qualify for parole. This model was rehabilitation focused and at times could be deemed inconsistent with time served for inmates as they were on a case by case basis. With the increase in violent crime beginning in the 1960's many states and their voter base wanted more consistent times served for the same crime. The general argument being that violent inmates were being released on parole or good behavior and then returning to their old ways of violence. Citizens wanted to be reassured that a violent offender, even if it's their first offense, stays in prison longer and serves their whole sentence. The Sentencing Reform Act of 1984 implemented truth in sentencing for those sent to federal prison and had them serve 85% of their sentence. Washington state would be the first state to implement truth in sentencing in 1984. In the early 1990's, Gallup polls were showing that crime had become the number one concern for the majority of Americans, particularly time served.⁴⁰

The Violent Crime Control and Law Enforcement Act of 1994 was in reaction to these concerns. The Act allocated \$10 billion towards states that implemented truth in sentencing legislation. These grants were given to states in order to construct more prison facilities. After the passing of 1994 crime bill, 29 states enacted some form of truth in sentencing legislation and applied to receive the federal grant funding.⁴¹ 25 of these states would be successful in meeting the 85% time served requirement.⁴² A minority of the

⁴⁰ Susan Turner; Peter W. Greenwood; Terry Fain; James R. Chiesa, "An Evaluation of the Federal Government's Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants," *Prison Journal* 86, no. 3 (September 2006): p. 367

⁴¹ *Ibid* p. 372

⁴² *Ibid* p. 373

states claimed that the financial incentive played a role in their decision. The grant funds were restricted to the construction of more prison beds or to even lease beds from a private company. By the end of the grant period, 2001, around 50,000 prison beds were constructed across the country.⁴³ Truth in sentencing laws were created in an effort to deter crime and prevent repeat offenses. Research shows that violent crime nationally was already on the decline prior to the passing of the 1994 crime bill, yet the number of people imprisoned continued to rise. Truth in sentencing does not directly correlate with reduced crime, but it has had the effect of keeping people imprisoned longer and aided in prison overcrowding.⁴⁴ By the end of Clinton's presidency in 2001, the prison population rose to 1,406,031 in state and federal prisons.⁴⁵

Legal Discrimination

The policies just discussed focused on making sure that criminals are convicted and remain in prison longer. What happens when they are eventually released? Convicted felons are banned from public housing, denied access to welfare, not permitted to vote, and are frequently overlooked for jobs. These forms of legal discrimination disproportionately affect African Americans and Hispanics, the primary victims of the

⁴³ Ibid p. 373

⁴⁴ National Research Council. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Committee on Causes and Consequences of High Rates of Incarceration, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press.

⁴⁵ Bureau of Justice Statistics

war on drugs. The Anti-Drug Abuse Act of 1988, as mentioned previously, contained a provision concerning public housing stating,

a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.⁴⁶

This provision is in response to heavy drug use and the physical deterioration of public housing sites during the late 1980's. In 1996, President Clinton sought to expand upon this provision in what he called "One Strike You're Out". The new legislation later passed by Congress states,

Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.⁴⁷

The language changed to include any member of the tenant's household or guest. The boundaries for the offense were also extended meaning that the offense is no longer simply on or near the public housing property. This means that the tenant is responsible for every person that enters their residence. The tenants' family member or guest does not have to be convicted of a crime to have their residency terminated, simply arrested. Lastly, the Department of Housing and Urban Development (HUD), the department in charge of public housing, is legally allowed to deny housing to anyone with a criminal

⁴⁶ Michelle Y. Ewert, "One Strike and You're out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violated Due Process and Fair Housing Principles," *Harvard Journal on Racial & Ethnic Justice* 32 (2016): p. 67

⁴⁷ *Ibid* p. 68

record. There is little research to determine how many people are denied from public housing due to a criminal record, but those just released from prison have little options.

In the same year, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act or the Welfare Act of 1996. This act contained a provision that permanently banned anyone with a drug related felony from receiving benefits.⁴⁸ This act primarily affected African American women and their children. Women with young children were the primary benefactors of government assistance across racial lines. At the time, African American women made up almost 50% of the female prisoner population.⁴⁹ Most were arrested for possession or a crime to support their addiction. With no means to support their children these women were more likely to return to a life of crime. The issues of access to public housing and government assistance can be traced back to policies signed by President Clinton. It is unclear whether or not these policies were racially motivated, but they did disproportionately affect minority communities. These issues were further compounded by legal discrimination in employment.

All 50 states have some form of legal discrimination for ex-felons in public employment. Ex-felons are typically barred from receiving a professional license such as accounting or a barber's license. Beyond that most employers will simply not hire people with criminal records. There is a racial bias that comes into play that one researcher was able to observe. Devah Pager published a study in 2003 that discovered employers are

⁴⁸ Cynthia Godsoe, "The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to Life Sentence," *Berkeley Women's Law Journal* 13, no. 1 (1998): p. 257

⁴⁹ *Ibid* p. 261

more likely to assume that African American applicants have a criminal record than white applicants.⁵⁰ They will typically confront African American applicants and ask them up front if they have a record prior to even looking at their resume. Even when applicants with the exact same resume and criminal background, white applicants were more likely to receive call backs. This study is the first of its kind to prove a link between incarceration and unemployment. These policies, and all the others discussed, were created as deterrents to crime but have only resulted in increased recidivism. A large percentage of inmates released from prison that face these legal forms of decriminalization will ultimately return to prison.⁵¹ The vast majority of these repeat offenders will be African American. African Americans make up 40% of the entire prison population while only representing 12% of the U.S. population.⁵² African American men are also six times more likely to be imprisoned when compared to white males. 1 in every 3 African American men on average are imprisoned as compared to 1 in every 17-white male.⁵³ This cycle of release, discrimination, and rearrests is the reason that these percentages are so high and will continue to remain high. This cycle began with the onset of the war on drugs through increased policing of inner cities and incentivized asset

⁵⁰ Jordan Segall, "Mass Incarceration, Ex-Felon Discrimination & Black Labor Market," *University of Pennsylvania Journal of Law and Social Change* 14, no. 1 (2011):p. 175

⁵¹ Michelle Alexander p. 94

⁵² Cecil J. II Hunt, "The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration," *Journal of Civil Rights and Economic Development* 29, no. 1 (Fall 2016):p. 15

⁵³ Marc Mauer, "Addressing Racial Disparities in Incarceration," *Prison Journal* 91, no. 3 Supplement (September 2011):p. 894

forfeiture. Long prison sentences and the removal of many privileges as a U.S. citizen were meant to ensure a drop in the crime rate. Is mass incarceration responsible for the drastic drop in crime that we see today? Is it appropriate to say that these punitive responses are justifiable?

Decline in Crime

In the United States virtually all forms of crime have reached all-time lows. Since the 1990's violent crime has dropped by nearly 70% and burglary has dropped by nearly 50%.⁵⁴ Some researchers attempt to attribute this drop in overall crime to the increased use of incarceration. However, a cross national study concluded that Canada and the U.S. experienced very similar drops in crime during the 1990's, despite Canada not increasing their use of incarceration during this period. There are numerous theories as to why crime dropped so rapidly across the board. The most popular theories include the growth of the economy, an aging population, policing strategies, and the development of security technology. Of all the theories presented the development of security technologies is believed to have the most influence on the crime rate. Anti-theft systems for cars and home security systems are considered greater deterrents to crime than increased punitive policies and increased policing. These developments can be seen across multiple western nations that experienced a drop-in crime. It is one of the few similarities that the nations had during this time period. No other nation increased policing and incarceration comparable to the U.S. yet they experienced roughly the same decrease in crime. Mass incarceration has not been linked to decreased crime in the U.S. and has played a very

⁵⁴ Graham Farrell; Nick Tilley; Andromachi Tseloni, "Why the Crime Drop," *Crime and Justice: A Review of Research* 43 (2014):p. 425

minimal role as an effective crime deterrent. Despite the steep drop in crime in the U.S. the prison population continued to grow throughout the 1990's and early 2000's.

II. The Rise of Prison Privatization

Prison privatization to many is a modern problem that just emerged in recent years in the media. In actuality, prison privatization began in the early 1980's and reached its peak of profitability during the late 1990's and early 2000's. The first private prison company in the United States was called Corrections Corporation of America (CCA), now known as CoreCivic, that started in 1983.⁵⁵ It was started by the former chair of the Tennessee Republican Party, Thomas Beasley. Beasley partnered with venture capitalist Jack Massey.⁵⁶ Massey was best known for funding the creation of another private company known as Hospital Corporation of America with Beasley creating the model for its operation. Hospital Corporation of America (HCA) privatized medical facilities and Beasley saw an opportunity to do the same with prisons. Beasley was so confident in the idea of selling prisons he described it as, "CCA will be to jails and prisons that are owned and managed by local, state, and federal governments what Hospital Corporation of America has become to medical facilities nationwide".⁵⁷ CCA received its first contract from the Immigration and Naturalization Service (INS) and was

⁵⁵ Ryan Miller, "The False Promise of Prison Privatization in America," *Loyola of Los Angeles International and Comparative Law Review* 37, no. 3 (Spring 2016): 377-418

⁵⁶ Mattera, Philip, Mafruza Khan, and Stephen Nathan. "Corrections Corporation of America: A Critical Look at its First Twenty Years." (2003) p. 10

⁵⁷ *Ibid* p. 10

tasked with building a facility to detain undocumented immigrants in Houston, Texas in 1984. CCA had a rough start with no prior experience in corrections. One of the co-founders of CCA, T Don. Hutto, was a corrections professional who had run the Arkansas prison system in the late 1970's but did not have the most favorable track record. The Supreme Court found that the Arkansas prison system was guilty of "cruel and unusual punishment" after reports of rape, torture, and high working hours for inmates.⁵⁸ Despite all of this, CCA was still trusted to construct the detention center. They originally failed to construct a facility in time so they leased a motel and repurposed it to fit their needs.⁵⁹ CCA would move on to gain more contracts from INS, gain contracts for multiple juvenile detention centers, and pre-release centers. In only a matter of a couple of years CCA was quickly turning a profit and went as far as to attempt to purchase the entire state prison system of Tennessee for \$100 million.⁶⁰ Tennessee, like many other states, was struggling to deal with prison overcrowding and was federal mandated to reduce overcrowding. Prison overcrowding became a major problem during the 1980's and the Supreme Court ruled that prison overcrowding can constitute a violation of the Eighth Amendment in certain situations.⁶¹ This fear of violating prisoners eighth amendment rights and budgetary constraints made private prison companies more

⁵⁸ Ibid p. 11

⁵⁹ Ibid p. 11

⁶⁰ Ibid p. 11

⁶¹ David A. Semanchik, "Prison Overcrowding in the United States: Judicial and Legislative Remedies," *New England Journal on Criminal and Civil Confinement* 16, no. 1 (Winter 1990): p. 80

appealing. More companies began to spring up around the country. The second largest company to come out of this time was called Wackenhut Corrections Corporation, better known now as The GEO Group. CCA and GEO Group would go on to become the two biggest private prison companies in the nation operating 132 prisons, as of 2014, and generate over \$3 billion in revenue each year.⁶²

Private prison companies have been operating in the country and turning a profit for over 30 years now. It is important to research the history of these companies because their actions and influence has continued to perpetuate the issue of mass incarceration. Private prisons stand in the way of meaningful legislative reform that can reduce the prison population. In the past they have been quietly in the background influencing politicians and legislation. Private prison companies have a financial incentive to continue perpetuating longer prison sentences for inmates. These companies turn a profit through state and government contracts that often include occupancy quotas. The state and federal government sign contracts that often seek a 90% occupancy rate at all times, and if they fail to reach this goal the companies can charge heavy fines.⁶³ These companies rely on the continued issue of prison overcrowding and budgetary constraints to ensure that they remain in business. Where the war on drugs and tough on crime policies resulted in mass incarceration, private prison companies seek to maintain these policies and even expand them for their own financial gain. CCA and The GEO Group

⁶² Ryan Miller, "The False Promise of Prison Privatization in America," *Loyola of Los Angeles International and Comparative Law Review* 37, no. 3 (Spring 2016):p. 385

⁶³ Patrice A. Fulcher, "Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex," *Washburn Law Journal* 51, no. 3 (Summer 2012): p. 608

have gone as far as lobbying for legislation that increases prison terms, making campaign contributions, and sometimes paying off judges and other legal figures to gain contracts.

Lobbying Efforts and Campaign Contributions

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.⁶⁴

This is a direct quote from a CCA annual report to their shareholders explaining to them how they will continue to lobby for legislation that increases the number of inmates in their facilities. It is estimated that CCA and The GEO Group paid over \$4 million in campaign contributions between the years of 2003 and 2012.⁶⁵ CCA and the GEO Group are also members of a very exclusive private interest group called the American Legislative Exchange Council (ALEC). ALEC writes and proposes model legislation to lawmakers and corporate sponsors.⁶⁶ ALEC members consist of conservative lawmakers and representatives from major corporations like Wells Fargo, Walmart, Coca Cola, CCA, and many more. Out of 825 bills that were written and proposed by ALEC to lawmakers, they successfully passed 115 bills in 2009.⁶⁷ Many of these bills were written to increase the

⁶⁴ Ibid p. 608

⁶⁵ Ibid p. 607

⁶⁶ Rebecca Cooper, Caroline Heldman, Alissa R. Ackerman & Victoria A. Farrar Meyers (2016) Hidden corporate profits in the U.S. prison system: the unorthodox policy-making of the American Legislative Exchange Council, *Contemporary Justice Review*, 19:3 p. 382

⁶⁷ Ibid p. 385

prison population, increase time served, and promote greater use of private prisons. These bills benefited companies that provided food and services for inmates, companies that use inmate labor, and directly benefited private prison companies like CCA.⁶⁸ ALEC has had a hand in writing many bills that were previously discussed such as mandatory minimums, truth in sentencing, and three strikes laws as the group has been operating since 1973. The group manages to stay out of the public eye due to the fact that lawmakers present these bills as their own, not as being written by ALEC and their team of researchers. ALEC makes an estimated \$25 million a year from corporate sponsorship on top of the \$7,000-\$25,000 membership fee that corporations have to pay in order to gain access to these meetings.⁶⁹ CCA and other private prison companies not only make large campaign contributions to lawmakers, but they are also members of this private interest group ensuring that these companies continue to make a profit for years to come.

Cost Savings

The allure of private prison contracts for many states was the idea that the taxpayer would be saving money in the long run. That the private sector could operate and manage prisons more effectively and cheaper. The research that has been done to determine whether private prisons are cheaper than state or federally operated prisons has been inconclusive. There are some researchers finding that privately operated prisons are cheaper, but the researchers behind these studies were found to be paid and funded by the private prison industry.⁷⁰ The latest example of this came from two economic professors

⁶⁸ Ibid p. 387

⁶⁹ Ibid p. 382

⁷⁰ Alex Friedmann, "Apples-to-Fish: Public and Private Prison Cost Comparisons," *Fordham Urban Law Journal* 42, no. 2 (December 2014):p. 506

from Temple University that released a study finding private prison cost savings in 2014. They did not disclose that they received funding from CCA and the GEO Group until after the study was published.⁷¹ The vast majority of research concerning privatization savings have found very minimal cost savings and, in some cases, have been shown to be more expensive than state operated facilities. Private prison companies use a couple of strategies to shift their costs back onto the state. The first being that these companies, based on their contracts, can strategically pick and choose the inmates they wish to house in their facilities. These companies choose minimal security, healthy, and non-violent inmates in order to save money on security and medical costs.⁷² A report conducted in 2004 concerning the security disparity among inmates in state and private prisons stated,

The private sector houses approximately 21% fewer inmates at the maximum and close security levels and approximately 15% more inmates at the minimum-security level than does the public sector. Thus, 90% of the private sector's inmate population is classified at the medium or minimum levels, whereas only 69% of the public sector's inmate population are so designated.⁷³

Private prison companies also make note in their contracts with states that they are not financially responsible for inmates that have serious medical conditions like HIV or AIDS.⁷⁴ If the facility does take in inmates that have these medical conditions they often

⁷¹ Ibid p. 507

⁷² Anne C. Jefferson, "Rehabilitating Prison Contracting: States Must Reclaim Prison Management and Emphasize Inmate Rehabilitation through Utilization of Schedule Contracts for State-Run Prison Procurement," *Public Contract Law Journal* 47, no. 1 (Fall 2017):p. 115

⁷³ Alex Friedmann, "Apples-to-Fish: Public and Private Prison Cost Comparisons," *Fordham Urban Law Journal* 42, no. 2 (December 2014): 522

⁷⁴ Ibid p. 525

have caps on the amount of medical expenses one inmate can have before the state has to begin paying the bill.⁷⁵ Finally in the majority of contracts, the transportation of inmates to and from private facilities is paid by the state.⁷⁶ This is very much apparent in the case of Hawaii as one third of its inmates are sent to private facilities on the mainland. Many states fail to realize that all of these costs add up and result in them paying more than just housing the inmates themselves. These costs don't necessarily apply to every state that contracts private companies and at the moment it is difficult for researchers to accurately side one way or the other on the issue of cost effectiveness. There are many factors that come into play such as prison population, medical costs, transportation costs, and security costs. No two facilities are the same and this makes cost comparisons difficult. These are just the actions of private companies to shift their expenses on to the state in order to appear as a cheaper alternative. Beyond this, private companies take measures to cut costs in areas that affect the safety and wellbeing of their inmates in order to maintain profits.

Security, Escapes, and Inmate Violence

In order for private prison companies to maintain their profitability they have to make budget cuts in vital areas regarding the wellbeing of their inmates and their security. Private prison companies often advertise their services by claiming that they can maintain and operate a facility with less manpower than a state-run facility. This cut to the number of correctional officers means that they save in wages, training, and benefits as one researcher notes,

⁷⁵ Ibid p. 527

⁷⁶ Ibid p. 532

The cost-cutting focus of private corporations translates to reduced staffing levels, reduced investment in training of prison guards, increased ratios of inmates to correctional officers, and lower wages for private correctional officers. Low pay, poor training, and high turnover may contribute to higher levels of violence in the private sector prisons. This may in turn encourage private prison employees to violate prisoners' rights-rights that would be better safeguarded if government employees in government-run facilities guarded the prisoners. This is the predicament of the privately housed federal prisoner.⁷⁷

The staffing model that these facilities use is not on the public record and the inmate to correctional officer ratio is often not disclosed. These facilities claim to not release this information due to it being a "trade secret".⁷⁸ This information is vital to researchers seeking to make cost comparisons as labor makes up the majority of prison costs. A report in 2005 is the latest information available concerning prison inmate to officer ratio and it found that there were 7.1 inmates per officer on average in private facilities.⁷⁹ This is well above the national standard of 2 to 1 ratio in state prisons. This disparity between inmates and officers has led to numerous national headlines reporting escapes, violence, and abuse. The most notable story came out of Arizona in 2010 where three inmates escaped from a Management and Training Company (MTC) operated facility. One of the inmates prior to being recaptured was connected to the murder of an elderly couple whose bodies were burned inside a trailer in New Mexico.⁸⁰ The inmates were able to

⁷⁷ Andre Douglas Pond Cummings; Adam Lamparello, "Private Prisons and the New Marketplace for Crime," *Wake Forest Journal of Law & Policy* 6, no. 2 (June 2016): p. 421

⁷⁸ Mike Tartaglia, "Private Prisons, Private Records," *Boston University Law Review* 94, no. 5 (October 2014): p. 1710

⁷⁹ *Ibid* p. 1711

⁸⁰ Michael Brickner; Shankyra Diaz, "Prisons for Profit: Incarceration for Sale," *Human Rights* 38, no. 3 (Summer 2011):p. 13

escape due to there being no security guards posted near one of the perimeter gates, the security system was not maintained, and non-operational flood lights.⁸¹ Another famous incident occurred at Idaho Correction Center operated by CCA. The facility gained a reputation among inmates due to its lack of staffing and rampant violence often referring to the facility as “gladiator school”⁸². There were many rival gangs in the facility and the correctional officers would often allow gang violence to persist as a way of maintaining order. Researchers have discovered that the rate of escapes, inmate to inmate violence, and guard to inmate violence is higher in private prisons compared to state prisons.⁸³ Overwhelmed staff eventually quit and this results in a high turnover rate within these facilities and ultimately a lack of experienced staff. This inexperienced staff struggle to handle inmate disputes and often resort to violence and are inexperienced in terms of oversight overlooking drug use, escapes, and violence.⁸⁴ This is only one way that private prison companies cut costs to operate their facilities.

Medical Care

Medical care for inmates is by far the biggest expense for state and federal prisons. With many of the same reasons for states moving their inmates to private

⁸¹ Ibid p. 13

⁸² Mike Tartaglia, "Private Prisons, Private Records," *Boston University Law Review* 94, no. 5 (October 2014):p. 1712

⁸³ Ibid p. 1715

⁸⁴ Andre Douglas Pond Cummings; Adam Lamparello, "Private Prisons and the New Marketplace for Crime," *Wake Forest Journal of Law & Policy* 6, no. 2 (June 2016):p. 426

prisons, state prisons often outsource their medical care to private companies. Private medical care providers serve state, federal, and private prisons as a means to lower healthcare costs. These companies are paid and make a profit in two distinct models. The first and most favorable for these companies is the flat rate model where the company is given an annual budget and any funds that are not spent on inmates turns to profit. This model incentivizes the company to keep costs as low as possible to retain as much of their budget and turn it to profit. The second model is the cost-plus model where the company is reimbursed for its medical expenses and paid extra for profit.⁸⁵ These companies are not too dissimilar to private prisons as they suffer from many of the same issues. In order to turn a profit, they are typically understaffed and experience high turnover rates from their doctors and nurses.⁸⁶ There are numerous private healthcare providers seeking state and federal contracts all advertising that they can do the job cheaper and more effective than the other. One of the largest private healthcare providers is Corizon Healthcare which was recently created through the merger of two large providers; Prison Healthcare Services (PHS) and Correctional Medical Services (CMS). Corizon Healthcare provides medical care to an estimated 271,000 inmates in twenty-nine states and 285 correctional

⁸⁵ Brittany Bondurant, "The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare," *New England Journal on Criminal and Civil Confinement* 39, no. 2 (Spring 2013):p. 419

⁸⁶ Doug Jones, "A Cruel and Unusual System: The Inherent Problems of the Practice of Outsourcing Health Care of Prisons and Jails," *Chicano-Latino Law Review* 27 (2008):p. 193

facilities.⁸⁷ Prior to the merger, PHS had numerous medical scandals in the state of New York.

Brian Tetrault was arrested after stealing a pair of skis from his ex-wife and was sent to county jail in New York in 2001. Tetrault suffered from Parkinson's disease and was denied the necessary medication to treat it due to the cost. His health began to rapidly deteriorate and nurses refused to give him the necessary medication believing that he was faking his condition. After ten days of not receiving his medication Tetrault died of septic shock in his cell.⁸⁸ The New York State Commission of Corrections reported, "the lack of credentials, lack of training, shocking incompetence and outright misconduct of the doctors and nurses . . . was emblematic of PHS's conduct as a business corporation, holding itself out as a medical care provider while seemingly bereft of any quality control".⁸⁹ This report came after the commission connected PHS to more than 20 deaths in state facilities. The commission also discovered that PHS frequently hired doctors and psychiatrists with foreign credentials, criminal convictions, and some that were forbidden to practice in other states.⁹⁰ Experienced doctors shy away from working in prisons as there is a risk of violence and the conditions have been described as, "prison health

⁸⁷ Brittany Bondurant, "The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare," *New England Journal on Criminal and Civil Confinement* 39, no. 2 (Spring 2013):p. 419

⁸⁸ Doug Jones, "A Cruel and Unusual System: The Inherent Problems of the Practice of Outsourcing Health Care of Prisons and Jails," *Chicano-Latino Law Review* 27 (2008):p. 182

⁸⁹ *Ibid* p. 184

⁹⁰ *Ibid* p. 193

facilities are typically poorly equipped, poorly ventilated, poorly lit, and run-down.”⁹¹

The nursing staff was frequently undertrained and in one incident a prenatal nurse allowed an infant to die after only being trained through an email with instructions from a university website.⁹² At Rikers Island, PHS understaffed their doctors and psychiatrists and avoided any penalties for doing so through the practice of “floating”. This practice refers to the constant shifting and moving of doctors and psychiatrists from building to building to appear fully staffed at all times.⁹³ PHS used these types of tactics often to avoid fines and even encouraged employees stating, “put your best face forward, hide as many problems as you can and hang on to the contract for as long as you can”.⁹⁴ PHS would maintain their contracts in New York as the state is mandated to contract with the lowest cost provider.⁹⁵ There is a very limited number of providers of healthcare currently and with the merger of PHS and CMS to create Corizon Healthcare, states are left with little options. With cuts to medical care in facilities, private prisons have also cut funding to rehabilitation efforts and this has resulted in increased recidivism rates.

⁹¹ Brittany Bondurant, "The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare," *New England Journal on Criminal and Civil Confinement* 39, no. 2 (Spring 2013):p. 421

⁹² Doug Jones, "A Cruel and Unusual System: The Inherent Problems of the Practice of Outsourcing Health Care of Prisons and Jails," *Chicano-Latino Law Review* 27 (2008):p. 194

⁹³ *Ibid* p. 193

⁹⁴ *Ibid* p. 195

⁹⁵ Brittany Bondurant, "The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare," *New England Journal on Criminal and Civil Confinement* 39, no. 2 (Spring 2013):p. 420

Rehabilitation and Recidivism

Private prison companies do not pride themselves on their rehabilitation and the reeducation of their inmates as it is counterintuitive to their business model. It is in their best interest to cut funding for rehabilitation programs to both decrease overhead costs and increase recidivism rates. In 2010, the ABA Criminal Justice Section released a report that best explains this predicament stating,

A concern with for-profit detention centers is that their private "profit" interest is not aligned with the public interest in rehabilitating and lowering recidivism rates among juvenile offenders. A for-profit model incentivizes detainment for financial profit, whereas public policy does not. Public policy interprets detainment as a means by which a child offender is punished and rehabilitated. Contrastingly, a for-profit model views detainment as a mechanism by which profit goals are met. This contrast in interpretation results in a direct conflict with the public purpose, and it is this direct conflict that creates undesirable results.⁹⁶

Reports concerning recidivism comparisons between private and state operated prisons are limited due to private companies withholding records. An independent study comparing recidivism rates between state and private facilities in Oklahoma concluded, "private prison inmate groups had a greater hazard of recidivism than did public inmate groups".⁹⁷ More research needs to be conducted to accurately conclude that recidivism rates are higher in private prisons. In terms of their business model, it is one of the best ways to ensure continued profits. Private prisons also generate profits through the use of prison labor.

⁹⁶ David M. Siegel, "Internalizing Private Prison Externalities: Let's Start with the GED," *Notre Dame Journal of Law, Ethics & Public Policy* 30, no. 1 (2016):p. 106

⁹⁷ Cassandre Momiue Davilmar, "We Tried to Make Them Offer Rehab, but They Said, No, No, No: Incentivizing Private Prison Reform through the Private Prisoner Rehabilitation Credit," *New York University Law Review* 89, no. 1 (April 2014):p. 277

Prison Labor

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁹⁸ The Thirteenth Amendment has been debated by proponents of the use of inmate labor for decades claiming private companies and the corrections facilities themselves profit from underpaid labor. The Prison Industry Enhancement Certification Program (PIECP) created in 1979, allowed state correctional facilities to contract with private companies to run manufacturing and other services within the prison.⁹⁹ In order for a state prison to qualify for this program they must first determine what company they wish to partner with. The prison has to ensure the government that its inmates are not taking away work from the local area. Typically, the companies that these prisons contract with are seeking to compete with foreign labor markets such as Mexico and China.¹⁰⁰ PIECP was created as a form of rehabilitation for inmates and a way to offset the costs of incarceration. The program is voluntary for inmates and the allure is to be able to send money to their families despite being in prison. A portion of their wages is sent to their families, another is collected for room and board, victim restitution, and lastly state and federal taxes.¹⁰¹ After all of these deductions

⁹⁸ U.S. CONST. amend. XIII, § 1.

⁹⁹ Alfred C. Jr. Aman; Carol J. Greenhouse, "Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate over Private Prisons," *Fordham Urban Law Journal* 42, no. 2 (December 2014):p. 388

¹⁰⁰ *Ibid* p. 389

¹⁰¹ Mary Rose Whitehouse, "Modern Prison Labor: A Reemergence of Convict Leasing under the Guide of Rehabilitation and Private Enterprises," *Loyola Journal of Public Interest Law* 18, no. 1 (Spring 2017):p. 100

the prison is mandated, by PIECP, to reserve 20% for the inmate. From the creation of the program in 1979 to 2005 the program generated millions in victim restitution, family support, federal and state taxes, and funds towards the cost of incarceration.¹⁰² The program in some states has been shown to successfully lower recidivism rates and improve chances of employment post release.¹⁰³ The major downside to this program is that states that are not certified under PIECP cannot sell inmate produced goods out of their state. For many facilities this isn't a problem, but this directly affects the wages of the inmates that can go as low as \$0.17 to \$5.35 an hour.¹⁰⁴ The benefits of this program do not translate over to private facilities however.

Private prisons are not held to the same standards as state prisons and can circumvent many of the restrictions placed by PIECP. The argument being that private prisons are under public contracts and this effectively makes the use of prison labor publicly supervised and accepted. One researcher notes, "Under the auspices of prison privatization, crime and criminals become engines of private investment For shareholders in private prison companies, inmates have quite literally become

¹⁰² Susan Kang (2009) Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, *New Political Science*, 31:2, p. 152

¹⁰³ Alfred C. Jr. Aman; Carol J. Greenhouse, "Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate over Private Prisons," *Fordham Urban Law Journal* 42, no. 2 (December 2014):p. 392

¹⁰⁴ Mary Rose Whitehouse, "Modern Prison Labor: A Reemergence of Convict Leasing under the Guide of Rehabilitation and Private Enterprises," *Loyola Journal of Public Interest Law* 18, no. 1 (Spring 2017):p. 101

commodities rather than liabilities.”¹⁰⁵ The use of cheap prison labor by private companies further increases their profitability. Unlike state prisons, these facilities do not use prison labor as a means to rehabilitate prisoners or reduce recidivism rates. They are used as another form of generating profits and reduce overhead costs. Private facilities have also been shown to pay their inmates far less than state facilities at \$0.17 cents an hour for six-hour days and \$0.50 being the highest paid per hour by CCA operated facilities.¹⁰⁶ Major companies that also happen to be members of ALEC, such as IBM and Walmart, benefit greatly from continued mass incarceration and cheap prison labor.

III. Return to Detention Centers

Private prison companies have come under heavy scrutiny for their political connections, questionable business practices, cost effectiveness, and quality in recent years. In 2011, there was a nationwide movement called the National Prison Industry Divestment Campaign. Protesters gathered in multiple cities to protest against CCA and GEO Groups large corporate backers like Wells Fargo Bank.¹⁰⁷ CCA also faced legal trouble after a lawsuit was filed by former inmates of their Idaho “gladiator school”. The former inmates are suing after they were attacked by a rival gang due to a lack of guards

¹⁰⁵ Ryan S. Marion, "Prisoners for Sale: Making the Thirteenth Amendment Case against State Private Prison Contracts," *William & Mary Bill of Rights Journal* 18, no. 1 (October 2009):p. 236

¹⁰⁶ Mary Rose Whitehouse, "Modern Prison Labor: A Reemergence of Convict Leasing under the Guide of Rehabilitation and Private Enterprises," *Loyola Journal of Public Interest Law* 18, no. 1 (Spring 2017):p. 102

¹⁰⁷ Handley, Joel. 2011. "Divesting from Private Prisons." *In these Times*, 08, 8-9..

on duty. An FBI investigation was conducted after the inmates reported that CCA was falsifying staffing hours.¹⁰⁸ Numerous legal battles and public scrutiny has forced CCA and the GEO Group to return to where they both started, immigrant detention centers. Many of the same issues that inmates of private prisons face are arguably worse in immigrant detention centers. Immigrants are not granted legal counsel and are often forced to represent themselves resulting in detainment and deportation. CCA and GEO Group create detention facilities that are not very different to the state prisons they construct, despite these facilities housing primarily families with young children. Healthcare is bare minimal and, in some cases, detainees are not granted access to a trained medical professional. Immigrants are given the opportunity to work for pennies by the hour assuming they are providing for their families. Finally, many immigrants are detained for months or even years in inhumane conditions waiting for their deportation hearing.

Tough on Immigration

The mass detention of illegal immigrants followed a very similar progression to that of prison inmates. In the early 1990's immigrants, particularly from Mexico, began immigrating in mass to the United States following the passing of the North American Free Trade Agreement (NAFTA). This allowed American agricultural businesses to purchase land in Mexico operated by local families. This displacement resulted in many Mexicans immigrating to the U.S. in search of work.¹⁰⁹ In response to this mass influx of

¹⁰⁸ Boone, R. (2016, Jul 07). Private prison company CCA to face trial in violence lawsuit. *AP English Language News (Includes AP 50 State Report)*

¹⁰⁹ Kilgore, James. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. New York: The New Press, 2015.

immigrants the U.S. heavily stigmatized immigrants in order to pass punitive legislation. Immigrants were described as burdens to taxpayers as they overcrowded public schools, accessed healthcare, and took jobs away from Americans.¹¹⁰ Illegal immigrants were also linked to the drug trade and this influenced the proceeding legislation. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) were passed in 1996.¹¹¹ These acts vastly increased the number of deportable offenses many being non-violent misdemeanors. IIRIRA specifically called for mandatory detention of immigrants prior to their deportation. Mandatory detention is deemed as a civil process whereby immigrants wait for their deportation hearing and after their deportation itself. This provision is largely responsible for the issue of mass detention of immigrants. Finally, the IIRIRA contained a provision that required the Department of Homeland Security (DHS) to consider contracting private prison companies in order to deal the influx of immigrant detainees. By 2012, DHS reported detaining more than 400,000 immigrants in its facilities more than any other nation in the world.¹¹²

Privatization

For-profit prisons did not enter the immigrant detention business based on a track record of successfully providing detention services. The rise of this industry has been attributed to a combination of factors, including the trend toward privatization of government services, the ability of private contractors to create

¹¹⁰ Patrisia Macias-Rojas, "Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996," *Journal on Migration and Human Security* 6, no. 1 (2018):p. 8

¹¹¹ *Ibid* p. 12

¹¹² Cesar Cuauhtemoc Garcia Hernandez Hernandez, "Immigration Detention as Punishment," *Immigration and Nationality Law Review* 35 (2014):p. 421

detention capacity more rapidly than government . . . , rising demand for detention and prison beds . . . , and the lack of accountability to DHS-ICE by state and local contractors.¹¹³

The annual cost to detain illegal immigrants is well over two billion dollars and companies like CCA and the GEO Group use the same lobbying strategies to continue the flow of federal contracts.

The most famous case of CCA lobbying for increased immigration criminalization is SB 1070 in Arizona. “The Support Our Law Enforcement and Safe Neighborhoods Act,” or S.B. 1070 allowed for the legal racial profiling of suspected illegal immigrants.¹¹⁴ Law enforcement could ask anyone they deemed suspicious for their proof of citizenship under this law. The bill was written by ALEC and was heavily supported by CCA.¹¹⁵ The bill was also widely supported by the voters of Arizona believing that immigrants were invading their state. Georgia followed suit with their own bill called “Show Me Your Papers” or H.B. 87. This bill forced businesses in the state to verify their employees’ citizenship. This bill was focused on removing immigrants from the workplace and imprisoning them with charges of up to ten years for falsified documents.¹¹⁶ Any immigrants that were caught with a falsified social security number were handed over to one of the six CCA facilities in Georgia. Lastly, Alabama passed

¹¹³ Anita Sinha, "Arbitrary Detention: The Immigration Detention Bed Quota," *Duke Journal of Constitutional Law & Public Policy* 12, no. 2 (2016):p. 91

¹¹⁴ William Arrocha, "From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation," *California Western Law Review* 48, no. 2 (Spring 2012):p. 266

¹¹⁵ *Ibid* p. 270

¹¹⁶ *Ibid* p. 275

H.B. 56 that was in some ways a combination of the previous two. One provision that Alabama did add was that children of undocumented parents would no longer be allowed to attend public schools in the state. Just like the last two bills, Alabama's was written by ALEC and supported by CCA. These policies ensured CCA's business model would continue to generate revenue not too dissimilar to their campaigns for three strikes and mandatory minimums. CCA and other companies will continue this cycle of advocating from increased criminalization for the sake of profits. Immigrants unfortunately have a harder time of defending themselves due to their lack of rights only granted to citizens.

Detention facilities are built and operated much in same way as prisons despite it being considered a civil process. Immigrants that are detained in these facilities have very limited protections and are not granted legal counsel.¹¹⁷ Immigrants are not given legal counsel due to the ruling that immigration hearings are a civil process not criminal. Because of these restrictions, immigrants frequently represent themselves during deportation hearings and often lose their cases. Private companies turn a profit from these facilities virtually the same way they do for prisons. They receive Immigration and Custom Enforcement (ICE) contracts and use cost cutting measures to increase profits. One cost cutting measure they use is the lack of legal libraries or resources within their facilities. With better access to legal resources, immigrants have a slightly better chance of representing themselves during their deportation hearing and potentially be released.

¹¹⁷ Kimberly R. Hamilton, "Immigrant Detention Centers in the United States and International Human Rights Law," *Berkeley La Raza Law Journal* 21 (2011): 94

Conditions

Privately operated facilities are not directly monitored by ICE and this greatly increases the chances of civil and human rights abuses.¹¹⁸ ICE also does not enforce any form of codable standards and regulations that private companies have to follow.¹¹⁹ This lack of oversight of privately operated facilities has resulted in under trained staff, staff shortages, food shortages, medical abuse and neglect, and poor sanitation in some facilities.¹²⁰ In one case a woman suffering from arthritis was not receiving timely medical assistance and decided to sign her deportation order despite wishing to stay in the country.¹²¹ Many detainees cannot handle the conditions within these facilities as they resemble prisons. Many of the facilities were once prisons or were constructed similar to prisons. The average detainee is detained for five months and the longest being up to three years.¹²² With wait times that can last years for some people, private companies make a fortune. There are a large number of detainee deaths within these facilities that were preventable with adequate medical care. Many deaths go unreported or are misreported, this being due to the lack of federally mandated medical standards.¹²³ Many

¹¹⁸ Ibid p. 105

¹¹⁹ Ibid p. 120

¹²⁰ Philip L. Torrey, "Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody," *University of Michigan Journal of Law Reform* 48, no. 4 (Summer 2015):p. 901

¹²¹ Riddhi Mukhopadhyay, "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States," *Seattle Journal for Social Justice* 7, no. 2 (Spring/Summer 2009): p. 700

¹²² Ibid p. 705

¹²³ Ibid p. 707

detainees suffer from depression, post-traumatic stress, and thoughts of suicide. The lack of medical care has resulted in high suicide rates among detainees.¹²⁴ These conditions are incredibly punitive and inhumane for people who are said to be a part of a civil process.

In some instances, detainees are being forced into working in the Voluntary Worker Program. This program allows inmates to work for as little as a dollar a day or .13 cents an hour. Some people do volunteer for this program to at least provide something for their families. The tasks usually range from cleaning cells, giving haircuts, and general maintenance. There have been reported cases of people being threatened with solitary confinement if they refuse to work.¹²⁵ In another case a detainee was injured from the previous day of labor and was forced by guards to continue working despite the injuries.¹²⁶ Companies save money by not having to hire minimum wage workers to maintain the facilities through maintenance and cleaning. With the election of President Trump and his current stance on illegal immigration, it is very likely that CCA and other companies will continue to profit from detainees for years to come.

Conclusion

The rise of mass incarceration can be traced back to the Nixon, Reagan, and Clinton administrations. The fear of increased drug use and the tough on crime rhetoric

¹²⁴ Ibid p. 710

¹²⁵ Seth H. Garfinkel, "The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers," *Case Western Reserve Law Review* 67, no. 4 (Summer 2017): 1293

¹²⁶ Ibid 1293

won elections. Policies that strayed away from rehabilitation and focused primarily on increased criminality dramatically increased the prison population. These laws, whether intentional or not, primarily affected African American and Latino communities. These policies created a segregated class of ex-felons that have limited rights as U.S. citizens. The justification for this being a deterrent to future crime, but it leaves ex-felons with little options and many return to a life of crime to survive. These policies show little correlation to the overall decrease in crime nationally. The overpopulation of state and federal prisons resulted in the outsourcing of a traditionally governmental function.

The private prison industry responded to the call of overcrowding and budgetary cuts. These companies directly benefited from harsh sentencing laws and longer prison sentences. In some instances, these companies successfully worked behind the scenes through lobbying and campaign contributions to pass bills that directly contributed to the increase in the prison population. In order to maximize profits, they also resorted to numerous cost cutting measures stripping staff, routine maintenance, and medical care to the bare minimum. These measures would not go unnoticed and increasingly the public began to distrust their claims of cost effectiveness and quality control. Lawsuits and public protests forced these companies to shift back to immigration detention centers where the inmates were less vocal of their conditions and treatment.

The United States has begun detaining more immigrants than ever before. With the same justification of deterring other offenders. Using the same tactics and cost cutting measures private companies began to return to operating detention centers. These companies lobbied for numerous state bills that legalized racial profiling and discrimination against Hispanics. Their cost cutting measures have resulted in numerous

deaths of innocent people. These companies will continue to prosper in our current political climate whether its private prisons or immigration detention centers.

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