ABOLISHING PRIVATE PRISONS: A CONSTITUTIONAL AND MORAL IMPERATIVE

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I. INTRODUCTION

President Richard Nixon declared a "War on Drugs" in 1971.[1] President Ronald Reagan federalized and militarized this "war" in the

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+ Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law; J.D., Howard University School of Law. I am grateful to my co-author Robert Craig for partnering expertly with me on this article and for his excellent work as Associate Director of Abolish Private Prisons, an Arizona 501(c)(3) created to combat private for-profit incarceration. I am appreciative to John Dacey the Executive Director of Abolish Private Prisons for his tireless work in exposing and challenging the private prison regime. I am grateful to the University of Arkansas at Little Rock William H. Bowen School of Law summer research grant which supported this work. I wish to express appreciation and respect to the terrific *Univeristy of Baltimore Law Review* editorial staff who organized a superb symposium "400 Years: Slavery and the Criminal Justice System" and who contributed thoughtful comments and helpful suggested edits to this resulting article. Finally, I express profound appreciation to my partner Lavinia and our babies, Cole Kaianuanu, Malia Ao'ilagi, and Maxwell Keave, who bring light and joy to my life, whose daily work is spent seeking to reveal and reverse racial and corporate injustice that often exists in the dark. As usual, any errors within are the sole responsibility of the authors.

1. *See* Ed Vulliamy, *Nixon's 'War on Drugs' Began 40 Years Ago, and the Battle Is Still Raging*, GUARDIAN (July 23, 2011, 7:07 PM), https://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years [https://perma.cc/S4QN-6TBW] ("Four decades ago, on 17 July 1971, President Richard Nixon declared what has come to be called the 'war on drugs.' Nixon told Congress that drug addiction had 'assumed the dimensions of a national emergency,' and asked Capitol Hill for an initial $84m (£52m) for 'emergency measures.' Drug abuse, said the President, was 'public enemy number one.'").

1980s.[2] Shortly after the War on Drugs was declared, federalized, and militarized, a private for-profit company in Tennessee sprang up calling itself the Corrections Corporations of America (CCA).[3] The creation of this private prison corporation ushered in a new carceral era where the traditional government function of adjudicating crime, punishment, and imprisonment became intertwined with the corporate governance principles and goals of profit maximization for shareholders; executive compensation based on profits and share price; forward-looking statements forecasting more robust prison populations; and increased profit levels built almost solely on human misery and degradation.[4]

In 1985, Professor Ira Robbins testified to the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice that U.S. jurisdictions considering contracting with private entities for incarceration services should proceed cautiously because there may be serious constitutional and pragmatic concerns with such an arrangement.[5] He penned a law review article further delineating reasons to approach private incarceration with caution[6] and served as the reporter for the American Bar Association's (ABA) Task Force on Privatization of Corrections.[7] That Resolution was adopted at the February 1990 Midyear Meeting as 115B and "urg[ed] that jurisdictions considering authorization of contracts with private corporations or other private entities . . . do so with extreme caution .

2. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 48–49, 69, 73 (2010).
3. *See* andré douglas pond cummings, *"All Eyez on Me": America's War on Drugs and the Prison-Industrial Complex*, 15 IOWA J. GENDER, RACE & JUST. 417, 419 (2012); *see generally* Tom Beasley, *A New Industry Emerges to Meet a Very Real Need*, CORECIVIC, http://www.corecivic.com/about/history [https://perma.cc/T2BS-JEKQ] (last visited Apr. 1, 2020) (CCA recently changed its name to CoreCivic; this article will, hereinafter, use the current name even when referring to the company's actions taken under the prior name).
4. *See* cummings, *supra* note 3, at 419–20; *see generall*y SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 45, 206, 229 (2018) (describing the human misery and general debasement of prisoners at private prison facilities run by CoreCivic in Oklahoma and Louisiana).
5. *Privatization of Corrections: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 69–107 (1985–1986) (statement of Ira P. Robbins, Professor of Law, Washington College of Law).
6. *See* Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 324, 325, 331 (1987).
7. *Ira P. Robbins Biography*, AM. U. WASH. C. L., https://www.wcl.american.edu/community/faculty/profile/robbins/bio [https://perma.cc/7HET-WNYT] (last visited Apr. 1, 2020).

. . .”[8] The Resolution further recognized that “the imposition and implementation of a sentence of incarceration for a criminal offense is a core function of government . . . and there is a strong public interest in having prison and jail systems in which lines of accountability are clear.”[9]

Despite passage of Resolution 115B in 1990, government reliance on private incarceration has since increased approximately sixteen-fold.[10] Private prison corporation directors, executives, managers, and their hired lobbyists currently work doggedly to increase shareholder profits by: (1) influencing carceral policy so that larger numbers of U.S. residents face incarceration;[11] (2) exploiting individuals locked up through private prison labor contracts;[12] (3) lobbying elected government officials to privatize entire state and federal prison systems and increase prison populations;[13] (4) diminishing the quality of food and degree of safety for prisoners in order to cut costs at privately run facilities;[14] (5) drafting legislation and lobbying elected legislators for passage of draconian sentencing guidelines including three-strikes and you’re out, mandatory minimums, and illegal immigration detention legislation;[15] (6) bribing judges to fill private prison facilities with children on

8. *Index to ABA Criminal Justice Policies: 115B (CJS)*, A.B.A. (1990), https://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting/ [https://perma.cc/9VAJ-W35R].

9. *Id.*

10. DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (Nov. 2, 2011) (citing to a United States Department of Justice report), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf [https://perma.cc/2DXZ-NHUA].

11. *See* cummings, *supra* note 3, at 439–40.

12. *See* Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 682 (2015); *see* Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 592, 600, 611 (2012) (discussing the exploitation of prisoners within the prison industrial complex).

13. Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFPOST (Feb. 14, 2012, 9:37 AM), https://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html [https://perma.cc/68SA-KEKG]. CoreCivic offered to purchase state-owned prison facilities from forty-eight cash-strapped states, so long as the state contractually agreed to keep the prisons occupied at 90% capacity. *Id.*

14. GREGORY GEISLER, CORRECTION INSTITUTION INSPECTION COMMITTEE, LAKE ERIE CORRECTIONAL INSTITUTION 3–5, 13, 39 (2013); *see also* BAUER, *supra* note 4, at 39–40, 91, 142–44 (detailing the unsafe and foolhardy cost cutting measures CoreCivic engaged in at a private prison in Louisiana).

15. *See* cummings, *supra* note 3, at 438–39.

questionable charges;[16] (7) requiring governments and municipalities that contract for their services to maintain capacity in their private prison facilities at 90% or in some contracts 100%;[17] and (8) building new prisons despite no government contract or inmates to fill them.[18]

Despite Professor Robbins's and the ABA's warning to proceed into prison privatization with extreme caution, what seems undeniable now is that the warning went unheeded and today private prison corporations are driven by perverse and immoral incentives whereby an increase in crime and an increase in the number of human beings placed into America's brutal prisons is good business news for that industry.[19] In reflecting on the fact that United States prison conditions are cruel and dehumanizing,[20] and that so many prisoners are low-level, nonviolent minor drug offenders,[21] the question as to why we as a nation stand for private corporate profit in the realm of human imprisonment must be addressed and resolved.[22] The perverse incentives that drive corporate profit are revealed when a growing population of imprisoned U.S. residents energizes corporate interests.[23] A private prison analyst recently stated that the consistent yearly increase in the prison population "from a business model perspective[] [is] clearly good news."[24]

16. Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES (Mar. 27, 2009), http://www.nytimes.com/2009/03/28/us/28judges.html [https://perma.cc/UL3K-A6KK].
17. Kevin Johnson, *Private Purchasing of Prisons Locks in Occupancy Rates*, USA TODAY (Mar. 8, 2012, 12:37 PM), http://www.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1 [https://perma.cc/2W54-Y4U5]; Chris Kirkham, *Prison Quotas Push Lawmakers to Fill Beds, Derail Reform*, HUFFPOST (Sept. 20, 2013), https://www.huffpost.com/entry/private-prison-quotas_n_3953483 [https://perma.cc/LV4S-66D2].
18. Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT'L LAW. GUILD REV. 70, 74–75 (2009) (remarking that private prison companies, like CoreCivic, are "building prisons on spec, with no contract to build and no prisoners to house").
19. *See infra* notes 44–54 and accompanying text.
20. *See generally* BAUER, *supra* note 4, at 45, 66, 206, 227 (describing the brutal and dehumanizing conditions present in the CoreCivic-run private prison in Louisiana and detailing the history of brutality that private profit incarceration has foisted upon inmates, often imprisoned for dubious reasons).
21. *See generally* ALEXANDER, *supra* note 2, at 95–97, 99, 186–87 (explaining the number of arrests and convictions that result from the War on Drugs are discriminatory and incarcerate hundreds of thousands of low-level drug offenders).
22. *See* cummings, *supra* note 3, at 433–34.
23. andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 413 (2016); *see* cummings, *supra* note 3, at 421–22.
24. JeeYeon Park, *Lock Up Profits — in Prison Stocks: Analyst*, CNBC (Nov. 1, 2010, 11:48 AM), https://www.cnbc.com/id/39949086 [https://perma.cc/3SUC-G6BB].

Private prison executives and lobbyists seek to increase privatization of the industry by promising that their prisons are run more efficiently at lower costs, with greater safety records, improved facilities, and with greater outcomes for prisoners.[25] However, studies and reports now show that these declarations by private prison executives and lobbyists are deceitful.[26] Private prisons are increasingly being shown to cost contracting governments' more, not less, are less safe, and less economical.[27] The exchange of taxpayer funds from governments and municipalities into the hands of corporate shareholders and executives is nothing more than an unabashed transfer of taxpayer monies into the personal accounts of those with a stake in private prisons—which are being shown to provide no real benefit in return.[28] Private incarceration makes no sense morally,[29] and it is increasingly apparent that the industry makes no sense economically[30] and, in fact, is likely unconstitutional.[31]

In 2005, Professor Robbins again addressed the issue of prison privatization.[32] His conclusions have been updated, including that private prisons are a "lamentable experiment" and "that the concept . . . is bad policy . . . based on a tenuous legal foundation . . . [with] profound moral implications."[33] Robbins notes the many "routine, quasi-judicial decisions" private vendors make that affect prisoners' welfare and legal status; the daily operations of private prisons that are conducted outside of public supervision; and the financial bias injected into circumstances where private corporations and key

25. cummings & Lamparello, *supra* note 23, at 413; *see also* CHRISTOPHER HARTNEY & CAROLINE GLESSMAN, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 2 (May 2012), http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf [https://perma.cc/3TCM-T5M3].

26. cummings & Lamparello, *supra* note 23, at 413; *see also* dré cummings, *Private Prison Industry Shenanigans in Florida*, CORP. JUST. BLOG (Oct. 26, 2012, 9:30 AM), http://corporatejusticeblog.blogspot.com/2012/10/private-prison-industry-shenanigans-in.html [https://perma.cc/WZN7-VGD4].

27. cummings & Lamparello, *supra* note 23, at 413.

28. *Id.* at 413–14; *see also* David M. Reutter, *Florida Provides Lesson in How Not to Privatize State Prisons*, PRISON LEGAL NEWS (Feb. 15, 2012), https://www.prisonlegalnews.org/news/2012/feb/15/florida-provides-lesson-in-how-not-to-privatize-state-prisons/ [https://perma.cc/UJ6W-62BV].

29. cummings & Lamparello, *supra* note 23, at 414.

30. *Id.*

31. *See infra* Part IV.

32. Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, 13 HUM. RTS. BRIEF 12, 12 (2006).

33. *Id.* at 12, 16.

employees make more money when more people are imprisoned for longer periods are each lamentable outcomes of a failed experiment.[34] Over the past few decades the United States has seen: the rapid, profitable growth and political influence of the private prison industry;[35] how incarceration-for-profit ensures more incarceration, quashes alternatives to incarceration, and creates a financial bias in jailers against the release of prisoners;[36] and, how mainstream religions have criticized private, for-profit prisons as immoral.[37] There is increasing reason for concern that these private prison corporations will become even more involved at the front end of law enforcement by working with police agencies to make sure their facilities stay filled.[38]

This article will show: first, that mixing profit with the core governmental function of incarceration leads to damaging consequences for prisoners, employees (of both private and public prisons), and the public at large while benefiting a small group of executives and shareholders;[39] second, that the implementation of for-profit incarceration in the United States hampers access to justice, particularly for already marginalized groups;[40] and third, that the serious constitutional concerns noted by Professor Robbins have been borne out, and they now deserve consideration by the United States Supreme Court.[41]

34. *See id.* at 12.

35. *See, e.g.*, CAROLINE ISAACS, PRIVATE PRISONS: THE PUBLIC'S PROBLEM, at i–ii (Feb. 2012), https://www.afsc.org/sites/default/files/documents/Arizona_Prison_Report_Executive_Summary.pdf [https://perma.cc/AD6R-ESA6] (tracing the path between donations from private prison lobbyists in Arizona to the passage of a bill authorizing privatization of almost the entire state correctional system).

36. *See* SHAPIRO, *supra* note 10, at 12.

37. *See generally Join the Movement!*, ABOLISH PRIV. PRISONS, https://www.abolishprivateprisons.org/resolutions [https://perma.cc/CT87-H6HH] (last visited Apr. 1, 2020) (providing an up-to-date list of religious organizations criticizing the industry).

38. *See* Beau Hodai, *Private Prison Company Used in Drug Raids at Public High School*, COMMON DREAMS (Nov. 27, 2012), https://www.commondreams.org/news/2012/11/27/private-prison-company-used-drug-raids-public-high-school[https://perma.cc/92YM-2ADP]; *see also* P. Smith, *In Profit-Sharing Scheme, Oklahoma DA Used Contractor for Highway Drug Stops*, STOP DRUG WAR (July 22, 2013, 6:05 PM), https://stopthedrugwar.org/chronicle/2013/jul/22/profitsharing_scheme_oklahoma_da [https://perma.cc/ASL3-H6TN] ("[T]he contract . . . gave Desert Snow 25% of all assets seized during training days and 10% of all assets seized even on days the contractors were not present.").

39. *See infra* Part II.

40. *See infra* Part III.

41. *See infra* Part IV.

II. INHERENT CONSEQUENCES OF LINKING PROFIT AND INCARCERATION

Privatization of incarceration introduces serious perverse incentives created by government and financial bias throughout the criminal justice process,[42] and contracting a core government function to private entities undermines the legitimacy of the justice system at large.[43] "Perhaps the most perverse incentive in the private prison industry is that shareholder and executive profit are intimately tied to the number of prisoners that enter the private prison facility."[44] When a profit motive is attached to human misery and bondage such as incarceration, the evidence shows that the depths to which profit seekers will sink to earn revenues knows no bounds, and the effects reverberate through the justice system.[45]

Private prison companies, while forcefully disclaiming such action,[46] aggressively lobby for harsher prison sentences such as mandatory-minimums and three-strikes laws;[47] for legislation that creates new crimes requiring incarceration, such as criminalization of illegal immigration or active detention of schoolchildren;[48] and

42. *See infra* notes 46–66 and accompanying text.
43. *See infra* notes 46–71 and accompanying text.
44. cummings & Lamparello, *supra* note 23, at 429; *see also* cummings, *supra* note 3, at 436–38.
45. *See* BAUER, *supra* note 4, at 39, 49–50 (highlighting one way in which private prisons choose to cut costs in order to ensure the maximization of profits).
46. *See* Richard P. Seiter, *Private Corrections: A Review of the Issues*, CORRECTIONS CORP. AM. (Mar. 2008), https://ccamericastorage.blob.core.windows.net/media/Default/documents/CCA-Resource-Center/Private_Corr_Review.pdf [https://perma.cc/3NSR-524W]. According to CoreCivic, it is a myth that they promote longer and tougher sentences. Corr. Corp. of Am., *Myths v. Reality in Private Corrections: The Truth Behind the Criticism*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/media/publications/cca_myth_vs._reality_in_corrections_promotional_sheet.pdf [https://perma.cc/V5TH-6P67] (last visited Apr. 1, 2020). *But see* Lee Fang, *Disclosure Shows Private Prison Company Misled on Immigration Lobbying*, NATION (June 4, 2013), https://www.thenation.com/article/disclosure-shows-private-prison-company-misled-immigration-lobbying/ [https://perma.cc/9BPE-MTYQ] ("A new disclosure shows that . . . Geo Group, has in fact paid an 'elite team of federal lobbyists' to influence the comprehensive immigration reform legislation making its way through Congress.").
47. cummings, *supra* note 3, at 438–39, 438 n.102.
48. *See, e.g.*, Nicole Flatow, *Mississippi County Jails Kids for School Dress Code Violations, Tardiness, DOJ Alleges*, THINKPROGRESS (Nov. 27, 2012, 2:00 PM), https://thinkprogress.org/mississippi-county-jails-kids-for-school-dress-code-violations-tardiness-doj-alleges-1fa9a26ae83b/ [https://perma.cc/4GXN-JLXQ] (describing how the police are a "taxi-service" for shuttling students to jail for class misbehavior).

against decriminalization.[49] In fact, these actions have been generously rewarded as of late; reports reveal that the two largest private prison companies, CoreCivic and GEO Group, together generated more than $2.9 billion in revenue in 2010, with revenues ever increasing through 2019.[50] To increase revenue at the rate indicated, private prison corporations, as mentioned above, hire lobbyists to increase prison populations and prison construction.[51] We argue that lobbying to increase the stream of prisoners and lobbying for harsher sentencing regimes is not just unseemly but inhumane,[52] which leads to another aberrant incentive of prison privatization: to increase profit, a private prison CEO is not selling more shoes (like Nike) or making additional motion pictures (like Disney), but is instead seeking to increase the flow of clients—prisoners—into the prison system.[53] Or stated another way, the

49. *See, e.g.*, Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/ [https://perma.cc/D55R-Q85G] ("The two largest for-profit prison companies in the United States . . . have funneled more than $10 million to candidates since 1989 and have spent nearly $25 million on lobbying efforts."). In a recent telling example, private prison companies donated heavily to Donald Trump's campaign, and their stocks sharply increased after he was elected President. *Under Mr. Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html [https://perma.cc/V3K7-KVMU].

50. cummings, *supra* note 3, at 436–37; *see also* Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying to Put More People in Jail*, THINKPROGRESS (June 23, 2011, 4:00 PM), https://thinkprogress.org/private-prisons-spend-millions-on-lobbying-to-put-more-people-in-jail-58e048bb37dd/ [https://perma.cc/4AE5-HQWF]. These profits have continued to grow in the past decade, as GEO Group alone reported bringing in $2.47 billion in revenue for 2019. *See* Renae Merle & Tracy Jan, *Wall Street Pulled Its Financing. Stocks Have Plummeted. But Private Prisons Still Thrive.*, WASH. POST (Oct. 3. 2019, 12:37 PM), https://www.washingtonpost.com/business/2019/10/03/wall-street-pulled-its-financing-stocks-have-plummeted-private-prisons-still-thrive/ [https://perma.cc/9D9L-2TWJ].

51. Lee Fang, *Prison Industry Funnels Donations to State Lawmakers Introducing SB1070-Like Bills Around the Country*, THINKPROGRESS (Sept. 16, 2010), https://thinkprogress.org/prison-industry-funnels-donations-to-state-lawmakers-introducing-sb1070-like-bills-around-the-afd16ced43b6/ [https://perma.cc/4AE5-HQWF].

52. *See infra* notes 72–80 and accompanying text.

53. cummings, *supra* note 3, at 437; *see also* PAUL ASHTON & AMANDA PETTERUTI, JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 22, (June 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf [https://perma.cc/X2G9-PD4U] (explaining that private prison companies have hired thirty lobbyists in Florida to promote their prison interests). Furthermore, CoreCivic has given over $900,000 annually to federal candidates since

private prison corporation is seeking to profit off of increasing the number of U.S. bodies that can be locked in cages.[54]

The amount of private prison company dollars spent on lobbying efforts is substantial.[55] CoreCivic spent more than $3 million on federal lobbying in 2005 and more than $1.2 million in 2019.[56] The largest U.S. private prison companies together have spent dozens of millions of dollars lobbying both state and federal elected officials since the founding of the U.S. private prison corporation in the 1970s.[57] Private prison lobbyists advocate for harsh legislative initiatives that increase the number of individuals sentenced to prison time[58] because "private prisons make money from putting people behind bars."[59] In addition, prison lobbyists battle to grow appropriations in expenditures in law enforcement, pass severe immigration laws, and increase immigration detention.[60] They also seek to influence lawmakers to implement unforgiving incarceration policies like the 2010 Arizona immigration legislation, originally titled "The Support Our Law Enforcement and Safe Neighborhoods

2003, and the prison companies have given more than $16 million to state and federal legislators since 2000, providing additional evidence that states are some of the private prison companies' most important clients. *Id.* at 22, 24.

54. *See* Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 23, 2012), https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america [https://perma.cc/F44Q-AGXU].

55. *See* ASHTON & PETTERUTI, *supra* note 53, at 17 (showing that in state campaign contributions from 2003 to 2010, CoreCivic has spent over $1.5 million in twenty-seven states, GEO has spent $2.4 million in twenty-three states, and from 2006 to 2009, Cornell Companies has spent $72,000 in six states).

56. *Id.* at 24; *see also Client Profile: CoreCivic Inc*., OPENSECRETS, http://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000021940 [https://perma.cc/VX78-UVT7] (last visited Apr. 1, 2020) (reporting that CoreCivic spent $1.23 million on lobbying in 2019).

57. *See* ASHTON & PETTERUTI, *supra* note 53, at 22–24.

58. *See id.* The private prison companies promote and advocate for "three-strikes" and "truth-in-sentencing" legislation because this creates more business. *Id.* at 3.

59. *Id.* at 21.

60. *See* Laura Sullivan, *Prison Economics Helped Drive Ariz. Immigration Law*, NAT'L PUB. RADIO (Oct. 28, 2010, 11:01 AM), https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law [https://perma.cc/VJU7-PV5L]; *see also* Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 357–58 (2012) ("Prison companies cannot justify building new prisons on the basis of drug convictions. However, prison companies *can* justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the 'Mexican.'").

Act" (SB 1070).[61] Several reports show that private prison lobbyists had a hand in drafting the legislation that became SB 1070.[62] Corporations are free to make campaign contributions to elected government officials, and the private prison lobby contributes liberally.[63] In light of the seminal 2010 Supreme Court case *Citizens United*,[64] private prison corporations' campaign contributions can now be made directly from the private prison corporate treasury to the federal and state legislators and judges whom they hope to influence.[65] Research indicates that private prison companies contribute millions of dollars to mostly incumbent politicians, seeking to garner influence in the legislative process, to continue privatizing the prison regime and receive advantageous contracts for private prison construction.[66]

According to news reports, more problems appear in the courthouse.[67] In what would eventually come to be known as the "Kids For Cash" scandal, two Pennsylvania judges sentenced juveniles to detention at twice the state average, earning $2.6 million in kickbacks.[68] In Iowa, the husband of a federal judge had significant stock holdings of two private prisons; he increased those holdings just five days before an immigration raid where nearly 400 workers were arrested, and of those, about 270 were sentenced to five months in federal prisons.[69] And in Mississippi, a former

61. cummings, *supra* note 3, at 438–39; *see* ASHTON & PETTERUTI, *supra* note 53, at 30; *see How Corporate Interests Got SB 1070 Passed*, NAT'L PUB. RADIO (Nov. 9, 2010, 1:00 PM), https://www.npr.org/2010/11/09/131191523/how-corporate-interests-got-sb-1070-passed [https://perma.cc/G6UR-BGF6]; *see also* Fang, *supra* note 51.

62. *See* Sullivan, *supra* note 60; *see also How Corporate Interests Got SB 1070 Passed*, *supra* note 61.

63. ASHTON & PETTERUTI, *supra* note 53, at 15–22.

64. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319, 362–67 (2010).

65. *See* andré douglas pond cummings, *Procuring 'Justice'?:* Citizens United*,* Caperton*, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 98 (2010) [hereinafter cummings, *Procuring 'Justice'?*]; *see also* Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 745–49 (2011) (describing the potential nefarious consequences of *Citizens United*).

66. cummings, *supra* note 3, at 437–39; *see* ASHTON & PETTERUTI, *supra* note 53, at 15–22; *see also* SHAPIRO, *supra* note 10, at 39.

67. *See infra* notes 68–70 and accompanying text.

68. *'Kids for Cash' Captures a Juvenile Justice Scandal from Two Sides*, NAT'L PUB. RADIO (Mar. 8, 2014, 6:26 PM), https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides [https://perma.cc/NJ7A-KNVV]; Urbina, *supra* note 16.

69. Samantha Michaels, *A Federal Judge Put Hundreds of Immigrants Behind Bars While Her Husband Invested in Private Prisons*, MOTHER JONES (Aug. 24, 2017), https://www.motherjones.com/crime-justice/2017/08/a-federal-judge-put-hundreds-

commissioner of the Department of Corrections accepted over $1 million in bribes in exchange for lucrative state contracts with private prisons.[70] Not one of these problems would have occurred had the traditional government function of imprisonment been left in public hands, rather than private—each serves to highlight the corrupting influence that profit has on human actors.[71]

Because a for-profit prison's primary motivation is to maximize profit, lowering the operational costs of running a facility is often at the forefront of their decision-making process.[72] This goal often results in fewer available educational opportunities for prisoners, and because private prison corporations benefit from high recidivism, they have every incentive not to use proven anti-recidivism programs.[73] As one commentator notes, "[m]uch of the presumed cost savings of private prisons are achieved through lower staffing costs: private prisons pay their employees less than public prisons."[74] Likewise, private incarceration facilities understaff relative to public

of-immigrants-behind-bars-while-her-husband-invested-in-private-prisons/ [https://perma.cc/5UPV-NX3K].

70. Alana Blinder, *2 Former Mississippi Officials Plead Guilty in a Graft Case Involving Private Prisons*, N.Y. TIMES (Feb. 25, 2015), https://www.nytimes.com/2015/02/26/us/christopher-epps-former-mississipi-prisons-chief-pleads-guilty-in-corruption-case.html [https://perma.cc/BG8G-PECA]. The investigation into the former commissioner uncovered an even broader scheme: former legislator Cecil McCrory; former state senator Irb Benjamin of Madison; Teresa Malone, the wife of former lawmaker and former House Corrections Chairman Bennett Malone; Texas businessman Mark Longoria; Dr. Carl Reddix; business and government consultant Robert Simmons; former MDOC insurance broker Guy E. Evans; and prison consultant Sam Waggoner were all charged and pled guilty. Jimmie E. Gates, *4 Louisiana Businessmen Charged in Chris Epps' Corruption Case*, CLARION LEDGER (Oct. 4, 2018, 3:24 PM), https://www.clarionledger.com/story/news/2018/10/04/chris-epps-corruption-case-4-la-businessmen-charged-bribery/1524892002/ [https://perma.cc/VYY3-ZD3Q].

71. *See infra* Section III.A.

72. In fact, this downward pressure on operational cost is perhaps the marquee feature of private incarceration and how the concept is sold to legislatures and other public decision-makers. *See generally* BAUER, *supra* note 4, at 40, 142–43, 204–05, 253 (showing that as an undercover prison guard, decisions from hiring, through training, to guarding prisoners, are all subject to this downward pressure leading to unwise and unsafe outcomes).

73. *See, e.g.*, Judith Greene, *Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews*, 11 CURRENT ISSUES CRIM. JUST. 202, 215–16 (1999) (finding that prisoners were significantly less likely to have access to any kind of education during private incarceration).

74. Matt Simmons, *Punishment & Profits: A Cost-Benefit Analysis of Private Prisons*, OKLA. POL'Y INST. (Aug. 7, 2013), https://okpolicy.org/punishment-profits-a-cost-benefit-analysis-of-private-prisons/ [https://perma.cc/3LVH-8KD3].

ones,[75] and even the staff eventually hired by private prison corporations tend to be underqualified and suffer from higher turnover.[76] These decisions sometimes lead to disastrous results.[77]

In one 2016 case, a federal judge said conditions at one private prison "paint[ed] a picture of such horror as should be unrealized anywhere in the civilized world," as the prison was essentially run by gangs, held organized gladiator-style fights encouraged by guards, and had "sexual misconduct . . . among the worst that we have seen in any facility anywhere in the nation."[78] In another stunning case, "[a] private prison in Idaho . . . established a reputation as a 'gladiator school' because prison guards encouraged violence between inmates."[79] Oklahoma Director of Department of Corrections Joe Allbaugh stated that he does not "believe taxpayers should be paying a premium for our prisoners [to private corporations]. . . . [B]ecause I think we can house inmates more efficiently."[80] At bottom, cost-effectiveness alone means nothing without accounting for the quality of the prison environment, which evidence shows borders on abusive.[81]

The profit motive also leads to less safety for correctional officers as operators drive down expenditures when reducing staffing costs.[82] Private prisons pay individual officers less: on average private corrections officers "received salaries that were about $7,000 lower than the average public officer's salary."[83] And in addition to paying each private officer less than their public counterparts, private prison operators "also tend to hire fewer officers; private prisons report an average of one officer per 6.9 inmates compared to one officer per

75. *See* David M. Siegel, *Internalizing Private Prison Externalities: Let's Start with the GED*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 106–07 (2016).

76. David N. Khey, *Privatization of Prison*, *in* 3 THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1036, 1041 (Wesley G. Jennings ed., 1st ed. 2016).

77. *See, e.g.*, BAUER, *supra* note 4, at 143–44.

78. Timothy Williams, *Privately Run Mississippi Prison, Called a Scene of Horror, Is Shut Down*, N.Y. TIMES (Sept. 15, 2016), https://www.nytimes.com/2016/09/16/us/mississippi-closes-private-prison-walnut-grove.html [https://perma.cc/3DLD-AHJV].

79. Simmons, *supra* note 74.

80. Andrew Knittle, *Oklahoma Paid Record $92.7 Million to Private Prisons in 2015*, OKLAHOMAN (Mar. 29, 2016, 7:00 AM), https://oklahoman.com/article/5487769/oklahoma-paid-record-927-million-to-private-prisons-in-2015 [https://perma.cc/Y7T7-MPT4].

81. *See, e.g.*, *Developments in the Law—the Law of Prisons*, 115 HARV. L. REV. 1838, 1883 (2002).

82. *See* Megan Mumford et al., *The Economics of Private Prisons*, HAMILTON PROJECT (Oct. 20, 2016), https://www.hamiltonproject.org/papers/the_economics_of_private_prisons [https://perma.cc/KE4V-3RHA].

83. *Id.*

4.9 inmates in public facilities."[84] In Oklahoma, "the ugliest outbreaks of prison violence toward correctional officers and among inmates have occurred in [that state's] private prisons, underlining the dangerous conditions in those facilities."[85]

In addition, the legitimacy of the justice system at large suffers from both normative and descriptive problems of private incarceration.[86] As discussed above, private prisons have been plagued by scandals, some of which have gripped the nation's attention.[87] Because the systemic problems of private incarceration stretch from legislation through release, the public has witnessed the negative effects on legislators, judges, and the prison institutions themselves.[88] These problems have contributed to a declining view of the justice system among U.S. residents,[89] including debates over the morality of investing in the private prison industry.[90] Scholarly research also largely views the normative case for private incarceration with great skepticism.[91]

III. ACCESS TO JUSTICE

The discussion about whether for-profit prison corporations can deliver on their stated purpose masks a more important failing: they are crucial components in perpetuating the failed policies that lead to

84. *Id.*; *see also* BAUER, *supra* note 4, at 142–43.

85. Ryan Gentzler, *Private Prisons Are Bad Policy, but They're Not to Blame for Oklahoma's Incarceration Problem*, OKLA. POL'Y INST. (Mar. 12, 2018), https://okpolicy.org/private-prisons-are-bad-policy-but-theyre-not-to-blame-for-oklahomas-incarceration-problem/ [https://perma.cc/7AQH-V8ED].

86. *See infra* notes 105–10 and accompanying text.

87. *See supra* notes 67–80 and accompanying text.

88. *See supra* notes 46–84 and accompanying text.

89. Congressional job approval remains among the lowest in the past quarter-century. *Congress and the Public*, GALLUP, http://news.gallup.com/poll/1600/Congress-Public.aspx [https://perma.cc/3XL7-W9XD] (last visited Apr. 1, 2020). Public opinion on the justice system at large has decreased since the early 2000s. *Confidence in Institutions*, GALLUP, http://news.gallup.com/poll/1597/Confidence-Institutions.aspx [https://perma.cc/JZY5-CSZH] (last visited Apr. 1, 2020).

90. Mike Antonucci, *California's Pension Fund Managers Are at Odds with Activists and Some Union Leaders over Divestments*, LA SCH. REP. (Feb. 27, 2018), http://laschoolreport.com/californias-pension-fund-managers-are-at-odds-with-activists-and-some-union-leaders-over-divestments/ [https://perma.cc/F82R-XBDY].

91. *See, e.g.*, Yoav Peled & Doron Navot, *Private Incarceration – Towards a Philosophical Critique*, 19 CONSTELLATIONS 216, 216–17, 30 (2012) (developing a moral argument against private incarceration based on civic republican foundations).

mass incarceration and hamper access to justice.[92] Public prisons have their share of problems, of course: overcrowding, safety, and crumbling infrastructure among them.[93] But injecting the core state function of incarceration with a profit motive leads to its own problems, many of which particularly affect already disadvantaged and oppressed communities.[94] In fact, private, for-profit incarceration violates all three principles of the United States Department of Justice's Office for Access to Justice: ensuring fairness, increasing efficiency, and promoting accessibility.[95]

A. Ensuring Fairness

One of the core principles of "access to justice" initiatives is ensuring that the judicial system delivers "fair and just outcomes for all parties, including those facing financial and other disadvantages."[96] Placing a financial motive into the justice system works directly against that purpose.[97]

First, private prison operators have a strong financial incentive to keep prison occupancy as high as possible because, as a business, large and predictable revenue streams are crucial for corporate health and vitality.[98] This incentive manifests in lobbying against common sense criminal justice reforms and lobbying for expansion of criminal and immigration laws.[99] For example, as introduced above, a report

92. *See* Julia Bowling, *Do Private Prison Contracts Fuel Mass Incarceration?* BRENNAN CTR. FOR JUST. (Sept. 20, 2013), https://www.brennancenter.org/our-work/analysis-opinion/do-private-prison-contracts-fuel-mass-incarceration [https://perma.cc/S5VV-2DCU].

93. *See* P.R. Lockhart, *America Is Finally Being Exposed to the Devastating Reality of Prison Violence*, VOX (Apr. 5, 2019, 7:10 PM), https://www.vox.com/policy-and-politics/2019/4/5/18297326/prison-violence-ohio-alabama-justice-department-lawsuit [https://perma.cc/ZMK2-6XBR].

94. *See* Section III.A.

95. *See* Sections III.A–C. There are varying definitions of "access to justice." The categories mentioned herein are meant to be representative rather than definitive or exhaustive. *Access to Justice*, U.S. DEP'T. JUST., https://www.justice.gov/olp/access-justice [https://perma.cc/9GJQ-CZVS] (last updated Oct. 24, 2018).

96. *Id.*

97. *See infra* notes 98–119 and accompanying text.

98. *See, e.g.*, CORRS. CORP. OF AM., FORM 10-K 36 (Feb. 24, 2010), http://ir.corecivic.com/sec-filings/sec-filing/10-k/0000950123-10-016309 [https://perma.cc/UTD5-9VDN] ("We believe the long-term growth opportunities of our business remain very attractive as insufficient bed development by our customers should result in a return to the supply and demand imbalance that has been benefiting the private prison industry.").

99. *See* Cohen, *supra* note 49 ("The two largest for-profit prison companies in the United States – GEO and Corrections Corporation of America – and their associates have

by National Public Radio revealed "a quiet, behind-the-scenes effort to help draft and pass Arizona Senate Bill 1070 by an industry that stands to benefit from it: the private prison industry."[100] The enormous gulf dividing the political power harnessed by large corporations and the marginalized groups who suffer the consequences of over-criminalization increases the odds that the justice system will not deliver the fair and just outcomes envisioned by access to justice advocates, instead tending toward results that enrich the already powerful.[101]

In addition to the legal but harmful lobbying efforts of for-profit incarceration corporations, privatization necessarily increases the avenues of corruption, often at the risk of harming marginalized communities.[102] The seductive presence of wealth can influence decision-making at various points of the criminal justice process.[103] For example, a wide-ranging kickback scheme perpetrated by then-Mississippi Department of Corrections Commissioner Christopher Epps touched on almost every aspect of imprisonment: construction of facilities, maintenance of those facilities, operation of those facilities, prisoner health care, commissary services, inmate telephone use, post-release tracking and monitoring, and drug testing.[104] After investigating the scheme, Mississippi recovered $26.6 million in settlement agreements with the various private prisons and other companies involved in the scandal.[105]

The corruptive effects of privatization have also touched judges.[106] In Pennsylvania, as described above, two juvenile court judges were involved in a scheme to close a county-run detention facility, forcing children into a privately-run center and sentencing juveniles to harsher punishments, including detention for behavior that would otherwise not merit such a sentence.[107] This scheme, known as the

funneled more than $10 million to candidates since 1989 and have spent nearly $25 million on lobbying efforts.").

100. Sullivan, *supra* note 60.

101. *See infra* notes 102–19 and accompanying text.

102. *See supra* notes 98–101 and accompanying text; *see infra* notes 103–20 and accompanying text.

103. *See infra* notes 104–19 and accompanying text.

104. Press Release, Jim Hood, Attorney Gen., Office of the Attorney Gen. State of Miss., Hood Recovers $26.6 Million, Settles Final Epps Bribery Case (Jan. 24, 2019), http://www.agjimhood.com/releases/hood-recovers-26-6-million-settles-final-epps-bribery-case/ [https://perma.cc/KB8L-U524].

105. *Id.*

106. *See infra* notes 107–11 and accompanying text.

107. *See* Urbina, *supra* note 16.

"kids-for-cash" scandal, resulted in, among other things, the suicide of one teenager, a guilty plea from one judge, and a criminal conviction of the other.[108]

More recently, as illustrated above, an investigation alleged that the husband of a federal court judge increased his stock holdings of companies involved in private detention days before a large raid that resulted in almost 400 arrests.[109] Court filings suggest that the judge knew about and took part in the planning of the raid for several months beforehand.[110] These instances show that fairness in the legal system disappears when those involved with dispensing justice have a financial stake in the outcome, and even if no wrongdoing occurred in the case involving the federal judge, such financial entanglement strips away the appearance of fairness.[111]

The avenues for corruption are not limited to the courthouse, as some of the largest companies involved in for-profit incarceration are now expanding into areas adjacent to their core business, many of which prey on communities of color and poor communities.[112] GEO Group, for example, lists post-release services on their website, including "programs tailored to pretrial, parole, probation, in-custody populations and those involved in immigration proceedings."[113] Unfortunately, these services are also ripe for abuse.[114] In Georgia, one company settled a case for $1.5 million based on "illegally throwing [the plaintiffs] in jail for not paying supervision fees and fines for traffic offenses or minor crimes like public intoxication."[115]

108. The Associated Press, *Mom Blames Son's Suicide on Luzerne County Judge in 'Kids for Cash' Case*, PENN LIVE, https://www.pennlive.com/midstate/2011/02/mom_blames_luzerne_county_judg.html [https://perma.cc/JY3C-QHUA] (last updated Jan. 6, 2019); *Pennsylvania Judge Gets 28 Years in 'Kids for Cash' Case*, NBC NEWS, http://www.nbcnews.com/id/44105072/ns/us_news-crime_and_courts/t/pennsylvania-judge-gets-years-kids-cash-case/#.Xi25a8hKiUl [https://perma.cc/ELK5-6955] (last updated Aug. 11, 2011).

109. Michaels, *supra* note 69.

110. *See id.*

111. *See supra* notes 106–10 and accompanying text.

112. *See infra* notes 113–19 and accompanying text.

113. *GEO Continuum of Care*, GEO GROUP, INC., https://www.geogroup.com/geos_continuum_of_care [https://perma.cc/B7AH-8LJV] (last visited Apr. 1, 2020).

114. *See Rutherford County, TN: Private Probation*, C.R. CORPS, http://www.civilrightscorps.org/work/criminalization-of-poverty/rutherford-county-tn-private-probation [https://perma.cc/7ZFU-QAHY] (last visited Apr. 1, 2020); *see also* Rhonda Cook, *Private Probation Company Settles Lawsuits for More than $2 Million*, ATLANTA J.-CONST. (Feb. 2, 2017), https://www.ajc.com/news/local/private-probation-company-settles-lawsuits-for-more-than-million/mkHQH9KFMSBNC4E8bK6QzM/ [https://perma.cc/RP65-FUJ3].

115. Cook, *supra* note 114.

And in Tennessee, Civil Rights Corps reached "a landmark settlement in a first-of-its-kind class action case . . . against Rutherford County and PCC, Inc., a private probation company that made millions of dollars over more than a decade by exploiting the poorest people in Rutherford County."[116] That lawsuit, which ended with a $14.3 million settlement, "alleged an unconstitutional racketeering enterprise between the County and the for-profit probation company to extort money from impoverished people"; as a result, the probation company went out of business, and Rutherford County agreed, *inter alia*, to prevent future privatization of its probation system.[117]

Private companies continue to expand into new profit-making areas and make decisions that lead to unjust outcomes for vulnerable groups, including a recent agreement between Cook County, Illinois and Track Group for ankle monitors capable of two-way communication.[118] The technology enables employees at Track Group's monitoring center to initiate a call with the juvenile that cannot be declined and includes both speaking and monitoring, all of which is recorded and remains available for any purpose, including criminal investigation.[119]

These episodes represent a preview of what is to come if government entities continue the process of privatizing justice. Introducing profit into the justice system thwarts fairness, often by placing additional burdens on poor and minority groups, which is antithetical to the concept of fair and just outcomes that is fundamental to the idea of access to justice.[120]

B. Increasing Efficiency

The Department of Justice also recognizes as a core principle of access to justice that the judicial system should deliver "fair and just outcomes effectively, without waste or duplication."[121] At first blush, private, for-profit incarceration seems a good match for increasing efficiency because producing greater efficiency is a core

116. *Rutherford County, TN: Private Probation*, *supra* note 114.
117. *Id.*
118. *See* Kira Lerner, *Chicago's Ankle Monitors Can Call and Record Kids Without Their Consent*, CITYLAB (Apr. 8, 2019), https://www.citylab.com/equity/2019/04/chicago-electronic-monitors-juveniles-can-call-and-record-them-without-consent/586639/ [https://perma.cc/DHU2-92HA].
119. *Id.*
120. *See supra* notes 96–119 and accompanying text.
121. *Access to Justice*, *supra* note 95.

promise of these businesses,[122] but they have failed to deliver on that promise.[123] Empirical research into this question is ongoing, and at this point is not conclusive because widescale for-profit incarceration is a relatively new phenomenon.[124] However, a growing body of studies suggests that private facilities are at best equally efficient,[125] and in many cases are significantly less efficient.[126] An early meta-analysis of twenty-four independent studies in 1999 revealed no statistically significant difference in per diem cost of an individual prisoner in public or private facilities, whether such facility was minimum-, medium-, or maximum-security.[127]

More recently, the American Civil Liberties Union (ACLU) collected information from states and the federal government and published the results.[128] The Arizona Auditor General found that it was costlier to house prisoners in private facilities for "both minimum- and medium-custody beds – the two categories of beds for which the [Arizona Department of Corrections] contracts."[129] A committee in Monmouth County, New Jersey recommended against private prisons because of potentially "increased risk of liability and safety risks without proof of cost savings."[130] In a separate memo from then-Attorney General Sally Yates, she noted that:

> [T]ime has shown that [private prisons] compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security.[131]

122. *See* HARTNEY & GLESMANN, *supra* note 25.
123. *See infra* notes 124–38 and accompanying text.
124. *See* Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 CRIME & DELINQ. 358, 358 (1999).
125. *See id.* at 358–59.
126. *See id.* at 359.
127. *Id.* at 358.
128. SHAPIRO, *supra* note 10, at 6–7.
129. *Id.* at 19.
130. *Id.* (emphasis omitted).
131. Memorandum from Sally Yates, Deputy Attorney Gen. U.S. Dep't of Justice to Acting Dir. Fed. Bureau of Prisons (Aug. 18, 2016), https://www.justice.gov/archives/opa/file/886311/download [https://perma.cc/5THE-8VG9].

And while there are a small sample of studies that have found minimal cost reduction, those purported savings often result from unpalatable cost-cutting.[132] For example, in a careful examination of nine states that housed at least 3000 prisoners in private prisons, Christopher Petrella found that people of color were overrepresented in private facilities relative to their public counterparts and that this outcome was the result of "finely tailored contractual provisions that implicitly exempt private prison companies from housing certain types of individuals whose health care and staffing costs disproportionately attenuate profit margins."[133] Or, stated another way, private prisons cherry pick the inmates they would most like to house because those prisoners are healthy and active, thereby providing greater profit margins in saving on healthcare costs and exploiting for labor gains.[134]

Other studies find inimicable cost-reduction in services that otherwise provide inmates with well-documented societal benefits.[135] Two researchers recently examined recidivism rates of similar prisoners housed in public and private facilities in Oklahoma and found that when holding other factors constant, people in general were more likely to recidivate when they spent more time in a private prison, and that men in private facilities were particularly more likely to recidivate.[136] Another study found that private prisons are staffed by fewer guards, and those guards are less qualified and undertrained compared to their public counterparts; those factors were hypothesized to account for the fact that private facilities are more dangerous, both for prisoners and staff, due to higher rates of violence.[137] Similar findings in a report by the Office of Inspector General comparing federal prisons to private facilities served as a key reason that the Department of Justice under President Obama decided to phase out the use of privately contracted facilities, although that

132. *See* Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, *in* 3 RADICAL CRIMINOLOGY 81, 82–83 (2014).

133. *Id.* at 82–83.

134. *See id.*

135. *See supra* notes 72–73 and accompanying text; *see infra* notes 136–38 and accompanying text.

136. Andrew L. Spivak & Susan F. Sharp, *Inmate Recidivism as a Measure of Private Prison Performance*, 54 CRIME & DELINQ. 482, 499–500 (2008).

137. *See* Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons: A Comparison of Select Characteristics*, 68 FED. PROB. 27 (2004); *see also* BAUER, *supra* note 4, at 40, 142–43, 252–53.

decision, but not the underlying evidence, was reversed by Attorney General Jeff Sessions.[138]

Private, for-profit prisons have not lived up to their promised efficiency, and ensuring access to justice requires that outcomes are delivered effectively and without waste, a result that private prison companies have not been able to produce.[139] The cost-cutting mechanisms employed to deliver profits to shareholders have not led to cheaper incarceration, and as researchers continue to gather and analyze data from the growing privately-incarcerated population, a strong body of evidence is showing that cost-cutting measures result in less-safe prisons with fewer opportunities for successful rehabilitation.[140]

C. Promoting Accessibility

Finally, the Office for Access to Justice aims to eliminate "barriers that prevent people from understanding and exercising their rights,"[141] which is a goal that private, for-profit incarceration hinders in at least two ways.[142] First, in many states, it is harder to access information from private prisons than their public counterparts.[143] Public facilities are subject to certain records requests, while private facilities often are not.[144]

Second, funding is a core part of democratic engagement for criminal justice.[145] Traditionally, voters can exercise their direct democratic voting rights to approve or disapprove of bonds for prison construction.[146] This activity serves as an important check on prosecutorial conduct by limiting the amount of people that can be

138. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS (Aug. 2016), https://oig.justice.gov/reports/2016/e1606.pdf [https://perma.cc/LRX3-EN73]; Memorandum from Jefferson B. Sessions III, Attorney Gen. U.S. Office of the Attorney Gen., to Acting Dir. Fed. Bureau of Prisons (Feb. 21, 2017), https://www.bop.gov/resources/news/pdfs/20170224_doj_memo.pdf [https://perma.cc/K955-88GV].

139. *See supra* notes 121–38 and accompanying text.

140. *See supra* notes 72–85 and accompanying text.

141. *Access to Justice*, *supra* note 95.

142. *See infra* notes 143–51 and accompanying text.

143. *See* Lauren-Brooke Eisen, *Private Prisons Lock Up Thousands of Americans with Almost No Oversight*, BRENNAN CTR. FOR JUST. (Nov. 8, 2017), https://www.brennancenter.org/analysis/private-prisons-lock-thousands-americans-almost-no-oversight [https://perma.cc/8G7D-EXEN].

144. *See id.*

145. *See infra* notes 146–51 and accompanying text.

146. Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 51, 58 (Gary W. Bowman et al. eds., 1993).

incarcerated at any one point.[147] Data in this area is hard to come by, but throughout the 1980s, "an average of 60 percent of all local referenda for jail bonds was rejected."[148] State legislators can bypass voters on this front, however, by contracting with a private company who invests the capital for construction of the facility and drawing funds for a contract (as long as twenty years in many states) from the state's general coffers.[149] In this way, private prisons narrow the ability of people to exercise their rights to participate in setting the boundaries of criminal justice spending to only voting for representatives.[150] And as discussed above, the concentrated interest of private prison corporations means they will spend large sums of money lobbying and donating to individual legislators to capture their support.[151]

Far from increasing society's access to justice by removing barriers to exercising individuals' rights, private, for-profit incarceration tilts the balance of power toward small groups of wealthy and politically connected organizations.[152]

IV. SERIOUS CONSTITUTIONAL CONCERNS OF FOR-PROFIT INCARCERATION

Private for-profit incarceration raises profound constitutional concerns. The recent renaissance of the private incarceration industry means the United States court systems have not yet fully addressed the problem.[153] In Israel, however, a petition to its Supreme Court was filed shortly after legislation authorizing private operation of prisons passed the Knesset.[154] The Supreme Court of Israel eventually found the entirety of the authorizing legislation invalid because it violated Basic-Law: Human Dignity and

147. *See id.* at 57.
148. *Id.* at 58.
149. *See id.* at 58–59.
150. *See id.* at 57–59.
151. *See supra* notes 45–66 and accompanying text.
152. *See supra* notes 141–51 and accompanying text; *see supra* Part II.
153. *See Private Prison Contractors Can't Stand in the Way of the Public's Right to Know*, CTR. FOR CONST. RTS. (Aug. 28, 2017), https://ccrjustice.org/home/blog/2017/08/28/ccr-news-private-prison-contractors-can-t-stand-way-public-s-right-know [https://perma.cc/295C-9C34].
154. Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT. J. CONST. L. 690, 696 (2010) (clarifying that the Knesset is both the Legislative branch and the Constitutive assembly of Israel).

Liberty.[155] That decision is instructive both because United States Supreme Court jurisprudence and the Israeli Basic-Law explicitly recognize human dignity as central to a person's liberty interest[156] and because the reasoning relied exclusively on legal principles rather than any kind of cost-benefit analysis offered by privatization.[157]

Private, for-profit incarceration in the United States implicates at least six distinct constitutional doctrines: 1) the private nondelegation doctrine;[158] 2) the right to an unbiased adjudicator protected by due process;[159] 3) the fundamental right to be treated like a person rather than like property protected by substantive due process and equal protection;[160] 4) procedural due process concerns related to substantial risks of erroneous deprivations of liberty;[161] 5) the prohibition on slavery in the Thirteenth Amendment;[162] and 6) the prohibition on cruel and unusual punishment in the Eighth Amendment.[163] Below, we argue that private, for-profit incarceration violates each of these constitutional protections, or, at a minimum, raises serious questions of constitutional law that must be addressed.[164]

A. Nondelegation

Private incarceration represents "delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of" the incarcerated.[165] The "intelligible principles" test may have rendered the public nondelegation doctrine toothless; "[n]ot so, however, in the case of private entities to whom the Constitution commits no executive power."[166] Although courts have not explicitly delineated the

155. *Id.*
156. *Id.*; *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) (noting that personal dignity is "central to the liberty protected by the Fourteenth Amendment").
157. *See* Medina, *supra* note 154, at 704–06.
158. *See infra* Section IV.A.
159. *See infra* Section IV.B.
160. *See infra* Section IV.C.
161. *See infra* Section IV.D.
162. *See infra* Section IV.E.
163. *See infra* Section IV.F.
164. *See infra* Sections IV.A–F.
165. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).
166. Ass'n of Am. R.R.s v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated and remanded sub nom*. Dep't of Trans. v. Ass'n of Am. R.R.s, 575 U.S. 43 (2015).

structural underpinnings of the private nondelegation doctrine,[167] two main themes drive their decisions: first, core governmental functions cannot be delegated to private parties;[168] and second, executive branches cannot grant legal enforcement power to entities outside the government over whom the executive does not exercise control.[169] Each of these themes point toward the result that private incarceration violates the United States Constitution.[170]

1. Core Government Function

It is beyond dispute that essential government functions must be exercised by their respective branches.[171] For example, in *A.L.A. Schechter Poultry*, the Supreme Court assumed that only Congress could "perform[] its essential legislative function" of creating generally applicable rules of behavior.[172] Likewise, the Court has explained that enforcing the laws and appointing and having control over the officers charged with the duty of enforcing those laws is exclusively an executive function.[173] In these cases, the task the Court faces is determining whether the challenged behavior constitutes a government function exclusive to that branch.[174] It is hard to imagine a task more quintessential to executive authority than incarceration. The Supreme Court has been hesitant to define essential government functions[175] and has never directly addressed whether incarceration is a government power susceptible of delegation.[176]

167. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 623–24 (2018).
168. *See infra* Section IV.A.1.
169. *See infra* Section IV.A.2.
170. *See infra* Sections IV.A.1–2.
171. *See infra* notes 172–74 and accompanying text.
172. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).
173. *See, e.g.*, Myers v. United States, 272 U.S. 52, 122, 176 (1926).
174. *See A.L.A Schechter Poultry Corp.*, 295 U.S. at 529–30; *see Myers*, 272 U.S. at 106.
175. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) ("Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism . . . .").
176. Stacey Jacovetti, Note, *The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel*, 6 GLOBAL BUS. L. REV. 61, 64 (2016).

Supporters of privatization argue that delegation can be proper when coupled with sufficient oversight and regulation;[177] however, the nature of incarceration requires jailers to exercise authority quickly and decisively.[178] In these types of situations, oversight is meaningless because government authority cannot intervene quickly enough to prevent oversteps.[179] Further, any remedies available to the inmate are necessarily post hoc, and courts—aware of the quick-moving and fraught circumstances of imprisonment—are hesitant to question jailers' decision-making.[180]

Other sources of thought, however, suggest that restriction of liberty is among the powers most closely intertwined with the concept of sovereignty such that only government entities may legitimately effect significant restriction of a person.[181] The Supreme Court of Israel, for example, ruled that privatization of prisons violated the Basic-Law.[182] That decision started from the principle that the "right to personal liberty is without doubt one of the most central and important basic rights in any democracy."[183] Legal academia also generally recognizes the close tie between incarceration and sovereignty.[184] And likewise, the state's "monopoly" on force[185] as coercion is fundamental to many

177. *See id.* at 67.

178. *See* BAUER, *supra* note 4, at 228–29, 252–53 (describing the numerous stabbings and assaults that take place inside private prisons).

179. *See id.*

180. *See* Editorial Board, *Holding Prison Guards Accountable*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/opinion/prison-guards-new-york.html [https://perma.cc/88L6-XEED].

181. *See infra* notes 182–89 and accompanying text.

182. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD 27, 34 (2009) (Isr.), http://www.privateci.org/private_pics/Israel_Ruling.pdf [https://perma.cc/9EXB-UMFG].

183. *Id.* at 58. The Israeli court recognized that right is not absolute, however, and restriction is proper when a person violates certain laws. *Id.* at 59. The identity of the entity restricting the liberty interest was crucial to their analysis because such restriction is only legitimate when done for the public interest—in the case of incarceration, the goals of deterrence, rehabilitation, and punishment. *Id.* at 60.

184. The legal academic writing in this area covers vast swaths, from the historical, *see* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004), to the philosophically normative, *see* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005), and from the strictly constitutional, *see* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983 (2011), to the economic, *see* John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951 (2016).

185. The Constitution explicitly recognizes one instance through which Congress can authorize private parties to exercise coercive force: the Marque and Reprisal Clause.

philosophical accounts of political legitimacy, from Thomas Hobbes[186] to John Rawls[187] and from Max Weber[188] to Ronald Dworkin.[189]

These sources state with a nearly uniform voice that incarceration is inherently entwined with statehood, and the Supreme Court relies on them as persuasive authorities when confronting constitutional issues.[190] Recently, the Court referred to the Declaration of Independence as evidence for how to interpret the Second Amendment.[191] Additionally, John Locke was cited at length by two Justices in the dissent of *Obergefell v. Hodges*,[192] and Ronald Dworkin's delineation of two meanings of "discretion" was important to the majority in *Board of Pardons v. Allen*.[193] Finally,

U.S. CONST. art. I, § 8, cl. 11. This Clause enshrined the Revolutionary War practice of dressing the actions of privateers in the cloak of government to redress injuries done to the state. *See* C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 958–60 (1997). Because the Constitution explicitly recognizes this single instance of private exercise of public power, other such delegations are constitutionally suspect. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 432 (2012) (Scalia, J., concurring in part and dissenting in part) (explaining that *expressio unius est exclusio alterius* is a common-sense interpretive canon that reveals drafters' intent to exclude similar items not explicitly listed when at least one item is listed).

186. THOMAS HOBBES, LEVIATHAN 126 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) ("Eleventhly, to the Soveraign is committed the Power of Rewarding with riches, or honour; and of Punishing with corporall, or pecuniary punishment, or with ignominy every Subject according to the Law he hath formerly made . . . .").

187. JOHN RAWLS, POLITICAL LIBERALISM 136 (expanded ed. 2005) ("Second, political power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force in upholding its laws.").

188. MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) ("Of course, force is certainly not the normal or the only means of the state—nobody says that—but force is a means specific to the state. Today the relation between the state and violence is an especially intimate one.").

189. RONALD DWORKIN, LAW'S EMPIRE 190–91 (1986).

190. *See infra* notes 191–99 and accompanying text.

191. *See* District of Columbia v. Heller, 554 U.S. 570, 586 (2008). The dissent also cited the Declaration of Independence. *Id.* at 640–41 (Stevens, J., dissenting).

192. Obergefell v. Hodges, 135 S. Ct. 2584, 2613, 2634, 2636–38 (2015) (Roberts, J. and Thomas, J., dissenting) ("The founding-era understanding of liberty was heavily influenced by John Locke, whose writings 'on natural rights and on the social and governmental contract' were cited '[i]n pamphlet after pamphlet' by American writers." (quoting BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967)).

193. Bd. of Pardons v. Allen, 482 U.S. 369, 375 (1987) (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 32 (1977)).

the Court explicitly relies on foreign law for the understanding of the Eighth Amendment's ban on unusual punishment,[194] and at least one Justice has explained that foreign courts can be sources of wisdom for the United States Supreme Court.[195]

Of note too, is the fact that state courts have been more active in invalidating delegations of executive and legislative authority.[196] While the federal Supreme Court has rarely addressed the nondelegation doctrine,[197] state courts have developed a relatively large body of caselaw, even if it suffers from inconsistency.[198] For example, the Washington Supreme Court invalidated an initiative that would have required every piece of tax legislation passed by the legislature to be approved in a statewide referendum because it unconstitutionally delegated the legislative power to the people at large.[199]

The Supreme Court of Texas reviewed this growing body of state decisions in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, a case that is important not only for its holding that the "[l]egislature made an unconstitutionally broad delegation of authority to the Foundation, a private entity," but also because it contains reasoned judicial analysis of the private nondelegation doctrine in the face of the modern administrative state that relies on public-private partnerships to accomplish a wide variety of goals.[200] In fact, one concern with the nondelegation doctrine is the sweeping breadth suggested by some statements of its principles.[201] For example, in *Texas Boll Weevil*, the court stated the general position (one that is echoed throughout opinions addressing the nondelegation

194. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.").

195. *See* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), https://www.nytimes.com/2009/04/12/us/12ginsburg.html [https://perma.cc/8UQF-UHEV] ("Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?").

196. *See* Amalgamated Transit Union Local 587 v. State, 11 P.3d 762, 806 (Wash. 2000).

197. *See* Iuliano & Whittington, *supra* note 167, at 634.

198. *See id.* at 645 ("Ultimately, the nondelegation doctrine is notable not for its demise during the New Deal revolution but rather for its surprising persistence through the twentieth and early twenty-first centuries.").

199. *See Amalgamated Transit*, 11 P.3d at 806.

200. Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997).

201. *Id.* at 469 (citing George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 659 (1975)).

doctrine) that "[t]he power to pass laws rests with the Legislature, and that power cannot be delegated to some commission or other tribunal."[202]

However, "these blanket pronouncements should not be read too literally" because the demands of a functioning society require that "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[203] To this end, after finding inspiration from opinions of other states' highest courts and articles from legal academia, the Texas Supreme Court announced eight factors to weigh when deciding whether any particular delegation to a private party is proper:

> 1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government? 2. Are the persons affected by the private delegate's actions adequately represented in the decision making process? 3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals? 4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function? 5. Is the private delegate empowered to define criminal acts or impose criminal sanctions? 6. Is the delegation narrow in duration, extent, and subject matter? 7. Does the private delegate possess special qualifications or training for the task delegated to it? 8. Has the Legislature provided sufficient standards to guide the private delegate in its work?[204]

We suggest neither that these eight factors are exclusive nor that all courts should use this exact list; but, together, these factors do encompass many concerns at the heart of delegation.[205] However, applying this exemplary list to private for-profit incarceration, questions two, three, four, five, and six clearly point in favor of finding delegation of incarceration to private for-profit corporations unconstitutional, and arguably questions one and seven point in the

202. *Id.* at 466 (quoting Brown v. Humble Oil & Refining Co., 83 S.W.2d 935, 941 (Tex. 1935).

203. *Id.*

204. *Id.* at 471–72.

205. *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659–60 (1986).

same direction.[206] Particularly troublesome are the factors that denote that a private delegate having a pecuniary interest that conflicts with his or her public function (factor four) and that the private delegate is able to define criminal acts and impose sanctions (factor five) are unmistakably implicated in private for-profit incarceration as particularly highlighted above.[207] Notably, the dissenting opinion expressed concern that this test would have "unknown ramifications" to, among other delegations, private prisons in Texas.[208]

2. Modern Revival in Federal Court

Recently, several Justices of the Supreme Court (and, in fact, judges on appellate courts)[209] have shown an eagerness to address the increasing delegation of powers constitutionally assigned to the legislative and executive branches.[210] Justice Alito sided with the majority in *Department of Transportation v. Association of American Railroads* (*AAR*), finding that Amtrak is a federal actor for constitutional purposes.[211] His separate concurrence, however, provided one focus for modern judges analyzing the problem of delegation: political accountability.[212] Justice Alito noted that all officers of the United States take an oath or affirmation to support the Constitution, and "[t]here is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States."[213] Further, "[t]hose who exercise the power of Government" are subject to special restraints because of the exercise of that power.[214] The Court has been hesitant to "enforce the nondelegation doctrine with more vigilance [because] the other branches of Government have vested powers of their own . . . however, there is not even a fig leaf of constitutional justification" when dealing with delegations to private entities because they are not vested with legislative *or* executive powers.[215]

206. *See supra* note 204 and accompanying text.
207. *See supra* Part II.
208. *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d. at 492 (Cornyn, J., concurring in part and dissenting in part).
209. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–19 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (per curiam).
210. *See infra* notes 211–28 and accompanying text.
211. Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 56 (2015) (Alito, J., concurring).
212. *See id.* at 56–57.
213. *Id.* at 57.
214. *Id.* at 58.
215. *Id.* at 61–62.

Under Justice Alito's theory, courts should doctrinally split nondelegation analysis into two distinct camps: public and private.[216] Analysis of public delegation is complex because for any given activity, one could classify it as part of the legislative, executive, or judicial powers.[217] For example, the activity at issue in *AAR* exhibits some hallmarks of executive power (initiating oversight by the Surface Transportation Board) and some legislative actions (crafting metrics and minimum standards for train operations).[218] Therefore, determining whether the entity exercising that power is properly part of the executive or legislative branch may be a futile exercise for courts.[219] When a private entity exercises legislative or executive powers, however, no such problem is present: a private party simply cannot exercise either legislative *or* executive power.[220]

Justice Alito recognized gradations of concern when dealing with private delegation, noting that Congress authorizing citizen suits raises grave concerns while delegating regulatory power is delegation "in its most obnoxious form."[221] Restricting liberty in the process of enforcing the law fits squarely in the executive branch powers,[222] and as discussed above, the nature of incarceration means that delegation of that function necessarily entails private parties exercising coercive authority that is reviewable only after the fact, when monetary remuneration may be a poor substitute for the vindication of constitutional rights.[223] Given the grave problems with public accountability implicated by private incarceration, the industry likely runs afoul of Justice Alito's conception of the nondelegation doctrine.[224]

Justice Thomas also concurred with the *AAR* majority's disposition, but did not join the analysis "because it fail[ed] to fully correct the errors that require us to vacate" the decision.[225] His concurrence focused on the structure of the Constitution,[226] noting

216. *See id.* at 60.
217. *See id.* at 58–61.
218. *See id.*
219. *See id.* at 61.
220. *See id.* at 62.
221. *See id.* (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)).
222. *See supra* Section IV.A.1.
223. *See Ass'n of Am. R.R.s*, 575 U.S. at 61–62 (Alito, J., concurring).
224. *See id.*
225. *Id.* at 67 (Thomas, J., concurring).
226. This concurrence accompanied two others that Justice Thomas filed recently addressing nondelegation. In *Michigan v. EPA*, Justice Thomas argued that *Chevron* deference potentially violates the vesting clauses of either Article III (because it

that the grants of legislative, executive, and judicial power are exclusive, so "[w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."[227] After delineating the legislative power, Thomas further explained that "although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates."[228]

Taken together, the Alito and Thomas concurrences[229] demonstrate a renewed interest in the nondelegation doctrine at the Supreme Court,[230] and because incarceration is such a fundamentally executive function, the constitutionality and practice of incarcerating people for profit deserves, at a minimum, a full and reasoned decision.[231]

B. Biased Adjudicator

The Due Process Clause prohibits adjudication by an interested party.[232] In particular, it violates the Due Process Clause if an average person in the adjudicator's position is likely to be partial.[233] Private, for-profit prisons act as adjudicators in varying degrees over the inmates in their facility by, for example, issuing negative

allows agencies to interpret statutes) or Article I (because it allows agencies to create generally applicable rules). Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring). In *Perez v. Mortgage Bankers Ass'n*, he wrote that *Seminole Rock* deference – under which courts defer to agency interpretation of regulations – "represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015). In all three of these cases, Thomas closely analyzes the constitutional separation of powers and how continuing deference and delegation may violate the careful allocation intended by the drafters. *See Michigan*, 135 S. Ct. at 2712–2714 (Thomas, J., concurring); *see Perez*, 575 U.S. at 112–33 (Thomas, J., concurring); *see Ass'n of Am. R.R.s*, 575 U.S. at 66–69 (Thomas, J., concurring).

227. *Ass'n of Am. R.R.s*, 575 U.S. at 68.

228. *Id.*

229. Additionally, the majority opinion from the D.C. Circuit provided a thorough and convincing analysis that the delegation to Amtrak violated the private nondelegation doctrine. *See* Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 721 F.3d 666, 674–77 (D.C. Cir. 2013), *vacated and remanded*, 575 U.S. 43 (2015). The conclusion that Amtrak was a private actor was overturned, so the Supreme Court did not address the merit of the nondelegation analysis. *See Ass'n of Am. R.R.s*, 575 U.S. at 55.

230. *See supra* text accompanying notes 212–28.

231. *See supra* text accompanying notes 171–80.

232. *See* U.S. CONST. amend. V; *see also* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

233. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242–43 (1980).

behavior determinations, classifying and assigning individuals to different units, deciding who is eligible for educational or work programs, and determining the eligibility status of early release or good time release.[234]

In *Tumey v. Ohio*, the Supreme Court reviewed a state statute through which town mayors sat as judges, and if a defendant was convicted, fees and fines assessed against the defendant could be kept by the municipality.[235] Additionally, some municipalities passed ordinances that allowed the mayor to keep the fees allocated to the municipality; as a result, mayors were sitting as judges in cases where they would personally receive fees and fines assessed to a defendant they found guilty.[236] In striking down such an arrangement, the Court noted:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.[237]

Since *Tumey*, the Court has expanded on the principle that a judge cannot preside over a case in which she has a direct financial incentive without violating the Due Process Clause of the Constitution; in particular, the Court has decided that the Clause is violated when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[238]

For example, the Court overturned a conviction when a mayor presided over the trial and fees from that trial went to the town's general fisc, over which the mayor also had control.[239] Likewise, the Due Process Clause was violated where an Alabama Supreme Court Justice voted to uphold punitive damages in one case while he was a lead plaintiff in a similar case in the lower court.[240] And most recently and expansively, the Court required recusal when the owner of a company found liable in a tort case made large donations to a

234. *See* BAUER, *supra* note 4, at 41–66.
235. *See* Tumey v. Ohio, 273 U.S. 510, 516–18 (1927).
236. *Id.* at 518–21.
237. *Id.* at 532.
238. Withrow v. Larkin, 421 U.S. 35, 47 (1975).
239. *See* Ward v. Village of Monroeville, 409 U.S. 57 (1972).
240. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

West Virginia Supreme Court candidate who was elected and eventually heard an appeal of the underlying case.[241]

For-profit incarceration violates the biased adjudicator doctrine of the Due Process Clause if either (1) decision-making inside of a private prison operates with a bias that negatively affects prisoners, or (2) political influence of private prison corporations has an impermissibly large influence on adjudicators.[242] Recent evidence indicates that private prison operators are violating the biased adjudicator doctrine on both counts, thereby contravening the Due Process Clause of the Constitution.[243]

C. Fundamental Rights Protected by Substantive Due Process and Equal Protection

The Constitution also ensures that some rights are not infringed by the government, regardless of the amount of safeguarding procedures.[244] Here, not being treated *like a slave* is a fundamental right that the government cannot infringe upon without showing that it has a compelling interest in doing so, and that any infringement is narrowly tailored to achieve that end.[245] The argument is both historical—widespread corporate private imprisonment was not a government practice until fairly recently[246]—and modern—states and nations are moving away from the practice as experience and evidence proves the theory that for-profit incarceration does not save money and results in worse outcomes for prisoners.[247]

The Constitution protects fundamental rights under two different doctrines: substantive due process[248] and equal protection.[249] If it is a fundamental right, any government interference must meet the high strict scrutiny standard, under which the government must show that the interference is supported by a compelling interest and the instantiation of the interference is the most narrowly drawn means of

241. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009); *see also* cummings, *Procuring 'Justice'?*, *supra* note 65, at 99–102 (describing the factual underpinnings of the *Caperton v. Massey* case where judicial recusal was ordered).
242. *See supra* text accompanying notes 223–32.
243. *See* BAUER, *supra* note 4, at 49–67.
244. *See* Zinermon v. Burch, 494 U.S. 113, 125–28 (1990).
245. *See supra* text accompanying notes 238–40; *see also infra* text accompanying notes 246–53.
246. SHAPIRO, *supra* note 10, at 5.
247. Memorandum from Sally Yates, Deputy Attorney Gen. U.S. Dep't of Justice to Acting Dir. Fed. Bureau of Prisons, *supra* note 131.
248. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 627 (1992).
249. U.S. CONST. amend. XIV, § 1.

achieving the government's compelling goal.[250] If the right is not fundamental, generally the government must only show that the action is rationally related to a legitimate interest (and courts are extremely reluctant to invalidate state action under this standard).[251] Examples of fundamental rights protected under substantive due process demanding the highest protection include "the right to marry, rights with respect to procreation, sexual activity (including private consensual homosexual activity), and medical care decision-making."[252] Under equal protection, courts have protected the right to vote, the right to travel, and the right not to be discriminated against based on race or ethnicity.[253]

Increasingly, these rights are being interpreted as interconnected.[254] For example, in *Plyler v. Doe*, the Supreme Court imported some principles traditionally relied on in due process cases to its equal protection analysis: the opinion explicitly rejected the conclusion that undocumented immigrant children were a suspect class—the usual way to reach heightened scrutiny under equal protection—and further rejected the conclusion that public education itself was a fundamental right.[255] However, the Court found its way to heightened scrutiny because although access to public education was not quite fundamental and the children did not quite represent a suspect class, the combination of the two deserved special protection.[256] Further, Justice Kennedy explained the interplay between these clauses in *Obergefell v. Hodges*, the case that protected the ability of same-sex couples to marry:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles; rights implicit in liberty and rights

250. Galloway, *supra* note 248, at 638.

251. *See id.* at 643–44.

252. Vincent J. Samar, *At the Intersection of Due Process and Equal Protection: Expanding the Range of Protected Interests*, 68 CATH. U. L. REV. 87, 91 (2019) (cataloging the history of fundamental rights cases protected by Substantive Due Process).

253. *Id.* at 92–93. It is worth noting that the Court has not always called these rights "fundamental" in the equal protection context; nonetheless, they do receive strict scrutiny protection and exhibit most of the same traits regardless of the label. *See Strict Scutiny*, L. LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/10552/Strict-Scrutiny.html [https://perma.cc/9L9N-N69K] (last visited Apr. 1, 2020).

254. *See infra* notes 255–57 and accompanying text.

255. Plyler v. Doe, 457 U.S. 202, 218–23 (1982).

256. *Id.* at 230.

> secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other, and in any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[257]

This hybrid analysis fits neatly when examining the modern practice of private for-profit incarceration because the right not to be held like a slave for the benefit of another party implicates both types of concerns.[258] Turning first to due process, the Supreme Court laid out the legal framework for determining whether a right is "fundamental," noting that it does not rely on any formula; instead, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."[259]

The argument that for-profit incarceration violates the fundamental right not to be treated like a slave is both historical and modern.[260] The historical argument distinguishes the modern incarnation of private incarceration from the kinds of private jailing that existed historically.[261] For example, although there was a practice in England of private innkeepers being given small payments to hold people before trial,[262] that kind of arrangement does not bear the same hallmarks of slavery that modern for-profit incarceration does: in the latter case of for-profit incarceration, the private corporation has complete control over the prisoner for long periods of time, generates profit by the presence of the prisoner in a cell, increases margins by convincing or coercing the prisoner to labor in a variety of ways, and has the ability and incentive to increase recidivism by not providing access to successful rehabilitative programs.[263]

257. Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015).

258. *See infra* notes 259–67 and accompanying text.

259. *Obergefell*, 135 S. Ct. at 2598 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (citation omitted)).

260. *See infra* Section IV.E.1.

261. Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 123–24 (2001).

262. *See* Dave Hill, *Marshalsea Mansions of Misery*, GUARDIAN (Oct. 29, 2016, 2:34 PM), https://www.theguardian.com/uk-news/davehillblog/2016/oct/29/marshalseas-mansions-of-misery [https://perma.cc/767C-MR52].

263. *See* Noah Smith, *Private Prisons Are a Failed Experiment*, BLOOMBERG (Apr. 1, 2019, 7:30 AM), https://www.bloomberg.com/opinion/articles/2019-04-01/u-s-private-prisons-are-a-failed-government-experiment [https://perma.cc/3JTP-CDDZ].

The modern portion of the argument points to the growing number of states and localities that have banned private incarceration,[264] organizations that have called for the same,[265] and countries like Israel who have found the practice to violate core individual rights that are based on the same philosophical bases as the United States.[266] In addition, even the countries who are allowing private incarceration to continue seem to be moving forward in a way that operates differently from how CoreCivic and GEO Group currently contract with state and federal agencies in the United States: in New Zealand, for example, at least one new private facility is purportedly being built with minimizing recidivism as a core principle which does not square with the profit motive present in the U.S.[267]

However, even if this analysis does not quite result in strict scrutiny on its own, the inclusion of the principles of equal protection may provide assistance.[268] As discussed above, prisoners in private for-profit facilities are likely to face a variety of negative consequences simply because they are assigned there rather than to a facility operated by the government.[269] And like in *Plyler*, they do face these consequences as the result of a voluntary act rather than an innate characteristic they possess.[270] But it seems starkly unfair to subject the category of people placed in these private facilities to worse consequences due to an arbitrary decision by the government agency.[271]

We argue that this combination of fundamental right-adjacency and arbitrarily unfair consequences based on private categorization

264. Steve Gorman, *California Bans Private Prisons and Immigration Detention Centers*, REUTERS (Oct. 11, 2019, 5:40 PM), https://www.reuters.com/article/us-california-prisons/california-bans-private-prisons-and-immigration-detention-centers-idUSKBN1WQ2Q9 [https://perma.cc/U854-RFJD].

265. *Join the Movement!*, *supra* note 37.

266. Angela E. Addae, *Challenging the Constitutionality of Private Prisons: Insights from Israel*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 527, 543 (2019).

267. *See* Rikha Sharma Rani, *New Zealand Tries a Different Kind of Private Prison*, CITYLAB (Aug. 31, 2017), https://www.citylab.com/equity/2017/08/new-zealand-tries-a-different-kind-of-private-prison/538506 [https://perma.cc/TM4S-MY93]; *see also* Lauren-Brooke Eisen, *Down Under, More Humane Private Prisons*, N.Y. TIMES: OPINION (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/opinion/private-prisons-australia-new-zealand.html [https://perma.cc/6EHX-SWGF].

268. *See supra* notes 249–57 and accompanying text.

269. *See supra* notes 260–67 and accompanying text.

270. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

271. *See supra* notes 229–31 and accompanying text.

deserves the protection of heightened scrutiny provided by the interplay between substantive due process and equal protection.[272]

D. Procedural Due Process

The Fifth and Fourteenth Amendment Due Process Clauses require that the state or any private entity acting in concert with or on behalf of the state provide sufficient procedures to prevent unconstitutional deprivation of core rights, including life, liberty, and property.[273] Common sense, theory, and experience have shown that private, for-profit incarceration negatively affects individuals: the prison corporation has every incentive to keep people in prison longer, make it more likely that the person returns to prison after release, and staff the facility with minimal, untrained staff, thereby depriving prisoners of life, liberty, or property.[274] Requiring additional procedures to ensure that such deprivations do not occur is not prohibitive; in fact, research shows that if private facilities are in fact cheaper, all or most of the cost savings can be explained by the fact that private facilities tend to house prisoners that require fewer resources.[275]

Generally, procedural due process focuses on whether the person challenging the outcome of any state action that deprived them of life, liberty, or property received adequate procedural safeguards.[276] For example, the landmark *Mathews v. Eldridge* case examined whether a Social Security beneficiary's due process rights were violated when the federal government terminated those benefits without a prior evidentiary hearing.[277] To answer the question, the Court developed a three-part test that balances (1) the importance of the private right at issue; (2) the risk of an erroneous deprivation of that right given the procedures in place and the probable added value of additional procedural safeguards; and (3) the government's interest, including the additional expense or other bureaucratic requirements for implementing the additional safeguards.[278]

272. *See supra* notes 259–71 and accompanying text.
273. *See* Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 821–22 (2016).
274. *See* Tara Joy, *The Problem with Private Prisons*, WESLEYAN ARGUS (Feb. 2, 2018), http://wesleyanargus.com/2018/02/02/the-problem-with-private-prisons/?utm_content=buffer83bd7&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [https://perma.cc/UUF7-YGSB].
275. *See supra* notes 132–34 and accompanying text.
276. *See* Woolhandler, *supra* note 273, at 846–47.
277. Mathews v. Eldridge, 424 U.S. 319, 323 (1976).
278. *See id.* at 321.

Each prong in the analysis arguably suggests that due process rights are violated by the current arrangement of private prison corporations.[279] First, the liberty interest protected by due process is perhaps the most important type of interest, the literal freedom from physical restraint, and at a minimum, courts have indicated that any infringement of liberty will be examined very closely.[280]

The second prong is somewhat more complicated, as it is not immediately clear what *procedure* a potential plaintiff would challenge.[281] The most obvious answer is to challenge each individual transfer, arguing that whatever agency decision resulted in a plaintiff being moved to a private facility did not have sufficient safeguards to prevent the erroneous deprivation of rights inherent in the facilities to which they were transferred.[282] To bolster this argument, the plaintiff could point to the kinds of contracts which may not have those inherent problems as a viable alternative.[283]

The third prong is also complex.[284] There is some lack of clarity (primarily in academic literature and inspector general reports from the federal government and various states) about whether private prison contracts save governments money or allow for greater flexibility; although a growing body of research suggests that if any money is saved at all it is minimal and probably depends on how the researcher accounts for different populations in different facilities.[285] But in terms of bureaucratic overhead, a paradox appears: for every additional procedure to safeguard a person's rights in a private facility, the overseeing government entity must expend additional time and money.[286] Thus, as governments increase the safeguards required to satisfy due process requirements, the scale tilts further towards violating the third prong of procedural due process

279. *See supra* notes 276–78 and accompanying text.

280. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

281. *See Matthews*, 424 U.S. at 321.

282. *See* Douglas W. Dunham, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1491–93 (1986) (discussing how decisions to transfer prisoners to private prisons do not require due process safeguards).

283. For example, a New Zealand private prison facility has been designed from the ground up with a focus on lowering recidivism rates. *See* Rani, *supra* note 267.

284. *See supra* notes 276–78 and accompanying text.

285. *See* Memorandum from Sally Yates, Deputy Attorney Gen. U.S. Dep't of Justice to Acting Dir. Fed. Bureau of Prisons, *supra* note 131.

286. *See* KARA GOTSCH & VINAY BASTI, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS, SENT'G PROJECT (Aug. 2, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/ [https://perma.cc/EPP6-LQVN].

analysis.[287] Therefore, we suggest here that a prisoner being held in a private for-profit incarceration facility can colorably argue that her/his procedural due process rights are being violated.[288]

E. Slavery

The Thirteenth Amendment to the United States Constitution sought to outlaw slavery in the United States: "[n]either 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."[289]

This Amendment has been largely unexplored by the Supreme Court, particularly in the last century.[290] However, a flurry of academic activity suggests a way forward for courts and litigants looking to apply the Thirteenth Amendment in novel factual scenarios.[291] For example, the article *The Thirteenth Amendment and Slavery in the Global Economy* provides a roadmap for a modern understanding of "slavery" as a practice in the modern world.[292] In particular, it describes "doctrinal tools—the same tools that pre-Civil War courts in free jurisdictions employed in combating the domestic institution of slavery while it was still alive, and that the post-Civil War Supreme Court employed in concluding that putatively 'voluntary' peonage schemes could not survive Thirteenth Amendment scrutiny."[293] It concludes that "[a]ny analysis of forced labor in a new industrial context must afford a privileged place to [the owner/subject relationship], as the Court did in prohibiting the emerging peonage schemes of the early twentieth century."[294]

Other academics have suggested that the Thirteenth Amendment could operate to: (1) prohibit sexual slavery in prison perpetrated by one prisoner against another,[295] (2) prohibit exploitative marriages where one spouse is an immigrant found through an international

287. *See id.*; *see also* Mathews v. Eldridge, 424 U.S. 319, 321 (1976).
288. *See supra* notes 279–87 and accompanying text.
289. U.S. CONST. amend. XIII, § 1.
290. *See* George Rutherglen, *The Thirteenth Amendment in Legal Theory*, 104 CORNELL L. REV. ONLINE 160, 160–61 (2019), https://www.lawschool.cornell.edu/research/cornell-law-review/Cornell-Law-Review-Online/upload/Rutherglen-essay-final.pdf [https://perma.cc/P7NQ-4678].
291. *See infra* notes 292–302 and accompanying text.
292. Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1031–32 (2002).
293. *Id.* at 1032.
294. *Id.*
295. Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 642 (2008).

matchmaking organization,[296] (3) provide an alternative constitutional basis to support a woman's right to abortion,[297] and even (4) require the state to intervene to stop child abuse.[298]

Drawing inspiration from this recent academic attention to the Thirteenth Amendment, we see three novel arguments suggesting that for-profit incarceration is unconstitutional: first, all incarceration is slavery, but the punishment clause allows the State and only the State to hold someone in the state of carceral slavery;[299] second, even if all incarceration is not slavery, the commodification of prisoners when they are held in a private for-profit prison changes their status from indentured servitude to slave;[300] and third, even if it is permissible to hold a prisoner as a slave, such action would require the legislature to authorize and the court to impose such punishment specifically.[301]

Before turning to these legal arguments, we provide needed context for the claim that for-profit incarceration is a form of slavery by tracing the direct connection between slavery as practiced from pre-colonial United States until the passage of the Thirteenth Amendment and addressing the understanding of the Punishment Clause that would permit slavery as punishment for a crime.[302]

1. The Historical Line Between Chattel Slavery and For-Profit Prisons

History provides a clear line between the chattel slavery that characterized the engine of American growth from the colonial period up through the Civil War and modern for-profit private prisons.[303] At its core, chattel slavery represented the subjugation of black labor for the sole financial benefit of slave owners.[304] The

296. Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547, 1588–90 (2000).

297. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–85 (1990).

298. Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1383–85 (1992).

299. *See infra* Sections IV.E.2–3.

300. *See infra* Section IV.E.4.

301. *See infra* Section IV.E.5.

302. *See infra* Sections IV.E.1–2.

303. *See infra* notes 304–22 and accompanying text.

304. *See* JUNIUS P. RODRIGUEZ, *The Rise of "King Cotton" and the Economics of Slavery*, *in* 2 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL AND HISTORICAL ENCYCLOPEDIA 107, 109–11 (Junius P. Rodriguez ed., 2007).

relationship was marked by one individual being the property of and entirely subject to the demands of another.[305] When the Civil War ended, northern abolitionists looked to enshrine the promise of the Emancipation Proclamation in the United States Constitution, and the Thirteenth Amendment was the result.[306]

However, Reconstruction-era policies looked to institute slavery by different names: widespread indentured servitude that touched black lives much more harshly than white apprenticeships;[307] "Coolie labor" aimed primarily at Asian immigrants, whether working in the United States or contracted by American corporations working abroad, such as at the Panama Canal;[308] and various peonage systems, which operated throughout the southern United States, with different particulars depending on the locality.[309] But a common theme of these systems, particularly in the South and particularly peonage, was a structural tool to bring black men into contact with the state's legal arm through black codes and convict leasing, and thereby perpetually subjugate them for the benefit of others.[310]

After the worst remnants of these systems were eradicated in the middle of the 20th century, there was a brief reprieve;[311] however, with the burgeoning War on Drugs instituted and militarized in the

305. *See id.* at 122–23.

306. *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1801–06 (2006) (detailing extensive impact of northern abolitionists on development of the Thirteenth Amendment).

307. *See* JUNIUS P. RODRIGUEZ, *Reconstruction: Are Liberty and Justice for All?*, *in* 1 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL AND HISTORICAL ENCYCLOPEDIA, *supra* note 304, at 143, 148–49; *see also* Margaret A. Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 CARDOZO L. REV. 433, 440–43 (1996) (discussing Supreme Court precedent on unconstitutional differences between white and black apprenticeships).

308. Panama Canal Laborers—Involuntary Servitude, 25 Op. Atty. Gen. 474, 480–82 (1905); *see also* Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement and the Coming of World War II*, 117 W. VA. L. REV. 1409, 1431–33 (2015) (explaining exploitation of Asian immigrant laborers).

309. *See* Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 345, 351–53 (1994) (discussing peonage system development in the South and Supreme Court cases dealing with the same).

310. *See id.* at 353 (discussing surety system); *see also* Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2259–61 (1998) (discussing pervasive use of black codes).

311. *See* Risa L. Goluboff, *Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U. TOL. L. REV. 883, 889–93 (2007) (detailing actions to eradicate racist peonage and surety systems and protect black citizens).

1970s and 1980s,[312] private corporations saw an opportunity to implement a new system that featured many of the markers of previous iterations of slavery with even closer entanglement with the state.[313]

As prison population skyrocketed as a result of mandatory minimums and increased enforcement of drug crimes, state facilities became inadequate to hold the growing number of prisoners.[314] Private, for-profit entities stepped in to fill the gap.[315] They devised contracts to build facilities to house this new population, which represented black males at a significantly higher rate than the general population.[316] Several reasons underlie this disparity, including racist policing practices, sentencing guidelines that affected black male defendants in ways that other groups escaped, and wider government policies that kept black populations stuck in patterns of poverty (such as redlining housing areas).[317]

The result is undeniable: young, black men are being incarcerated at staggeringly high rates.[318] And to make matters worse, private prisons tend to house disproportionate rates of young black men because they represent the cheapest segment of prisoners: they are less likely to require the expensive medical care that often accompanies older and female prisoners.[319]

312. RONALD CHEPESIUK, THE WAR ON DRUGS: AN INTERNATIONAL ENCYCLOPEDIA, at xxviii (1999).

313. *See* cummings & Lamparello, *supra* note 23, at 410–12.

314. *See* John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 377, 379–82 (2013) (detailing development of mass incarceration in United States); *see also* Am. Civ. Liberties Union, *Overcrowding and Overuse of Imprisonment in the United States,* UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS. 1 (May 2015), https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf [https://perma.cc/9SAQ-MTCV] (discussing inadequate state facilities).

315. *See* cummings & Lamparello, *supra* note 23, at 411–12.

316. *See id.* at 409–12.

317. *See id.* at 407, 409–10, 434; *see* Alex Gano, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 26 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 437, 451–52 (2018) (discussing redlining practices); *see* Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [https://perma.cc/TR47-CP9B] (discussing pervasive nature of disparate impact).

318. *See* ALEXANDER, *supra* note 2, at 175–76.

319. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS, at i–ii (2015), https://oig.justice.gov/reports/2015/e1505.pdf [https://perma.cc/7Z9F-UTMJ] (detailing increased cost statistics for older inmates); NAT'L COUNCIL ON CRIME AND

Then, when the younger, overwhelmingly black male population arrives at the private facility, they are afforded fewer educational opportunities than their white counterpart population at public facilities;[320] they work for less wages (at some private facilities, workers make pennies per hour, while public facilities often pay several dollars an hour, which is an indefensibly small amount, but an order of magnitude higher than the private prison population); they receive disciplinary decisions at a higher rate than public prisoners; and they ultimately spend more time incarcerated for the same crimes than if they were incarcerated in a public facility.[321] It is no surprise that each of these differences is intimately linked to higher profits for the private corporation.[322]

DELINQUENCY, THE SPIRAL OF RISK: HEALTH CARE PROVISION TO INCARCERATED WOMEN 7, 20 (2006), http://www.nccdglobal.org/sites/default/files/publication_pdf/spiral-of-risk.pdf [https://perma.cc/RQ8T-FLE9] (detailing common health care issues of female prisoners); Rina Palta, *Why For-Profit Prisons House More Inmates of Color*, NAT'L PUB. RADIO (Mar. 13, 2014, 7:12 AM), https://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color [https://perma.cc/D8ES-SULR] (discussing selection of young people of color by private prisons).

320. This condition reflects a similar disparity dating back to the late 19th century. *See In re* Turner, 24 F. Cas. 337, 339 (C.C. Md. 1867) (discussing difference in treatment of black and white indentured servants).

321. *See* BAUER, *supra* note 4, at 160 (discussing black inmates as majority of population at private prison); *see* Anita Mukherjee, *Does Prison Privatization Distort Justice? Evidence on Time Served and Recidivism*, SEMANTIC SCHOLAR 13, 23 (Mar. 8, 2016), https://pdfs.semanticscholar.org/b1d8/154954dd2d124b048b9083782e3aaed18a9f.pdf?_ga=2.231055835.510023849.1579652499-4278527.1579652499 [https://perma.cc/ZX6E-6NF5] (summarizing data showing inmates in private prisons serve longer sentences and are subject to more disciplinary action); *see also* Clint Smith, *Why the U.S. Is Right to Move Away from Private Prisons*, NEW YORKER (Aug. 24, 2016), https://www.newyorker.com/news/news-desk/why-the-u-s-is-right-to-move-away-from-private-prisons [https://perma.cc/G6P6-4AX7] (reporting lack of education provided to private prison inmates). *Compare* BAUER, *supra* note 4, at 53 (detailing wage of two cents per hour in private prison), *with* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/U989-TJVU] (providing table of information on inmate wages at public prison facilities).

322. Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J.C.R. & ECON. DEV. 679, 681–82 (2015) (discussing wages designed to maximize profits); *see also* Mukherjee, *supra* note 321, at 23, 25 (detailing how inmates in private prison serve longer portions of their sentence to increase profits); *see also* Smith, *supra* note 321 (reporting lack of education for private prison inmates to increase profits).

2. The Punishment Clause

Perhaps the most significant hurdle facing a successful challenge to private incarceration based on the Thirteenth Amendment is the Punishment Clause.[323] As noted above, the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist . . . ."[324] If the Punishment Clause modifies both slavery and involuntary servitude, the challenge to private incarceration based on the Thirteenth Amendment relies on arguing that the Clause does not apply for some reason;[325] however, such a conclusion is not foregone.[326]

In fact, there are good reasons to think that this reading of the Amendment should not prevail.[327] First, as a historical matter, research suggests that most congresspeople at the time the Amendment was drafted and passed believed that the language completely abolished slavery, particularly the Republicans responsible for writing the Amendment.[328] And second, the alternative reading allows for full chattel slavery as a punishment for crime, which is an unlikely outcome.[329] It would have allowed Reconstruction-era southern states to skirt the efficacy of the Amendment by implementing slavery as punishment for even minor crimes (something the drafters of the Amendment were concerned about preventing), and such a reading goes against modern mores and values.[330] While southern states did implement convict leasing and black codes, essentially implementing slavery by another name (i.e., forced labor for those incarcerated on dubious charges), it did require an incarcerable offense first.[331] Notably, these practices never reached the Supreme Court, and it is doubtful that the modern Supreme Court would uphold the practice of convict leasing given the evolution of societal norms, particularly the understanding that

323. U.S. CONST. amend. XIII, § 1; *see also* Slaughter-House Cases, 83 U.S. 36, 50, 69 (1872) (upholding servitude exception for punishment of crime).
324. U.S. CONST. amend. XIII, § 1 (emphasis added).
325. *See* Slaughter-House Cases, 83 U.S. at 72 (1872).
326. *See infra* notes 328–33 and accompanying text.
327. *See infra* notes 328–30 and accompanying text.
328. *See, e.g.*, Ghali, *supra* note 295, at 625–27.
329. *See id.* at 627–28.
330. *See id.*
331. *See* BAUER, *supra* note 4, at 18–19.

prisoners retain key human rights.[332] Finally, some textual analysts have argued that the placement of the Punishment Clause after "indentured servitude" means that the Clause modifies only the term "indentured servitude" and not "slavery."[333]

3. All Incarceration Is Slavery, and Incarceration in For-Profit Institutions Is Prohibited

The drafters of the Thirteenth Amendment knew that the contemporaneous understanding of slavery encompassed incarceration, and they, therefore, included the Punishment Clause exception to preserve the ability of the government to punish people.[334] The view that prison was a form of slavery is perhaps best summed up by an opinion from the Supreme Court of Virginia, where, describing a prisoner, the court stated: "He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."[335]

This view of prisoners has been somewhat softened, of course: Prisoners no longer forfeit all of their personal rights.[336] However, Justice Christian, the author of the *Ruffin* decision, was not alone in his view of prisoners as slaves.[337] Speaking shortly after the Civil War, prominent abolitionist Carl Schurz noted that "emancipation of the slaves is submitted to only in so far as chattel slavery in the old form could not be kept up."[338] In fact, he noted that the slaves were no longer considered to be property of a private party, instead the newly free man becomes the slave of society because "state legislation will share the tendency to make him such," recognizing

332. *See* Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 225–229 (2009).

333. Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, HISTORY (Oct. 2, 2018), https://www.history.com/news/13th-amendment-slavery-loophole-jim-crow-prisons [https://perma.cc/T8YS-VK33].

334. James G. Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1476 (2019) ("Sumner himself later opined that the Senators had 'supposed that the [Clause] was simply applicable to ordinary imprisonment,' rejecting his own view 'that it might be extended so as to cover some form of slavery.'").

335. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

336. *Do Inmates Have Rights? If So, What Are They?*, HG.ORG, https://www.hg.org/legal-articles/do-inmates-have-rights-if-so-what-are-they-31517 [https://perma.cc/4HTX-5BYK] (last visited Apr. 1, 2020).

337. *See* CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH 101 (1865) (ebook).

338. *Id.* at 179.

that criminal convictions could lead to slavery, but not to the former master, to the government.[339]

However, except for anti-abolitionists from the post-Civil War South, that exception was not meant to exempt private for-profit incarceration from the Amendment's slavery prohibition.[340] In fact, the Republican party responsible for the drafting and passage of the Amendment explicitly drew a line between normal incarceration, which often manifested in hard labor for the benefit of the State, and reimplementation of chattel slavery under the new name of convict leasing.[341]

The current model of for-profit incarceration mirrors the model explicitly rejected by those responsible for the Thirteenth Amendment.[342] Today, individuals are convicted of crimes, committed to the responsibility of a government agency for a period of time, and then sold to a corporation as part of a "lot" of unidentified prisoners so that the private prison corporation can make more money.[343] The major difference is that these corporations are sophisticated enough not to require manual labor to make money; instead, the prisoner's mere presence in his cell generates revenue by virtue of his appearance on a balance sheet.[344] This transfer of funds from government to a private party on the back of an incarcerated person was not meant to be exempted by the Punishment Clause.[345]

4. The Commodification of Prisoners Changes Their Status from Prisoner to Slave

Even if one is not convinced that incarceration by itself is slavery, it becomes so when the prisoner is sold from a public facility to a private one to enrich his new jailer.[346] Some people suggest that a Thirteenth Amendment suit by a non-forced laboring prisoner "is at least irrelevant and at most ludicrous" because it constitutes neither slavery nor involuntary servitude to be incarcerated.[347] Avoiding this outcome and successfully opening such a challenge to prisoners in for-profit facilities requires a close analysis of the private prison's

339. *Id.*
340. *See* Pope, *supra* note 334, at 1485–90.
341. *Id.*
342. *See infra* notes 343–45 and accompanying text.
343. *See* Marion, *supra* note 332, at 237.
344. *See id.* at 236.
345. *See id.* at 237.
346. *See* Marion, *supra* note 332, at 235–37.
347. *Id.*

remuneration in the context of private incarceration as an industry.[348] For example, an examination of the operational structure of a private prison and how a prisoner adds value to the corporation through both his own labor—for example, by cleaning his cell, laundering outfits, or serving meals—and his meager living conditions shows how even a non-hard laboring prisoner is a slave because his body is being used to enrich the corporate owner.[349] Viewing through this commodification lens differentiates the prisoner in a state prison (which is a drain on resources) and the prisoner in a private prison (whose continued incarceration represents an increased profit margin for the prison corporation).[350]

Under this softened view, incarceration constitutes slavery only when a prisoner makes money for a private party.[351] The key constitutional question then becomes whether slavery is permitted at all, rather than whether there is a distinction between slavery at the hands of the state and slavery for the benefit of a private party; and, as we discuss above, we think careful analysis of the Punishment Clause reveals that the exception applies only to indentured servitude.[352] Therefore, because the prisoner becomes a slave once commodified and the Punishment Clause does apply to slavery, the practice of private for-profit incarceration is unconstitutional.[353]

5. Imposition of Slavery Requires Specific Intention from Legislature and Sentencing Judge

We also argue that if the Punishment Clause does allow a prisoner to be held as a slave, then the legislature must authorize such a punishment for specific crimes, and the sentencing judge must impose the punishment explicitly, rather than transfer to slave-like conditions as a corollary condition of the sentence.[354]

The Supreme Court has stated that in the Eighth Amendment context, "punishment" requires an intentional mental state; that is, "punishment" is not cruel and unusual unless the prison official affirmatively intends that action and it is not the result of mere accident or negligence.[355] In that context, the Court quoted Judge Posner, who explained that:

348. *Id.*
349. *Id.* at 235–37.
350. *Id.*
351. *See supra* notes 346–50 and accompanying text.
352. *See supra* notes 323–33 and accompanying text.
353. *See supra* notes 346–50 and accompanying text.
354. *See infra* notes 355–62 and accompanying text.
355. Wilson v. Seiter, 501 U.S. 294, 300 (1991).

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century…. [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[356]

If punishment means the same thing in the Thirteenth Amendment as it does in the Eighth – and there is no good reason to treat them differently – slavery as punishment for a crime can only pass constitutional muster if it is intentionally imposed by the sentencing judge and authorized by Congress.[357] This is so because "punishment always requires a mental state: It is imposed intentionally by a legislature or a sentencing judge . . . ."[358] In other words, a prisoner could not be held as a slave (i.e., traded as property for the benefit of a private entity) unless the judge so ordered because "prison conditions, no matter how harsh, can never qualify as punishment without inquiring into the mental state of a prison official."[359] Further, we recognize that legislatures know how to tie such a sentence together for certain crimes given the history of the black codes and convict leasing discussed above.[360] Therefore, because Congress has not authorized slavery for any crime, and no judge has imposed that sentence, any prisoner currently incarcerated in a private for-profit reason is being held contrary to the Thirteenth Amendment.[361]

As the Constitution's ban on slavery through the Thirteenth Amendment should eliminate the use of private for-profit prisons in the United States, we finally argue that private incarceration should be eradicated because it violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[362]

356. *Id.* (alteration in original) (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).
357. *See id.*
358. Ghali, *supra* note 295, at 635.
359. *See* Wilson, 501 U.S. at 300; *see* Ghali, *supra* note 295, at 635.
360. *See supra* notes 307–10 and accompanying text.
361. *See infra* Section IV.F.
362. *See infra* Section IV.F.

F. Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution affirms: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[363] The Supreme Court has reasoned "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[364] The Court has employed various analytical approaches depending on the context of the challenged government behavior, including: "gross disproportionality," a "categorical approach that implements bright line rules to prohibit certain sentencing practices,"[365] and "wanton and unnecessary infliction of pain."[366] Under any of these paradigms, treating people like slaves by commodifying their existence is cruel and unusual.[367]

We first note that modern Eighth Amendment jurisprudence is at best a "thicket" of confusing holdings muddled by plurality opinions.[368] Additionally, an Eighth Amendment challenge to private for-profit incarceration falls far outside the typical cases addressed under the prohibition on cruel and unusual punishment.[369] Those cases—especially the ones that receive attention from the Supreme Court—tend to be capital cases, often deal with methods of execution, otherwise seek the boundaries of life imprisonment, address the lack of medical care, or confront dangerous overcrowding.[370]

Further, given other abhorrent practices currently at the forefront of Eighth Amendment jurisprudence—for example, torturous combinations of chemicals used in lethal injection compounds that

363. U.S. CONST. amend. VIII.

364. Weems v. United States, 217 U.S. 349, 367 (1910).

365. Kevin White, *The Constitutional Limits of the "National Consensus" Doctrine in Eighth Amendment Jurisprudence*, 2012 BYU L. Rev. 1371, 1372.

366. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

367. *See id.*

368. Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

369. *See generally The Case Against the Death Penalty*, AM. CIV. LIBERTIES UNION (2012), https://www.aclu.org/other/case-against-death-penalty [https://perma.cc/6AX5-CZVC] (discussing that the normal case challenging the Eighth Amendment is regarding the death penalty) .

370. *See id.*; *see also* Nina Totenberg, *Supreme Court Closely Divides on "Cruel and Unusual" Death Penalty Case*, NAT'L PUB. RADIO (Apr. 1, 2019, 11:48 AM), https://www.npr.org/2019/04/01/708729884/supreme-court-rules-against-death-row-inmate-who-appealed-execution [https://perma.cc/42CT-TYKV].

can lead to prisoners "writhing in pain"—[371]warehousing prisoners in private facilities in the service of enriching corporations and their shareholders represents a more abstract concern that can fail to resonate as deeply.[372] Nonetheless, here we sketch the outlines of an Eighth Amendment challenge using broad principles underlying the prohibition of cruel and unusual punishment.[373]

Traditionally, the Supreme Court has employed a proportionality analysis to challenges involving the sentence of a particular person (usually for terms-of-year challenges) and reserved the categorical analysis for capital cases.[374] Recently, however, the court has signaled a willingness to expand the scope of its categorical analysis to include non-capital sentences.[375] We argue that the unique circumstances involved with incarcerating people for profit implicates concerns that make a categorical challenge relying on modern conceptions of human dignity appropriate.[376] This categorical approach looks to "evolving standards of decency" including national consensus, international considerations, historical teachings, and the judge's own conscience.[377]

The existence of a national consensus on a given correctional practice, or a lack thereof, is often a major consideration for courts.[378] That determination includes, but is not limited to, looking to state legislatures as a barometer of preferences across the nation.[379] Here, for-profit incarceration is currently used in a majority of states and by several federal agencies.[380] Consequently, it may seem that there is a national consensus supporting for-profit incarceration.[381] However, there is significant momentum against private prisons, including: multiple states passing recent legislation banning the practice; a widespread divestment campaign consisting of diverse groups from students and teachers to banks; and growing political effort to push

371. Graham L. Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready to Try Again*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/oklahoma-executions.html [https://perma.cc/T3J2-QMH2].
372. *See supra* notes 368–71 and accompanying text.
373. *See infra* notes 374–96 and accompanying text.
374. White, *supra* note 365, at 1372–73.
375. Graham v. Florida, 560 U.S. 48, 61–62 (2010).
376. *See infra* notes 377–96 and accompanying text.
377. *See* Coker v. Georgia, 433 U.S. 584, 592–600 (1977).
378. White, *supra* note 365, at 1376–78 (tracing the history of the national consensus approach and major benchmark cases).
379. *Id.* at 1367.
380. *See* GOTSCH & BASTI, *supra* note 286, at 5.
381. *See id.*

the conversation into the mainstream.[382] Additionally, we expect this momentum to continue, strengthening the argument as potential cases work their way through the court system.[383]

Courts also inform their Eighth Amendment analysis by considering the historical perspective of the challenged practice.[384] As discussed above, for-profit incarceration is just the latest iteration of slavery, an institution that is widely regarded among the most morally repugnant in the history of the world.[385] Through this lens, the historical perspective on profiting off ownership of another person is clear: at least since the late 19th century in the United States, such a relationship is a complete anathema.[386] Even if a reviewing court does not see the for-profit incarceration arrangement as tantamount to slavery, it should nonetheless be convinced that carrying out punishment for a crime has essentially always been the province of the state.[387] In either case, the historical perspective on ownership of or profiting off the punishment of another person weighs against the constitutionality of the practice.[388]

Finally, the third main prong that courts review to determine where the current evolving standard of decency stands is through looking at international standards.[389] In *Roper*, for example, the Court quoted this noteworthy passage from *Thompson v. Oklahoma* to arrive at its holding:

382. *See* Catherine Kim, *Private Prisons Face an Uncertain Future as States Turn Their Backs on the Industry*, VOX (Dec. 1, 2019, 3:53 PM), https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-califonia-nevada-colorado [https://perma.cc/K8HU-UKRP]; *see* Molly Korab, *University Students Push for Prison Divestment*, COMMON DREAMS (Feb. 2, 2015), https://www.commondreams.org/views/2015/02/02/university-students-push-prison-divestment [https://perma.cc/8RMR-GNDV]; *see* Mike Ludwig, *In the US, Big Banks Are Divesting from Private Prisons, Thanks to Anti-ICE Activism*, EQUAL TIMES (Aug. 20, 2019), https://www.equaltimes.org/in-the-us-big-banks-are-divesting?lang=en#.Xi3lXGhKhPY [https://perma.cc/EM4Y-LQ5K]; *see* Ashley Smith, *New York Teachers Fight for Divestment from Prison Industry*, TRUTHOUT (June 12, 2019), https://truthout.org/articles/new-york-teachers-fight-for-divestment-from-prison-industry/ [https://perma.cc/G4RZ-3GL3].

383. *See supra* notes 378–82 and accompanying text.

384. *See supra* Section IV.E.1.

385. *See supra* Section IV.E.4.

386. *See* Vicky Peláez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, CTR. FOR RES. ON GLOBALIZATION (Dec. 15, 2019), https://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289 [https://perma.cc/H9BR-9A9E].

387. *But see id.*

388. *See id.*

389. *See infra* notes 390–95 and accompanying text.

> The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[390]

Here, the evidence is mixed.[391] Israel stands out as the prime example of a nation that has banned the practice of for-profit incarceration, and they did so in a convincing manner, relying on human rights and philosophies shared with the United States.[392] Likewise, only a small number of countries overall use private prison facilities: approximately eleven as of 2013.[393] However, the trend does seem to be growing somewhat, and the practice is concentrated in English-speaking common law countries, such as England, Australia, and New Zealand.[394] Nevertheless, momentum in opposition to private incarceration for profit is growing in the United States.[395]

Thus, on balance, based on national, historical, and international perspectives and practices, we argue that private prisons run afoul of the Cruel and Unusual Punishment Clause of the Eighth Amendment while recognizing the challenges inherent to this claim.[396] And further, we hope that as this practice receives additional public scrutiny, more states will ban for-profit incarceration within their borders, strengthening the Eighth Amendment argument.

V. CONCLUSION

For a myriad of reasons, the very existence of private for-profit incarceration represents questionable and dubious legality.[397] We argue above that on at least six primary grounds private prisons are

390. Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 830 (1988)).
391. *See infra* notes 392–95 and accompanying text.
392. *See supra* notes 154–57 and accompanying text.
393. *See* Cody Mason, *International Growth Trends in Prison Privatization*, SENT'G PROJECT 2 (Aug. 20, 2013), https://sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf [https://perma.cc/9W3E-CT89].
394. *See id.*
395. *See supra* notes 382–83 and accompanying text.
396. *See supra* notes 363–95 and accompanying text.
397. *See supra* Part II.

unconstitutional.[398] Further, we argue above that private prisons are abhorrent on moral grounds, including for the ways that for-profit incarceration wrecks access to justice and diminishes equality in the U.S. criminal justice system.[399] When a carceral regime incentivizes incarcerating more U.S. residents for longer periods of time, with lesser hope for rehabilitation[400] and achieves its ends by offering less safe, less efficient, and less humane prison conditions,[401] then this regime must be confronted.

Private prisons have not been the panacea promised by corporations responsible for selling their use to government entities.[402] From private local jails to private federal prisons, we see rampant prisoner abuse,[403] underqualified and underpaid staff,[404] lack of educational opportunities and rehabilitation programs,[405] and cost savings that vanish on close analysis.[406] Granting such power to private entities violates the constitutional rights of prisoners so housed.[407]

398. *See supra* Part IV.
399. *See supra* Part III.
400. *See supra* notes 72–76, 140 and accompanying text.
401. *See supra* notes 77–85 and accompanying text.
402. *See supra* Part II.
403. *See supra* notes 78–81 and accompanying text.
404. *See supra* notes 74–76, 82–85 and accompanying text.
405. *See supra* notes 72–73 and accompanying text.
406. *See supra* Section III.B.
407. *See supra* Part IV.